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FOREWORD

There is much discussion in the world today around the many challenges to implementation and enforcement of International Humanitarian Law (IHL). Due to ongoing and new armed conflicts as well as the continued development of new weapon technologies criticism on the validity and sufficiency of the law is always at the center of any debate on IHL in particular and Public International Law in general. At the International Committee of the Red Cross (ICRC), we too remain concerned about these and other developments and engage with States at all levels to work towards enhancing respect for the law.

Yet, that is not all that has happened in the past year. Where developments in new means and methods of warfare are ongoing and we see increasingly protracted conflicts, the past months have also witnessed States reaffirming their commitment to IHL. After ratifying the Treaty on the prohibition of Nuclear Weapons (TPNW) in 2021, Philippines then ratified the Arms Trade Treaty and Protocol V to the Convention on Certain Conventional Weapons this year. Timor-Leste also acceded to the TPNW in June 2022 along with other States. This year also saw other initiatives that illustrate commitment to IHL such the first Meeting of State Parties to the TPNW, where States committed to advance universalization and national implementation of the TPNW, as well as the work done towards a political declaration on avoiding the use of heavy explosive weapons with wide-impact areas in densely populated areas, to name just a few. These advancements show what is possible when we are united in purpose. They show what we can achieve when we put our heads together and analyze the continued impact IHL has on the lives of people affected by armed conflicts and other situations of violence.

Of course, it does not mean that we should stop here or that our work as humanitarians and as citizens of the world is done. What it does mean is that not all hope is lost even when one may feel it to be so. What it also means is that there is a continuous need to demystify the law, to bring it to the masses and to the decision-makers. What is then needed is to focus on keeping the

momentum going and for proponents and advocates to become part of the debate on all these concerning developments.

At the ICRC, an integral part of our preventive work is to convene platforms for dialogue, discussions and peer-exchanges among practitioners and policymakers from around the world as such exchange is essential to enhancing understanding of IHL, to help clarify and develop it and thereby to strengthen this body of law and universal humanitarian principles.

One such platform, that we at the ICRC are proud to support is the Asia Pacific Journal of International Humanitarian law (APJIHL). Reinvigorated in 2020 and going strong into its third edition, the APJIHL focuses on pertinent contemporary issues in its aim to bolster voices from the region.

Through this edition, it is my personal honor to bring to you inspiring words from the ICRC's former Director for International Law and Policy, Dr. Helen Durham. There is nothing that I can say which will do justice to the reflections Helen shares in an interview with colleagues from the Philippines and transcribed in the opening piece. What I will say is how grateful we at the ICRC and especially at the Legal Division have been to have worked with and known Helen. For me, this goes even beyond and much before I started working for the ICRC six years ago. As someone who would be fascinated by the brilliance and foresight of humanitarians at the ICRC and having religiously followed numerous legal issues the ICRC has expounded upon, I recall meeting Helen for the first time before I had joined the ICRC and being completely awe-struck, not being able to say a word lest I make an impression I will later regret. To then sit on a panel that Helen was moderating and be guided by her reassuring attitude, her soft-spoken yet forceful reflections, her ability to speak from the heart, I still vividly remember thinking how she embodied all the ideals I had held the ICRC up to. To then have the privilege of working under her leadership, was indeed a dream come true – cliched as that sounds. Thank you Helen, for everything that you do and hope you know the impact you have on the lives and the work of so many of us around the world.

Following this opening and inspiring piece, is another insightful article by Mr. Santosh Anand reviewing a leading manuscript titled "Revisiting the Geneva Conventions: 1949-2019" edited by Dr. Muhammad Jahid Hossain Bhuiyan and Dr. Burhan Uddin Khan. Reading Mr. Anand's review, one realizes the many crucial contemporary topics that the authors have addressed in this work and opened the door for further deliberations especially from scholars within the Southern hemisphere.

A third article is then on an increasingly relevant and pertinent issue that looks at "Redefining Rescue Operations in Contemporary Naval Warfare: A Necessary interplay between Maritime Bodies in International Law", authored by Alba Grembi. The author explains the importance of and proposes an evolutionary interpretation of the laws on naval warfare in order to better protect persons at sea.

The final piece in the 2022 Edition is on demonstrating the role of fact-finding commissions and similar mechanisms in strengthening criminal repression of violations of international law, including IHL. Titled "Commissions of Inquiry as Bulwarks against Impunity" and authored Mr. Sarthak Roy, the article is a timely analysis on the effectiveness of such mechanisms and the benefit to be had from their findings and reports.

Compiling these analyses, it is, thus, on behalf of the ICRC, my pleasure to bring to you this third edition of the APJIHL, and hope that it continues to be a platform for voices from the region to demonstrate your genuine interest in promotion of IHL and strengthening its respect.

This is indeed not the fruit of ICRC's labor alone. I am privileged to have the guidance and support of a dedicated Board of Experts, of Professor Rommel Casis, of Ms. Georgia Hinds and the entire APJIHL team who have made this edition possible with their tireless efforts and commitment. Thank you!

SAHAR HAROON
Managing Editor

PREFACE

The Institute of International Legal Studies (IILS) of the Universities of the Philippines (UP) Law Center and the International Committee of the Red Cross is proud to publish the 2022 Edition of the Asia-Pacific Journal of International Humanitarian Law.

Now on its third year of publication, APJIHL continues to be at the forefront of IHL scholarship in the region. Exploring emerging and relevant thematic areas of IHL through peer-reviewed articles, the 2022 Edition builds on the successful publication of the inaugural 2020 Edition and the 2021 Edition – a feat achieved amidst the evolving challenges posed by COVID-19. Through the 2022 Edition, APJIHL also continues to be a platform for in-depth academic discussions on IHL from the inter-disciplinary perspective of scholars from the region, with and through the guidance of a Board of Experts comprised of some of the most important voices in international law.

For its part, UP-IILS has served as the research base for IHL, both prior to and through the publication of APJIHL, as part of its research and training mandate under Philippine law. Its long-standing partnership with ICRC has served as the foundation for the successful hosting of the Philippine National Moot Court on International Humanitarian Law and the five-volume publication of the Asia-Pacific Yearbook of International Humanitarian Law (APYIHL). In May 2019, this partnership was further strengthened, when a Memorandum of Understanding was signed, thus paving the way for APJIHL. Since then, APJIHL has been a key addition to the UP Law Center's roster of research and publications, contributing to the advancement of legal scholarship in the region, and being a springboard for legal reforms in rights protection, international relations, and rule of law. With the publication of the 2022 Edition and the Call for Papers for the 2023 Edition, APJIHL will continue to serve as an avenue for IHL scholarship in the Asia-Pacific, uniquely delivered from the voices of those from the region.

UP-IILS would like to thank the research and administrative staff of the UP Law Center who most kindly assisted with the editorial and

organizational needs of the Journal. This volume would not be possible if not for the continued hardwork and efforts of Associate Editor Atty. Maria Emilynda Jeddahlyn Pia Benosa, Assistant Editor Atty. Joan Paula Deveraturda, Assisting Lawyer Prof. Michael B. Tiu, Jr., Copy Editor Sheigne Alvir Miñano, Research Assistants Jasmin Althea Siscar, Marc Cedric Dela Cruz and Holden Kenneth Alcazaren, and Mr. Mario Dela Cruz who prepared the lay-out. We would also like to thank the ICRC, particularly Ms. Sahar Haroon and Ms. Georgia Hinds whose continued support made this third volume possible.

ROMMEL J. CASIS
Managing Editor

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Interview with Dr Helen Durham

Allelu de Jesus and Jeffrey-Michael Sison, Legal Advisers
International Committee of the Red Cross

Dr Helen Durham has been the Director of International Law and Policy at the International Committee of the Red Cross ("ICRC") since 2014. Previously, she was Head of Office for the ICRC in Sydney, Legal Adviser for the ICRC Regional Delegation in the Pacific and Director of International Law and Strategy, among other roles, for the Australian Red Cross. Along with missions in the field for the ICRC in the Philippines, Aceh, Myanmar and many Pacific nations, she has had more than two decades of experience working in the International Red Cross and Red Crescent Movement. Dr Durham was also Director of Research for the Asia Pacific Centre for Military Law at the Melbourne Law School, and she has a PhD in the fields of international criminal law and international humanitarian law ("IHL"). Her term as an ICRC Director is ending in June 2022, and she sat down with ICRC Legal Advisers Allelu de Jesus and Jeffrey-Michael Sison to discuss her reflections from her eight years in that position and the road ahead, particularly for IHL and the Asia Pacific region.

So firstly, for our readers who might not be too familiar with the ICRC and its somewhat complicated structure, could you briefly explain the role of the ICRC Directorate?

As a Director with the ICRC, you play two roles: one is being a Director of your department and in my instance, it's the international law and policy department; but you also play a role in the wider infrastructure and decision-making of the institution. So, you have to have a two-layered focus: making sure that in your own department you provide leadership, management and support and at the same time make decisions about and for the whole of ICRC including the 20,000 staff we have. This can include budget issues, or globally on security questions, how we deal with data protection or humanitarian crises requiring increased human resource support. An interesting combination of challenges and leadership.

You have been Director of International Law and Policy for eight years, what are some of your most memorable moments from that time?

There are far too many over eight years to choose just one, but some of those that stand out are the large, important State meetings, such as addressing the United Nations Security Council on the protection of civilians. Then, the experiences I have when I go into the field and meet colleagues who do amazing work in our various delegations around the world, whether it be in Asia, places such as Myanmar, Afghanistan, the Philippines, or the Middle East somewhere like Iraq, or in Africa in Somalia or South Sudan. I've been able to do numerous interesting missions and I can then see how we really bring the key IHL and policy issues to life in the field. Of course, it's always very memorable meeting the people we serve. I can remember very particular instances going into places of detention, engaging with people who are very resilient and have strong ways to cope with terrible situations. Seeing our work in action, in supporting those in need is always memorable.

Have you found that these experiences in the field have also contributed when you find yourself in front of States in forums like the Security Council?

Absolutely. I think the strength of the ICRC is that we combine our experience in the field with our expertise in international law and policy and diplomacy, and this is what sets us apart from, say, a think tank or from academic institutions. Instead, we are an operational humanitarian organization, but with this legal framework, IHL, that is our backbone. So many examples of witnessing breaches of IHL but sometimes those involved actually don't know this, a, requirement of extra nutrition for nursing mothers, use of child soldiers or certain conduct of hostilities decisions. The IHL framework and expertise allow me to speak to the authorities for them to understand what their obligations are. And then at the same time, when dealing with the diplomatic issues at the United Nations level, that experience allows me to say that this law is not just the paper it is written on—it makes a difference in people's lives. And I can bring into those more diplomatic discussions the real-life examples. So, I see mutual reinforcement of taking the law into the field and the field into the law.

What are you most proud of from your term as director of international law and policy?

Well, number one: I'm really proud of the people that I've had the honour to lead with on these issues. I'm really proud of the incredible work done at all levels, across the ICRC and of course in my particular department. People are highly committed, people are extremely smart, but also people are kind to each other. In terms of the external outcomes, there are many different elements. Of course, in some areas we've really advanced with new treaties such as the Treaty on the Prohibition of Nuclear Weapons, which was adopted in 2017; declarations around certain other weapons, in particular a recent example is in relation to explosive weapons in populated areas, as well as significant policy work on climate and conflict. Overall, I'm extremely proud that we have remained the reference organization on IHL, and ensured we use this law to make a difference. Activities such as updating the commentaries to the Geneva Conventions, which is work that requires a very deep level of detail, advice to our operational colleagues, plus seeing our armed forces and police delegates provide advice is impressive.

So, from supporting the development of treaties or United Nations Security Council resolutions, our ratification work in the field, our application and implementation work in the field, as well as some of the policies, we have really been able to move forward this idea that even wars have limits.

Thank you for sharing those successes. It's encouraging to hear about the progress that has been made. Turning then to the other side, are there any issues where you would have liked to have made more progress during your directorship and what would you say was the main roadblock that slowed down progress in terms of achieving objectives?

I think as humanitarians we always want to do more and that's one of the things with my beautiful colleagues globally: the *status quo* is never good enough for people like us. We always think there's more we can do to help people. So, of course whilst I leave feeling proud of my team and our achievements, there are always things where we could have done more. One of them is on the issue of pushing more for compliance with IHL. When I started there was a process, a joint Swiss/ICRC initiative in place to create a formal structure to increase compliance. Ultimately, we were not able to

move it where we wanted to, and a lot of that was because I think it was an idea that wasn't ready for its time. A number of the States that we worked with were not ready, and there wasn't the political will. And if you look at the history of ICRC, we are often ahead. We propose things and sometimes they take twenty years, sometimes they take even longer.

That being said, we are still working on a lot of the elements of that issue and we continue to find different ways to advance. Compliance with IHL has been a challenge for us for many years and I would say it will remain so for years to come. How do we ensure that States and non-State armed groups actually comply with the magnificent legal framework that is in place to reduce suffering?

Yes, this is something that we are very familiar with as ICRC Legal Advisers: how to get these beautiful laws into action, and how to also face that frustration in between. Can you share any advice for Legal Advisers who are in that frustrating position of trying to convince parties to a conflict to take an interest in bringing life to those laws that we have?

No doubt, being an international lawyer is always a frustrating job. We have very high ambitions of bringing humanity to the table of authorities, of diplomats, of people in positions of power over others. In some ways we've almost set ourselves up for an impossible job. Thus, the first advice I always give is: we have to have patience and we have to be aware that the journey is long. If you look at even the creation of the Geneva Conventions, we proposed a treaty regime even after World War I. Even then, it took more terrible suffering and many more years before we got the Geneva Conventions of 1949.

I think one thing is that, to have the energy to continue to drive forward ironically requires you also have passion and patience and to be able to find different ways. If you are stuck one way and you can't get access or you can't convince there, come back and think about different ways you can connect it. For example, maybe it is looking at cultural issues and IHL or thinking, "Can I connect it with that religious issue? Can I find different people and contacts that might be able to help me?"

The way we want the world to be is not always the way that we experience it—our job is to try and bridge the reality with the rhetoric. We can often see the ways that we could work to reduce suffering: we know if we can get access to prisoners of war and register them and connect them with their families, it helps. But we can't always get access to detainees or prisoners of war. We have to find methods to deal with that frustration but continue our energy to drive forward.

Excellent advice and relevant not just to Legal Advisers no doubt.

Now moving to current IHL priorities, what would you say are some themes or issues that would be particularly relevant to the Asia Pacific region?

I think it is really important to understand that you constantly have evolving themes and that has been one of the challenges for the ICRC: to make sure we are dealing with the reality of how conflicts are being experienced today but also to anticipate some of the issues on the horizon.

For example, the evidence from places such as Afghanistan to the Philippines to Sri Lanka is that explosive weapons with a wide impact in populated areas creates much suffering. This is both immediate and long term when essential infrastructure is affected. ICRC has made a clear policy call on this issue, requiring avoidance of use of such weapons unless mitigating measures can be taken.

Still looking at weapons issues, cyber warfare will be of growing importance. We know that some countries in your region have acknowledged that they use, or have used, cyber in their military operations and we need to examine the humanitarian consequences of non-kinetic attacks. We know the terrible consequences of kinetic attacks, such as the use of explosive weapons, but there is also—as the world is increasingly interdependent in a digital space—the potential for massive humanitarian suffering even without those more obvious physical effects. So, cyber warfare is another issue very relevant to your region. Indeed, the Asia Pacific region is a place too where there are many advances in technology and innovative, cutting-edge developments. It makes me really proud to come from that part of the world and it means we need to constantly be having these discussions to put the concept of humanity

into the evolution, particularly when it relates to weapons and a digital battlefield.

Finally, on the weapons issue, the work towards the eradication of nuclear weapons is absolutely critical. The Asia Pacific region once again has really spoken out strongly on this, whether it be from those States that have experienced the testing of nuclear weapons or others. At the ICRC, we know from our historical experiences as the first organization on the ground to witness the aftermath of the bombing of Hiroshima and Nagasaki in World War II, the devastating humanitarian consequences. And of course, there are many, many other issues relating to weapons that I think are relevant in your part of the world, from Cambodia's work in mine action and support by the Filipino authorities and others. So, weapons are definitely a key and a very broad issue.

And finally, in the Asia Pacific region, there is a lot of work we need to do on the domestic implementation of the international legal obligations. That is always a critical area of work and, if I may say, I'm really proud of the work we do in this space. It's behind the scenes though. Often, we can't make too much noise about it but as an institution when we are able to support States to ratify these instruments and to put in place strong domestic legal frameworks, that's great. There is definitely some extra work we need to do in our region in that space. We've got the upcoming 45th anniversary of the 1977 Additional Protocols and this will be an ideal opportunity to push for more comprehensive legislation.

On the subject of nuclear weapons, the first Meeting of States Parties to the historic Treaty on the Prohibition of Nuclear Weapons will be taking place in Vienna later this month (21-23 June). What would be some of your hopes in terms of the outcome of those discussions?

I think what is very exciting is we've got our president, Peter Maurer, speaking at that meeting. The international community have acknowledged the role that the ICRC, and the Red Cross and Red Crescent Movement more widely, has played in pushing forward in this space and this is fantastic.

The second thing we're hoping is that the meeting of State Parties encourages more States to sign up, ratify and create domestic legislation. That

this meeting pushes forward the agenda for more support for this critical treaty.

The third thing that we would hope is that there is an understanding and a further discussion around the unacceptable humanitarian consequences that relate to the use of nuclear weapons—from the immediate suffering to the impact on the environment and production of food. This Treaty is only in existence because globally, we know that if there is a use of nuclear weapons, the consequences are going to be horrific and there is no way even an organization like the ICRC can assist to address the humanitarian consequences. So, if you cannot assist, if you cannot respond, then you have to prevent, you have to stop the chance of these terrible weapons ever being used again. This is why we really hope that States continue to have a wider discussion globally about the unacceptable nature of these weapons.

You've mentioned the challenges you faced during your term in strengthening compliance with IHL. What do you see as some of the main challenges now that are acting as obstacles for the kind of promotion and strengthening of IHL that we advocate for?

I think it's a really profound question because as international lawyers with the ICRC, our job is to really counter these challenges. So, it's something that we've thought about a lot.

The first one is that there seems to be a sense today that IHL and the legal framework, that has been so carefully negotiated, is not relevant to the situations we experience. One of the challenges then is that we have to constantly find ways to explain and demonstrate the relevance of the key principles: distinction, proportionality and precautions in attack. One area is also to continue to highlight the relevance of the role of IHL. And that's a challenge because there is a political discourse that often takes over saying that these laws are out of date or no longer relevant to situations of conflict today. Yes, they are over 70 years old but the key principles are extremely relevant and we have updated interpretations of them as we go along in the area of making more specific laws regarding weapons, looking at customary law as well as updating the commentaries which give a fresh view of their application. So, that's the first one: shoring up and confirming the relevance of IHL.

I think the second challenge is that States often see IHL as too restrictive. It's almost as though they see the laws as the highest level, the ceiling. Whereas of course we know that, because they have been extensively negotiated, they are the bottom level, the minimum standards. They're the level that keeps our humanity alive in conflict rather than an aspirational aim for the world to be perfect. So, I think the second thing is, once we demonstrate its relevance, to say that you cannot go below these laws—that is the level to which they were negotiated by you as States, you own that law, we only play our role as guardian and you cannot go below the bare humanity you have agreed to before. There is no category of person that falls outside the law. There's no category of weapon that should not be looked at and tested against the principles of, for example, superfluous injury and unnecessary suffering or that can violate the principle of distinction.

The third issue for me, is we need to continue to work to make sure the general public understands that even wars have limits because the public put pressure on the authorities. The militaries, even non-State armed groups, they don't sit in a bubble. They are looking for authority from the population. So, we need to continue to work with our brothers and sisters in the national Red Cross and Red Crescent Societies, as well as in our own work, to make sure that at a minimum the general public understands that there are certain behaviours in war that are unacceptable.

Those three things: make it relevant, make States understand that it is the bottom line and they cannot go below it and thirdly, make sure we have a wider understanding, are critical going forward.

You are from Australia, and you already highlighted the expertise coming from the Asia Pacific region in terms of new technology and other issues. And yet, you are the first person from this region to hold the position and it seems that Asia Pacific voices are not always prominent in global IHL discussions. Do you have any thoughts as to why that might be the case and what we could do to boost representation and this regional voice?

This is a really good question. Actually, just to let you know, I am the first non-Swiss and first female in 160 years to hold this role. So, for the first non-Swiss and they chose someone from our region, that really was a great honour. And I must admit, people thought perhaps being the first woman in

this role would have some challenges but I felt also coming from a part of the world where we have a different way of seeing was something that hopefully added a different voice to the table. So yes, I'm very proud to have represented this part of the world where I spent so much time when I was a delegate. In fact, all my missions were in the Asia Pacific region so that makes me proud.

I do think there is something about the geographical distance and even something seemingly as simple as the time difference. A lot of the work we do in Africa and even the Middle East is more in a similar time zone and sitting here in Geneva, it is a lot quicker. I am still shocked by how quickly one can get from Geneva to places like Kenya: it's only around eight hours, compared to if I'm going somewhere like Indonesia or to Australia or the Philippines.

Having said that, we should not underestimate the role that the voice of this region has played and continues to play in new negotiations I mentioned that feature in the weapons race, whether it be nuclear weapons or some of the discussions around autonomous weapons systems or other things. So, when you are far away in the Asia Pacific region, you may think that your voice isn't heard, but I do believe there is increasing understanding of the important learnings from that part of the world. Going forward, I think that States and academic institutions and think tanks need to offer opportunities for exchange. We need to bring more people from Europe and other parts of the world out to the Asia Pacific region so they can see the rich and important discussions that are occurring. And at the same time, we also need to have a bit of an exchange in the way that we see the world and the way that we understand these principles. The principles are universal, they apply across the globe. But of course, in the implementation there are different understandings, so I would say going forward we just need to continue to work together and work on standing in each other's shoes.

Moving now to something a little bit lighter, we know that people have written songs about you in the past. So, if you were to choose a theme song to capture your experience as the Director for International Law and Policy, what would it be and why?

Oh there are so many songs and I love music and there's a lot of music in my family. So, this is a hard question.

Conceptually though, I would say the song by John Lennon called "Imagine". It is a song that has really spoken to me because I think as an international lawyer with the ICRC, you're constantly imagining a world where there is less suffering. And you're imagining a world where there is better respect and treatment of each other. As an ICRC lawyer, we have to be both very rigorous and technical but also very creative in finding ways to make sure the law is understood, is applied. You can't just be a blackletter lawyer; you have to make it live. "Imagine" is a song that gives me great peace and inspiration.

A lovely song, good choice. Now with your term ending soon, can we ask what comes next for you?

Certainly. Well, I am returning back to beautiful Australia and I'm having a sabbatical for at least six to eight months, so I don't have any plans. I feel very fortunate and I do believe the future could hold a range of things but for now I need to focus on my family, support my husband who has given a lot to my job. This job has been long hours and significant pressure so having some time to "decompress" is important. I have no doubt that you'll see me popping up again somewhere. I do have a deep passion for IHL, for policy, for diplomacy, but right now I'm going to have a sabbatical and really enjoy life for a while. Read some novels, do some writing and really get back to being a member of my family. Pay back to my family as they've supported me so much.

A very well-deserved sabbatical! Thank you, Helen, we know the last few weeks are jam-packed for you, so we appreciate you taking the time for us and for our readers.

I also wanted to thank you for your time; it's so lovely and I felt so proud to come from this part of the world. I can't tell you how much being Australian and spending my time in the Asia Pacific region influenced me when sitting there amongst a Swiss environment. And it has been really great to feel that I've got behind me all these wonderful people like yourself. So, thank you.

Book Review of "Revisiting the Geneva Conventions: 1949-2019"*

Santosh Anand

The standard disciplinary history of the Geneva Conventions of 1949 tended to depict a picture that was exclusively a triumph of humanitarian principles. Only much later did revisionist scholarly accounts emerge that analyzed the present day issues of humanitarian law by invoking a broader historical trajectory.[1] A markedly different understanding of the origins, development and existing rules has since emerged in this body of literature.[2] The edited volume under review can similarly be broadly located within this recent trend. The volume provides both an analysis of present issues in humanitarian law and possible future trajectories while maintaining particular focus on a broader historical context across its chapters.

Borhan Uddin Khan and Mohammad Nazmuzzaman Bhuian provide an extended historical account on the "Development of the Geneva Conventions" in Chapter 1. They trace this development through five historical phases starting from the battle of Solferino (1859) to the contemporary period. Their account of the development of the Geneva Conventions is not a narrative of linear progression. Instead, they narrate a story of uneven development through the contingencies of wars, colonialism, anti-colonial struggles, and technological innovations. While they note that present-day armed conflicts pose several critical challenges to the rules of war, they still argue that these Conventions retain their significance amid changed legal and operational landscapes.

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* Md Jahid Hossain Bhuiyan and Borhan Uddin Khan (eds.), Brill-Nihoff, Leiden | Boston, 2019. XVII + 332 pp.

[1] For example, Frédéric Mégret, "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'", in Anne Orford (ed.), *International Law and its Others*, Cambridge University Press, Cambridge, 2006.

[2] Among others, Giovanni Mantilla, "The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols", in Matthew Evangelista and Nina Tannenwald (eds), *Do the Geneva Conventions Matter?*, Oxford University Press, Oxford, 2017; Boyd van Dijk, *Preparing for War: The Making of the 1949 Geneva Conventions*, Oxford University Press, Oxford, 2022.

Md Jahid Hossain Bhuiyan offers an elaborate account of how the rules of war regarding the treatment of prisoners of war (POWs) have developed over time in Chapter 2 on "The Legal Status and Protection of the Rights of Prisoners of War". He foregrounds the particular vulnerability of POWs in war in his discussion of the specific rules designed to protect this group. He notes that the Geneva Conventions provide robust protection to POWs. However, he argues that similar protection is now available to every detainee during war under the applicable rights regime. He goes on to argue that the corpus of detainee rights effectively renders inconsequential the distinction between an individual having the status of POW and the one without it as far as the protections both will have.

In his chapter on "The Prohibition of Deportation and Forcible Transfer of Civilian Populations in the Fourth Geneva Convention and Beyond," Etienne Henry provides an account of the emergence and later development of the prohibition on deportation. He argues that international law failed to prohibit individual forcible transfers as well as forcible transfers within territories under belligerent occupation prior to 1949. In his assessment, the available evidence indicates that this prohibition has now attained the status of *jus cogens*. However, he highlights the problematic assumption underlying the prohibition that the civilian population may spontaneously run away before the onset of armed conflict or occupation. He also points out that not all forcible transfers are illegal by virtue of this prohibition. For instance, evacuations are permitted for security or military reasons under Article 49(2) of the Fourth Geneva Convention.

Yutaka Arai-Takahashi examines the scope of liability of medical aircraft flying over a neutral state in Chapter 4 on "Combatants Aboard Medical Aircraft Who Fall into the Hands of a Neutral Power - the Scope of Their Liability to Detention Under the 1949 Geneva Conventions and the 1977 Additional Protocol I". The specific problem that he addresses is under what circumstances a Neutral Power may lawfully detain members of the armed forces and other related civilian officials aboard medical aircraft under its authority. He argues that while the relevant provisions in different Geneva Conventions do not provide a clear answer, it is reasonable to assume that removing passengers who are not permitted onboard a medical aircraft is a necessary condition for allowing onward journey of the aircraft with lawful passengers. Through this, the protected status of the medical staff can be respected.

In Chapter 5 on "Forced Transfer of Aliens during Armed Conflicts," Pablo Antonio Fernán-dez Sánchez provides an account of development over time of rules regulating the transfer of populations during armed conflict and occupation. He highlights how World War II drew attention to the issue of forcible transfer of populations and incidents thereof were subsequently examined at Nuremberg. He elaborates how the Geneva Convention IV later developed specific protections for civilians, as well as criminal prohibition, though much later, of the same offence under the institutional structures of international criminal law. However, he notes that the transfer of populations may be a legal imperative for humanitarian considerations in a given situation; specifically as a measure to avert harm to the civilian population. He insists that even in such situations, the principle of *non-refoulement* sets the outer limits of permissible conduct.

In her chapter on "The Geneva Conventions and Non-International Armed Conflicts," Noelle Higgins analyses the evolution of the regulatory framework governing non-international armed conflicts. She outlines how non-regulation of this category of armed conflicts at the international level before 1949 gave way to the minimum protections incorporated in Article 3 common to all four Geneva Conventions of 1949, and later the more onerous set of protective provisions incorporated in Additional Protocol II. However, she points out that gaps in the protection afforded continue to exist in non-international armed conflicts on account of the lesser number of ratifications of Additional Protocol II, that many of its provisions have not attained the status of customary international law, and above all, its high threshold for applicability in a given situation. Nevertheless, she notes that State practice and judicial creativity have managed to close at least some of these gaps.

In Chapter 7 on the "Four Geneva Conventions of 1949: A Third World View," Srinivas Burra offers a Third World critique of the Geneva Conventions by focusing on the occlusion of problems of colonial conflicts, colonial occupation and the Red Cross emblem. He develops a persuasive account of how the European experience of armed conflicts was prioritized at Geneva to the effective exclusion of historical and ongoing experience of extensive colonial violence in Asia and Africa. He shows how Western States prevailed over the Third World States in ensuring that no explicit reference was made to colonial conflicts in the Conventions. He further notes that Western States prevailed yet again in extending the Conventions to civil wars despite opposition from the Third World States. Similarly, Western

preferences reflecting cultural and religious considerations succeeded in determining humanitarian symbols. Uncertainty regarding the neutrality claim of the Red Cross symbol and its clear association with Christianity undermines its universal credibility. Burra observes that questions regarding the universal and neutral character of the Red Cross persisted with the decision to use the Red Crescent and Red Lion and Sun along with the Red Cross.

In his chapter on "Criminalising Rape and Sexual Violence in Armed Conflicts: Evolving Criminality and Culpability from the Geneva Conventions to the Bangladesh International Crimes Trial," M Rafiqul Islam assesses the extent of criminalisation of wartime rape and other sexual violence that exists in the relevant instruments. He notes that rape or sexual violence was originally not even included in the definition of war crimes in the Geneva Conventions. He argues that rape is implicitly considered a war crime because the specified war crimes logically include it. In his view, this implicit criminality fails to capture the trauma of victims. Furthermore, the post-conflict preference for peace over accountability leads to further marginalisation of justice for survivors of wartime sexual violence. He specifically discusses the example of the Bangladesh liberation war to illustrate this phenomenon.

In Chapter 9 on the "Principles of Distinction, Proportionality and Precautions under the Geneva Conventions: The Perspective of Islamic Law," Mohd Hisham Mohd Kamal offers an extended account of the Islamic law of war focusing particularly on requirements of distinction, proportionality and precautions. He notes that the requirement of targeting only those who are fighting implicitly prohibits the targeting of civilians. He further observes that all alternatives must be considered before identifying the final targets with a view to avoiding unnecessary bloodshed. He notes that the intentional targeting of civilians which is characteristic of acts of terrorism, make them un-Islamic. He also observes that the principle of precautions mandates that all efforts should be made to ensure protection of civilian populations on all sides. Finally, he argues that any violation of any of these three principles is punishable under Islamic law.

Borhan Uddin Khan and Nakib M. Nasrullah in their chapter on "Implementation of International Humanitarian Law and the Current Challenges," discuss problems of implementation and other current

challenges to the laws of war. They identify lack of adequate cooperation, collaboration and political will among the relevant actors as critical problems plaguing these laws today. They further identify issues with application and institutional measures of implementation emanating from both a combination of the design of these frameworks and new challenges brought about by the changing character of war and technological innovation. They make a number of suggestions to remedy these issues. These suggestions for ensuring the preservation of humanitarian standards range from undertaking normative innovations following Common Article 1, to institutional changes involving the International Committee of the Red Cross, the International Criminal Court, international humanitarian organisations, and even the United Nations Security Council.

In the final chapter on "The Geneva Conventions and Enforcement of International Humanitarian Law," Derek Jinks delves into the compliance dilemma faced by the Geneva Conventions. He considers this issue by helpfully discussing the dynamic of compliance operating under the classical law of war. He argues that the Geneva Conventions provide a much better enforcement mechanism than the classical law including by providing a logical basis of inter-belligerent sanctions while restricting resort to reprisals. He further argues that while the provision for war crimes trials as retaliation under the Conventions is not designed to prevent the initial violations, it provides a better alternative to the risks inherent to a full-fledged inter-belligerent enforcement mechanism.

Based on an elaborate account of the origins, evolution, challenges and possible future development, this volume constitutes a very important contribution to the existing literature on the need to reassess and revisit the Geneva Conventions. The fact that the majority of chapters have been authored by scholars based in the Global South counts as one of its distinct achievements. This is evident in the way the volume brings attention to several of the blind spots of the Geneva Conventions of 1949; especially marginalisation of issues of colonial occupation, colonial conflicts and generally the disproportionate space given to the European experience of armed conflicts and Western concerns. The volume would have benefitted from a more concrete reconstructive agenda while focusing on the need to revisit the Geneva Conventions and added greater specificity in elaborating the way forward. That said, this volume will be useful for practitioners, academics and students of international law.

Redefining Rescue Operations in Contemporary Naval Warfare: A Necessary Interplay between Maritime Bodies in International Law*

Alba Grembi

While international law in general takes into account evolving State capacities in technology and material challenges, the obsolete character of certain norms under the law of naval warfare leaves the framework of present-day maritime rescue operations incomplete. This has created drawbacks *vis-à-vis* the efficient protection of search and rescue operations in practice, as shown in the case of the search and rescue vessel Sapphire operating during the naval warfare in the Black Sea. This article demonstrates the necessity of belligerent abidance by the object and purpose of the Second Geneva Convention of 1949 and the role of relevant maritime law norms in the effective implementation of maritime rescue services during naval warfare.

Keywords: Treaty Interpretation, IHL, Second Geneva Convention, Maritime Search and Rescue, Coastal Rescue Craft

1. Introduction

From 1984 to 1986, the International Committee of the Red Cross ("ICRC") and the International Lifeboat Conference made joint attempts to achieve progress in humanitarian law by drafting a technical manual that "[intends] to facilitate the practical application of the Second Geneva Convention"

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("GC II").[1] The acceptance of their recommendations would have contributed to a general understanding among international actors that GC II is subject to an evolutionary interpretation that allows the expansion of its scope to contemporary situations involving technical abilities and challenges at sea which had not been initially considered by the Parties. This would take practical effect through a generally accepted interpretation that invoked the interplay of the Convention's provisions with modern maritime law norms on issues concerning the protection of rescue craft and their fixed coastal installations in times of armed conflict. The manner through which this would have been realized was the broadening of these provisions' scope from various points of view.[2]

The attempt, however, did not lead to the expected outcome, generating limited interest and international scholarship on the subject. This has contributed to the insufficient protection of coastal rescue craft and their rescue operations in contemporary naval warfare, as recently demonstrated by the seizure of the rescue vessel Sapphire[3] during its operation in the conflict between Ukraine and Russia in the Black Sea.[4] Interestingly, the Ukrainian government opined that the International Convention on the Safety of Life at Sea ("SOLAS") of 1974 applies to the vessel's mission to retrieve the bodies of "allegedly deceased Ukrainian State Border Guard officers and soldiers" following an attack by a Russian warship[5] and that the seizure of this vessel

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[1] Phillipe Eberlin, "The Protection of Rescue craft in Periods of armed Conflict", *International Review of the Red Cross*, No. 246, 1985, p. 140; International Committee of the Red Cross [hereinafter ICRC], *Reaffirmation and Development of International Humanitarian Law: Identification of Medical Transports*, Geneva, 1995.

[2] ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., 2017, paras 2169-2174 [hereinafter *ICRC Commentary of 2017*]; *see also* ICRC, *Minutes of the Meeting of the Special Working Group with the International Committee of the Red Cross*, Geneva, 1984, Appendix B.

[3] The vessel has been released at the time of writing; *see* The Kyiv Independent News Desk, "Russian occupiers return Ukraine's 'Sapphire' rescue ship they seized in February", *The Kyiv Independent*, 8 April 2022, available at: https://kyivindependent.com/uncategorized/russian-occupiersreturn-ukraines-sapphire-rescue-ship-they-seized-in-february/ (all internet references were accessed on September 2022).

[4] "The Russians seized the Ukrainian rescue ship 'Sapphire' and lead her to Sevastopol", *The Odessa Journal*, 9 March 2022, https://odessa-journal.com/the-invaders-forcibly-lead-the-stolen-rescue-ship-sapphire-to-sevastopol/.

[5] International Convention for the Safety of Life at Sea, 1184 UNTS 2, 1 November 1974 (entered into force 25 May 1980) [hereinafter SOLAS Convention].

during the rescue operation is in general unlawful.[6] On the other hand, the capture of these vessels would be lawful under GC II to the extent that certain conditions are satisfied,[7] since their respect and protection go as far as "operational requirements permit".[8] The incident is important as it reflects the fears expressed in the 2017 ICRC Commentary on the ability of parties to an international armed conflict ("IAC") to prevent these vessels from performing their humanitarian tasks based on operational considerations.[9]

Therefore, the lack of international commitment to continue the efforts developed in 1984-1986 and to reach general agreement on the protection of search and rescue ("SAR") operations at sea has allowed concerned Parties to interpret the law from a thoroughly subjective point of view. This points to a general discretion of belligerents to instill, based on legal uncertainty, an incorrect sense of unlawfulness to the conduct of their enemies during naval warfare. The negative consequences of this discretion can thus be manifested upon the reality of SAR operations, the activities of SAR organisations in practical situations and eventually the implementation of international rules during armed conflict at sea. Gradually, the limited enthusiasm with which international literature approaches certain aspects of the *lex lata* and the lack of extended effort to apprise these with contemporary material and legal elements brings us to the assessment of a dystopic future in armed conflicts whereby the implementation of obsolete humanitarian norms may depend more upon the perspective of belligerents than a generally accepted interpretation of international law.

This article intends to show that similar instances can be avoided in the future through an evolutionary interpretation of GC II. As will be argued, the Convention's purpose demands an interpretation of its norms that

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6 International Maritime Organisation [hereinafter IMO], *Circular Letter No.4526: Communication from the Government of Ukraine*, London, 8 March 2022, https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/Black Sea and Sea of Azov - Member States and Associate Members Communications/Circular Letter No.4526 - Communication From The Government Of Ukraine (Secretariat).pdf [hereinafter Communications of Ukraine to the IMO].

7 Louise Doswald-Beck (ed.), *San Remo Manual on International Law applicable to Armed Conflicts at Sea*, Grotius Publications, Cambridge University Press, Cambridge, 1995, paras 48, 52 and 137 [hereinafter San Remo Manual].

8 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 27(1) [hereinafter GC II].

9 *ICRC Commentary of 2017*, above note 2, para. 2196.

responds to the evolution of social and material reality and general international law. Indeed, this purpose could not be fulfilled if it were to be "construed in an obsolete surrounding".[10] The norms that may be used for such an evolutionary interpretation are offered by the international maritime law applicable to SAR operations, and specifically, the International Convention on Maritime Search and Rescue ("M-SAR Convention")[11] through which States Parties apply the SAR duty at sea.[12] This opinion is reinforced by the 2017 ICRC Commentary which contends that treaties adopted under the auspices of the International Maritime Organization ("IMO") are applicable in times of armed conflict due to, *inter alia*, their character as multilateral law-making treaties.[13] The Commentary also takes the view that, with regard to IACs, "the more a question is linked, or the closer it occurs to, actual hostilities, the more the Second Convention prevails," adding that "situations far from the battlefield or not linked to actual hostilities may still be regulated by IMO treaty commitments."[14] Among others, this paper accredits and elaborates on this view in further detail.

It is highlighted that the present paper is not principally directed toward military personnel. Rather, its primary aim is to contribute an analysis that may advance the law of naval warfare on the protection of persons at sea. It intends to demonstrate that the purpose of GC II justifies an evolutionary interpretation that considers the maritime instruments regulating SAR operations in peacetime (section 2). With this view, it aims to determine the object and purpose of GC II through the teleological method of interpretation (section 3) and demonstrate how the latter renders these instruments applicable in times of naval warfare (section 4). Finally, it displays an interplay between the respective norms, keeping in mind the object and purpose that allow for an evolution of the Convention and using the specific

[10] Robert Kolb, *The Law of Treaties: An Introduction*, Edward Elgar Publishing, Cheltenham, 2016, p. 15.
[11] International Convention on Maritime Search and Rescue (as amended), 1403 UNTS, 27 April 1979 (entered into force 22 June 1985) [hereinafter M-SAR].
[12] Francesco Munari, "Search and Rescue at Sea: Do New Challenges Require New Rules?", in Chircop, A., Goerlandt, F., Aporta, C., Pelot, R. (eds), *Governance of Arctic Shipping*, Springer, Cham, 2020, p. 68.
[13] *ICRC Commentary of 2017*, above note 2, para. 56; *see also* Draft Articles on the Effects of Armed Conflicts on Treaties, *Yearbook of the International Law Commission*, Vol. II ,2011, Art. 7, and the commentary on the Annex with the "Indicative list of treaties referred to in Article 7", paras 15–21.
[14] *ICRC Commentary of 2017*, above note 2, para. 58.

example of the protection of SAR operations under the prism of Article 27 of GC II (section 5).

2. The Interpretation of Treaties

The most common approaches to interpretation in international law are the teleological,[15] textual[16] and subjective methods of interpretation.[17] The validity of legal analysis alluding to these methods should be examined on a case by case basis, no less because there are no definite distinctions between them.[18] Indeed, the majority of international law scholars give primacy to "the text, while at the same time providing a certain space to extrinsic evidence concerning the intentions of the parties and the object and purpose of the treaty as means of interpretation".[19] The general rules of interpretation found in the Vienna Convention on the Law of Treaties ("VCLT") verify this practice by stipulating that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[20] In cases whereby the wording is not clear, the Convention requires recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31".[21]

VCLT limits the application of the subjective method to cases of ambiguity, since finding the subjective intention of Parties to universal treaties would mean no less than "searching for the pot of gold at the end of the

[15] Pierre-Marie Dupuy, "Evolutionary Interpretation of Treaties: Between Memory and Prophecy", in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford, 2011, p. 123; *see also* Eirik Bjorge, *The Evolutionary Interpretation of Treaties*, Oxford University Press, Oxford, 2014, pp. 1–3.

[16] Odile Ammann, "The Interpretative Methods of International Law: What Are They, and Why Use Them?", in Odile Ammann, *Domestic Courts and the Interpretation of International Law*, Vol. 72, Brill, Leiden, The Netherlands, 2019, p. 197.

[17] Vesna Crnic-Grotic, "Object and Purpose of Treaties in the Vienna Convention on the Law of Treaties", *Asian Yearbook of International Law*, Vol. 7, 1997, pp. 141, 159; *see also* Arnold Mcnair, *The Law of Treaties*, 1st ed., Clarendon Press, Oxford, 1961, p. 204.

[18] International Law Commission [hereinafter ILC], *Draft Articles on the Law of Treaties with commentaries*, ILC, New York, 18 January 1966, p. 218, para. 2 [hereinafter *ILC Commentary of 1966*].

[19] *Ibid.*

[20] Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), Art. 31(1) [hereinafter VCLT].

[21] *Ibid.*, Art 32.

rainbow".[22] On the other hand, the textual approach, which gives primacy to the ordinary meaning of the terms of a convention as an objective category to be derived from the text, often its preamble, or implied in it, hinders derogations from the textual premises.[23] The 2017 ICRC Commentary elucidates this approach by noting that "beyond the preambles", which is the usual place to find the object and purpose, "the whole text of the Conventions, including the titles and annexes, has to be taken into account in ascertaining their object and purpose."[24]

2.1. The Teleological Method of Interpretation

The present article resorts to the above methods mainly as secondary means of interpretation additional to the teleological approach for determining the purpose of GC II. It does so in consideration of the historical, systematic, law-making and humanitarian nature of the considered instruments[25] which pose inherent obligations and must be interpreted with a view to their "context in the legal system as a whole".[26] What is more, these texts should be interpreted as "living instruments", insofar as, among others, their understanding and interpretation are affected by the evolution and change taking place in other spheres of reality,[27] especially general international law and technological evolution.[28] That is to say, a contemporary interpretation of GC II should have the goal of expanding its scope and impact on situations arising within armed conflict and affected by changes in these spheres which had not been considered during the time of its drafting. In the particular instance of

[22] *See* E. Bjorge, above note 15, p. 130; *see also* Malgosia Fitzmaurice, "Interpretation of the European Convention on Human Rights: Lessons from the Naït-Liman Case", *Queen Mary Law Research Papers*, No. 346, London, 2020, pp. 3–4; As of the time of writing, GC II counts 196 Parties and the M-SAR Convention, 113.
[23] *See* O. Ammann, above note 16, p. 197.
[24] *ICRC Commentary of 2017*, above note 2, para. 29.
[25] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. 1, Grotius Publications, Cambridge, 1986, p. 42.
[26] *Ibid.*, pp. 42, 398; *see* R. Kolb, above note 10, p. 139.
[27] *See, e.g.*, European Court of Human Rights, *Mamatkulov and Askarov v. Turkey*, App. No. 46827/99 and 46951/99 121, Judgment (Grand Chamber), 4 February 2005.
[28] *See* Stefan Theil, "Is the 'Living Instrument' Approach of the European Court of Human Rights Compatible with the ECHR and International Law?", *European Public Law*, Vol. 23, No. 3, 2017, p. 590.

maritime SAR operations, this also involves the technical abilities of the concerned Parties.[29]

Emphasis is therefore given hereon to the teleological approach which prioritizes the function, aim or purpose of a treaty, rendering necessary an interpretation that resorts beyond the scope of the text.[30] Having a long history of use in international law,[31] this method sometimes makes way for the countermanding of the Parties' initial intentions[32] as elucidated by their selected wording in a given convention and its substitution by a deeper reading of its purpose.[33] However, this also allows in the same manner for an evolutionary interpretation that adapts the concerned conventions' provisions to present-day conditions and necessities[34] while also considering the current interests of the Parties who are affected by the convention.[35] Therefore, it has

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[29] *See* Rain Liivoja, "Technological change and the evolution of the law of war", *International Review of the Red Cross*, Vol. 97, 2015, p. 1161.

[30] Shai Dothan, "The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights", *Fordham International Law Journal*, Vol. 42, No. 3, 2018, p. 768.

[31] *See* Hugo Grotius, *De jure belli ac pacis*, Libri tres, 1625, reproduced in *Classics of International Law*, Lib. 11, Ch. XVI, Washington, 1913, para. VIII; Emerich de Vattel, *Le droit des gens ou prindpes de loi naturelle*, 1758, reproduced in *Classics of International Law*, Lib. II, Ch. XVII Washington, 1916, para. 287; Permanent Court of International Justice, *Minority Schools in Albania,* Advisory Opinion, PCIJ Rep. Series A/B No. 64; Permanent Court of International Justice, *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer,* Advisory Opinion, Series B No. 13; Permanent Court of International Justice, *Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration, Signed at Neuilly-sur-Seine on November 27th, 1919 (Question of the "Communities"),* Advisory Opinion, PCIJ Rep. Series B No. 17; Permanent Court of International Justice, *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night*, Advisory Opinion, PCIJ Rep. Series A/B No. 50, Dissenting Opinion of Judge Anzilotti, p. 383; see International Court of Justice, *US Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgement, ICJ Rep 1980, para. 54; Arbitral Tribunal for German External Debts, *Young Loan Case (Belgium, France, Switzerland, UK and US v Federal Republic of Germany)*, 1980, 19 ILM 1357, 1370, paras 16 and 30; International Court of Justice, *Case Concerning the Arbitral Awards of 31 July 1989 (Guinea-Bissau v Senegal)*, Judgement, ICJ Rep 1991, paras 55–56; *see also* Isabelle Buffard, Karl Zemanek, "The 'Object and Purpose' of a Treaty: An Enigma?", *Austrian Review of International & European Law*, Vol. 3, 1998, p. 315.

[32] Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951– 4: Treaty Interpretation and Other Treaty Points", *British Yearbook of International Law*, Vol. 33, pp. 204–207; O. Ammann, above note 16, p. 212.

[33] S. Dothan, above note 30, p. 784.

[34] John Hart Ely, *Democracy and Distrust – A Theory of Judicial Review*, Harvard University Press, Harvard, 1980, pp. 76–84.

[35] S. Dothan, above note 30, pp. 785 and 790; *see also* Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues In The Law Of Treaties*, Eleven International Publishing, The

been utilized by international jurisprudence, among others, to maintain the living character and the correspondence of the respective treaties with changes made in the law over time.[36]

To summarize this reasoning, it should be underscored that the considered conventions consist of a humanitarian and multilateral law-making character that "leaves room for a teleological approach, as well as for a 'systematic interpretation' which takes into account the context of the entire legal system in which the norm operates".[37] This reasonable standpoint authorizes a valuable opportunity to utilize the maritime conventions' norms that have a greater connection to the modern reality of SAR operations to fill gaps of GC II that were not originally foreseen by the Parties.

2.2. Object and Purpose as Distinct Concepts

An important question that seeks clarification for a valid determination of GC II's "object and purpose" is whether these terms are to be considered synonymous or distinct. In this regard, the ICRC is mindful[38] of the opinion expressed by the International Law Commission ("ILC") in its introduction to the commentary on draft Articles 27 and 28 of VCLT (which are now Articles 31 and 32), thus:

When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and

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Netherlands, 2005, p. 219; Aharon Barak, *The Judge in a Democracy*, Princeton University Press, New Jersey, 2008, pp. 183–184; Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication*, Oxford University Press, Oxford, 2014, pp. 210–13.

[36] Permanent Court of International Justice, *Competence of the International Labour Organisation to regulate, incidentally, the personal work of the employer*, Advisory Opinion, PCIJ Series B No 13, para. 18; *see also* V. Crnic-Grotic, above note 17, p. 166; Denys Simon, *L'Interprétation Judiciaire des Traités D'organisations Internationales: Morphologie des Conventions et Fonction Juridictionnelle*, Pedone Paris, 1981; International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Rep 1951, p. 23; *see also* International Court of Justice, *Reparation for Injuries Suffered in the Service of the UN*, Advisory Opinion, ICJ Rep 1949, pp. 178-182; International Court of Justice, *Case concerning the International Status of South-West Africa*, Advisory Opinion, ICJ Rep 1950, p. 136; *see* European Court of Human Rights, *Case of Pretto and others v Italy,* Judgement, ECHR Application No. 7984/77, para. 26.

[37] Catherine Brölmann, "Law-Making Treaties: Form and Function in International Law", *Nordic Journal of International Law*, Vol. 74, 2005, p. 393.

[38] *ICRC Commentary of 2017*, above note 2, para. 29.

the *objects and purposes* of the treaty demand that the former interpretation be adopted.[39]

In quoting this view, the 2017 Commentary seemingly supports the doctrine of distinct interpretation of the terms[40] which is shared mostly by French writers. This doctrine views the object as an instrument to achieve the treaty's purpose and, therefore, the purpose as the reason for the object, the situation for which the object was given.[41] A different view with which this author is more aligned deems the object as the subject matter subjected to regulation, necessitating an interpretation that considers the "vocabulary and usages of the branch in question", and the purpose as the aim to be achieved by the norm.[42] Nevertheless, the 2017 Commentary culminates with the view that, while "strictly speaking", the terms object and purpose are defined as distinct terms, they are "used as a combined whole". Thus, it joins the majority of German and English writers regarding the separate use of these terms in Article 31(1) of VCLT as pleonastic,[43] to find that the Convention's overall object and purpose is to "ensure respect for and protection of the wounded, sick and shipwrecked, as well as the dead, in international armed conflict at sea or other waters".[44]

2.2.1. The Importance of Distinction Between the Concepts

The present author does not share the Committee's opinion as mentioned above. As Buffard and Zemanek most properly substantiate to this end, if "purpose" was the only guiding principle of interpretation, "unfettered teleology would be possible and the treaty provisions actually agreed upon might become more or less irrelevant as long as the conduct of the parties achieved the aim of the treaty".[45] Accordingly, the purpose of a treaty should be understood as a more implicit concept contingent on a subjective understanding.[46] Moreover, the ILC Commentary, as quoted by the ICRC in

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[39] *ILC Commentary of 1966*, above note 18, p. 219, para. 6 (emphasis added).
[40] For a discussion on this issue, *see* I. Buffard and K. Zemanek, above note 31, pp. 325–328.
[41] *Ibid.*
[42] R. Kolb, above note 10, p. 145.
[43] *See* Hervé Ascensio, "Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law", *ICSID Review*, Vol. 31, Issue 2, 2016, p. 370.
[44] *ICRC Commentary of 2017*, above note 2, para. 29.
[45] I. Buffard and K. Zemanek, above note 31, p. 332.
[46] *See* ILC, *Yearbook of the International Law Commission*, Vol I, New York, 1964, p. 26, para. 77; *Young Loan Case*, above note 31, p. 1377; *see also* International Court of Justice, *Case*

its 2017 Commentary, contends that it is the character of a treaty that "may affect the question whether the application of a particular principle, maxim or method of interpretation is suitable in a particular case".[47]

GC II qualifies as a living instrument that "breathes" through IHL, maintaining in this manner a necessary connection to material and social reality. Consequently, the link between the general regime and its specific instrument is established in their common purpose. In this case, the synonymous use of the terms "object and purpose" could alienate this connection and GC II from its primary purpose, causing some of its essential articles to seem incomprehensible. For instance, the technical limitation of Article 34 prohibiting the use of a secret code for wireless or other means of communication could either portray the article *per se* as irrelevant to the purpose of the Convention as interpreted by the ICRC, or cause the impression of an autonomous purpose within it.[48] This could be detrimental to the Convention's applicability since the isolated reading of various, distinctive purposes could also prove contradictory to the norm's object. Ultimately, it may contribute to the fragmentation of IHL in general.

It has been, for example, supported that "[c]ommon Article 3—which is often considered as a mini treaty of the conventions—can be said to have a distinct purpose, that of protecting persons not or no longer participating in hostilities in situations of international armed conflict".[49] In the opinion of this author, this interpretation entails the danger of depriving the Convention of the necessary coherence facilitating its observation in practical situations and, by allowing a broad reading of contradictory goals, it could enable its *mala fide* implementation by the involved Parties. What is more, in pertinence with the present article, it could be used to authorize the implementation of other legal regimes that facilitate the fulfilment of these distinct purposes in disregard of the Convention's objectives. This paper considers that GC II's purpose is implicitly indicated in its preamble as will be analysed in due

Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras), Judgement, ICJ Rep 1988, para. 89; European Court of Human Rights, *Case relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, Merits, 1 EHRR 252, 1968, p. 832.

[47] *ILC Commentary of 1966*, above note 18, p. 219, para. 6.

[48] *See, e.g.*, O. Ammann, above note 16, p. 212.

[49] Jean-Marie Henckaerts and Elvina Pothelet, "The Interpretation of IHL Treaties: Subsequent practice and other salient issues" in Heike Krieger and Jonas Püschmann (eds), *Law-Making and Legitimacy in International Humanitarian Law*, Edward Elgar Publishing, Cheltenham, 2021, p. 157 (emphasis added).

course, while its object explicitly lies within its title, testifying to the legal subject to be submitted to regulation and its respective norms, the instruments through which this purpose will be achieved.

3. The Object and Purpose of the GC II

It is deduced from the above that, when the implementation of peacetime norms regulating the maritime SAR operations is deemed necessary under the various circumstances arising during naval warfare, consideration must be paid to the object and purpose of the *lex specialis* applicable in times of armed conflict. Indeed, as will be supported in due course, such implementation may in some situations facilitate the effective abidance of the Parties by the object and purpose of this special law.

As mentioned, the object of GC II is found in its respective provisions and, principally, its title. It constitutes, namely, the amelioration of the condition of wounded, sick and shipwrecked members of the armed forces at sea. Its purpose, on the other hand, rises through the examination of its preamble, testifying to a shared aim with its predecessors. In detail, the preamble declares its purpose of revising the Hague Convention (X) of 1907 and the Geneva Convention of 1906.[50] In their turn, these conventions expressly indicate the desire of the drafters "to diminish… the inevitable evils of war",[51] a phrase which they omit to define, in this author's opinion, deliberately. Indeed, the said omission allows these instruments to remain in contact with other manifestations of legitimacy within a "socially constructed system of norms and values"[52] over time.

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[50] The Preamble explains that its purpose is to revise the Xth Hague Convention of October 18, 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906.

[51] Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906 (entered into force 9 August 1907), available at: https://ihl-databases.icrc.org/ihl/INTRO/180?OpenDocument; Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, 205 CTS 359, 18 October 1907 (entered into force 26 January 1910), Preamble; *see also* the Text of the Fifth Plenary Meeting of the Hague Conference of 1907 Prepared Under the Supervision of Jamess Brown Scott, Oxford Univerity Press, New York, 1920, p. 155.

[52] *See* Terry D. Gill, "ILMO: The 'Flux Capacitor' of Contemporary Military Operations" in Rogier Bartels, et al. (eds), *Military Operations and the Notion of Control Under International Law*, Springer, The Hague, 2021, pp. 35, 37.

3.1. The Purpose of GC II as Evidenced in General IHL

Despite the broad understanding of the "evils of warfare", there are two distinct elements found in various IHL texts that testify to the character of this concept. The said elements are especially discovered in the primary provisions implementing humanitarian protection such as the 1868 St Petersburg Declaration which restricted the use of means and methods of warfare by fixing by common agreement the technical limits at which "the necessities of war ought to yield to the requirements of humanity".[53] In the words of Theodor Meron, the desire to lessen the evils of war typifies the counterbalancing of military necessity by the principle of humanity.[54] Yoram Dinstein stresses that the thrust of IHL is not absolute mitigation of the calamities of war but relief from its tribulations as much as possible. In this sense, the law of IAC (and, as an extension, its authoritative texts) is "predicated on a subtle equilibrium" between the two diametrically opposed notions.[55] Other authors consider the principle of military necessity to be both a specific element and a general foundational principle of IHL existing in the equipoise with the principle of humanity.[56] Excessive restrictions on the principle of military necessity would force impractical limitations on combatants and result in the inability of IHL to reduce the adverse effects of armed conflict.[57] On the other hand, a counterbalanced principle of military necessity advances military advantage and satisfies the humanitarian requirements of IHL.[58]

[53] These statements have led to the conclusion that the Commission "negotiated the Declaration with the notion of humanity uppermost in their minds"; *see* Speech by Jakob Kellenberger, president of the ICRC, International Conference on IHL dedicated to the 140th Anniversary of the 1868 St. Petersburg Declaration (24 November 2008); Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 11 December 1868, Preamble, available at: https://ihl-databases.icrc.org/ihl/full/declaration1868; *see also* Instructions for the Government of Armies of the United States in the Field, General Orders No.100, 1863, Arts. 4, 14–16 [hereinafter The Lieber Code].

[54] *See* Theodor Meron, "The Humanization of International Humanitarian Law", *The American Journal of International Law*, Vol. 94, No. 2, 2000, p. 243.

[55] Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 1st ed., Cambridge University Press, Cambridge, 2004, p. 16.

[56] Michael N. Schmitt, "Military Necessity and Humanity in International Law: Preserving the Delicate Balance", *Virginia Journal of International Law*, Vol. 50, No. 4, 2010, p. 796.

[57] Viola Vincze, "Taming the Untameable: The Role of Military Necessity in Constraining Violence", *ELTE Law Journal,* Vol. 2, 2016, p. 108.

[58] *Ibid.*, p. 96.

This section examines the principle of humanity and its role in the interplay of the regimes under consideration. To fully realize the purpose of GC II, however, one has to also comprehend the nature of military necessity as well as its function in the development of the law of war and its practices.

3.1.1. Military Necessity

While an extensive discussion of military necessity is not afforded in this article mainly for economy of space, it suffices to stress that the intended interplay must attend to the importance of this principle upon belligerent conduct during wartime and the interpretation of IHL in general. Indeed, the principle serves, as suggested above, the desire to lessen the evils of warfare, making an interpretation of IHL in disregard of its function perilous for the achievement of the law's objectives. Therefore, the Lieber Code defines military necessity as "those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war".[59] Articles 22 of the 1899 and 1907 Hague Regulations and 35(1) of the First Additional Protocol of 1977 ("AP I") have drawn inspiration from the principle to clarify that the right of belligerents to choose methods and means of warfare is not unlimited.[60] In general, the principle permits "measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by international humanitarian law".[61]

The goal of belligerents according to military necessity is to achieve the defeat of the enemy with the minimum expenditure of life and recourses.[62] Their abidance by its dictates is significant insofar as the ultimate goal of this principle is to avoid prolongation of fighting and increase of the overall suffering caused by the war.[63] Especially since the aftermath of World War II,

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[59] The Lieber Code, above note 53, Art 14.

[60] V. Vincze, above note 57, p. 93; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978).

[61] Marco Sassoli, et al. (eds), *How does Law Protect in War? Military Necessity,* Online Casebook, ICRC, 2022, available at: https://casebook.icrc.org/glossary/military-necessity.

[62] William H Boothby and Wolff Heintschel von Heinegg, *The Law of War: A Detailed Assessment of the US Department of Defense Law of War Manual*, Cambridge University Press, Cambridge, 2018, p. 31.

[63] *See* Department of Defence Law of War Manual, as amended, 2016, Directives 2311.01E and 5145.01, para. 2.2.3.1 [hereinafter US DoD Manual].

international law literature has moved further in agreeing that military necessity is manifested in the rules and principles of the law of armed conflict.[64] This disqualifies the lawfulness of conduct that violates the laws and usages of war by referring to military necessity.[65] In the *Hostage* case, for instance, the Nuremberg Tribunal rejected the argument that the principle justified killing and destruction, noting that the concept is not equal to convenience and strategic interests and that it could only be used in relation to lawful acts of war.[66] In this manner, the principle assumes a permissive and a restrictive role: on the one hand, it authorizes the infliction of direct and intentional damage between enemy belligerents; on the other hand, "it restricts permissible damage to that which is legal under the laws of war, and more importantly, to that which is actually necessary to attain the military goal."[67]

3.2. A Role for Counterbalance

It derives from the above that the purpose of GC II is to maintain the counterbalance between humanity and military necessity at sea.[68] This purpose can be deduced through a careful examination of each of its norms. For example, the obligation to adopt all possible measures to search for and collect protected persons in Article 18 seems to reflect both elements of the counterbalancing scale since it may allow Parties a discretionary judgement on their abilities after each engagement while also asserting the obligation to utilize measures most possible in any case.

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[64] *See* Wolff Heintschel von Heinegg, "Considerations of Necessity under Article 57(2)(a)(ii), (c), and (3) and Proportionality under Article 51(5)(b) and Article 57(2)(b) of Additional Protocol I: Is there a Room for an Integrated Approach?" in Claus Kreß and Robert Lawless (ed.), *Necessity and Proportionality in International Peace and Security Law*, Oxford University Press, Oxford, 2021, p. 327.

[65] V. Vincze, above note 57, 98.

[66] Nuremberg Military Tribunal, *Hostage Case (United States v. List)*, Case No 7, Trial Judgment, 19 February 1948, in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Volume XI/2, pp. 1252–1253–1256.

[67] Gabriela Blum, "The Laws of War and the Lesser Evil", *Yale Journal of International Law*, Vol. 35, No. 1, 2010, p. 3; *see* Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford University Press, Oxford, 2008, p. 280-84; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law,* Clanderon Press, Oxford, 1989, p. 215-17; Burrus M. Carnahan, "Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity", *American Journal of International Law*, Vol. 92, 1998, p. 215-19.

[68] *See* Marco Sassoli, *International Humanitarian Law Rules, Controversies, and Solutions to Problems Arising in Warfare*, Principles of International Law Series, Edward Elgar Publishing, Cheltenham, 2019, p. 435; T. Meron, above note 54, p. 243.

This counterbalance ensures that, on the one hand, humanitarian considerations are not invoked to such a degree that would render impossible the Parties' achieving of their intended military ends in warfare. On the other hand, it means that the pursuit of military interests cannot be invoked so as to aggravate human suffering to such a degree that it affects the humanity of the involved actors irreversibly and/or excessively in relation to the military advantage anticipated from a given conduct. Therefore, even though military action in warfare may invariably aggravate human suffering, the latter must be in any case proportionate to what is necessary to achieve the goal of the military conduct as a whole in line with what is allowed (or disallowed) by the rules and principles of warfare, including the principle of humanity.[69] Respectively, when a norm allows for greater consideration of military interests in general by lowering the threshold of an object's or person's protection, one should be also mindful of the principle of humanity to determine whether a decision affecting or leading military conduct under the specific circumstances of the case would excessively aggravate human suffering in relation to the advantage achieved from the conduct as a whole. This helps to avoid uneven results *vis-à-vis* the general purpose of the applicable law and prevent a situation of armed conflict whereby "no legal restrictions would exist and the elementary considerations of humanity would become meaningless".[70] The last section of this article provides a detailed demonstration of how an application of maritime law in the pursuit of this counterbalance could allow for the evolution of IHL norms in accordance with current abilities and challenges at sea.

4. Humanity: A Linking Principle of Humanitarian Regimes

Use of the teleological method is also found in the case of "general principles of international law, which must be ascertained based on the *ratio legis* of national laws and the specificities of international law".[71] It is held here that the SAR duty embodies the applicability of such a principle, i.e., the principle of human dignity at sea.

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[69] On the effect of the principle of proportionality to the relationship between military necessity and humanity, *see* Major R. Scott Adams, "Power and Proportionality: The Role of Empathy and Ethics on Valuing Excessive Harm", *The Airforce Law Review,* Vol. 80, 2019, p. 150.

[70] Wolff Heintschel von Heinegg, "The Protection of Navigation in Case of Armed Conflict", *The International Journal of Maritime and Coastal Law*, Vol. 18, No. 3, 2003, p. 404.

[71] O. Ammann, above note 16, p. 211; International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Anto Furundija*, Judgment, 10 December 1998, para. 178.

4.1. The SAR Duty as an Expression of Humanity: Human Dignity

To verify the above hypothesis *vis-à-vis* the operations by coastal rescue craft, one has to examine the great importance that the drafting Parties of the M-SAR Convention attached "in several conventions to the rendering of assistance to persons in distress at sea and to the establishment by every coastal State of adequate and effective arrangements for coast watching and for search and rescue services".[72] It bears importance to note that the M-SAR Convention is an operational treaty declaratory of the object of the States Parties to the mentioned conventions and instrumental to the implementation of their purpose. This purpose is better elucidated by its reference to the desire of the Parties to establish "an international maritime search and rescue plan responsible to the needs of maritime traffic for the rescue of persons in distress at sea".[73]

4.1.1. The Perspectives of Human Dignity at Sea

The extant literature indicates a relationship between the duty to rescue persons in distress at sea and the non-derogable right to life. As has been stressed, "the delivery of assistance to those in peril at sea is a central principle of life at sea."[74] The opposite can be, however, also true: the principle of life at sea as delivered by the concept of "safety of life at sea" is a central principle of the duty to deliver assistance to persons in distress. The SAR duty expresses the obligation to protect and ensure the protection of human life which is a fundamental principle of international law.[75] Nevertheless, this duty regards primarily the right to life but not merely so: it exerts an influence on and is *per se* influenced by values and principles that find their expression in general international law such as in IHL and international human rights law ("IHRL").

Indeed, the M-SAR Convention has its own maritime character taking into consideration the general perils that persons encounter at sea as opposed

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[72] M-SAR Convention, above note 11, Preamble.
[73] *Ibid.*
[74] *See* Martin Ratcovic, "The Concept of 'Place of Safety': Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?", *Australian Year Book of International Law*, Vol. 33, No. 34, 2015, p. 84.
[75] Tullio Scovazzi, "Human Rights and Immigration at Sea", in Ruth Rubio-Marín (ed.), *Human Rights and Immigration*, Oxford University Press, Oxford, 2014, p. 225.

to a limitation to perils against, specifically, their lives. Namely, the SAR duty does not only apply when human life *per se* is in danger but also when there is a person found at sea "in danger of being lost". This terminology of Article 98(1) of the United Nations Convention on the Law of the Sea ("UNCLOS")[76] resonates with the M-SAR Convention's consideration of a reasonable certainty "that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance".[77] It also reveals an attempt to prevent persons from being exposed to the inhuman and degrading conditions that come with being lost at sea including the consequences of physical exposure to the elements of the sea and the mental torment that loss in this environment entails.[78] Thus, the terms "in danger of being lost" should be seen as indicating—but not be limited to—perishing under these conditions.

The link between human rights[79] and the SAR duty is owed to their connection with the "dignity and worth of the human person", one of the core values of the Charter of the United Nations, as could be induced by an evolutionary interpretation of its Preamble, protecting certain prerogatives inherent to the individuals.[80] This principle is not based on an assignment to individuals by the State or the society in which they develop their personality, but on the deep roots that follow the human condition and are inherent to

[76] United Nations Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982 (entered into force 16 November 1994) [hereinafter UNCLOS].

[77] M-SAR Convention, above note 11, Annex, para. 1.3.13 regarding the definition of a distress phase.

[78] Note that the main point is not the struggle for survival in general but loss at sea. The conditions for physical survival after a shipwreck may be fulfilled at least to a certain extent or point in time, but the mental torment from being lost at sea is also significant to the long-term effects against the well-being of individuals. It is also important that the definition of sickness under Article 8(1) of AP I includes persons "whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility".

[79] *See* HCJ 6427/02, *The Movement for Quality in Government in Israel v the Knesset* (Judgement) IsrSC 61 (IL 2006), pp. 619, 685, where the Israeli Supreme Court held that "[a]t the center of human dignity are the sanctity and the liberty of life"; *see also* Ukri Soirila, *The Law of Humanity Project: A Story of International Law Reform and State-making*, Vol. 82, Hart Publishing, Oxford, UK, 2021, p. 74-75.

[80] Charter of the United Nations, 1 UNTS XVI, 26 June 1945 (entered into force 24 October 1945), Preamble; *see also* R. Kolb, above note 10, p. 158; and Robert Kolb, "The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions", *International Review of the Red Cross*, No. 324, 1998, 409.

human nature.[81] As such, it cannot be subjected to a decision of provision, creation or deprivation, but pertains to all human beings.[82] The connection of this value with the maritime conventions applying the SAR duty is most evident in their directing attention to all subjects at sea and not merely to persons in distress. Indeed, it is the possibility of human suffering in general that drives the operation of the conventions applying the SAR duty at sea, commanding attention to all persons by virtue of their humanity.[83] As a principle of international law, human dignity is applied by specific acts and decisions which depend on the particular circumstances of the case, whether in times of peace or armed conflict. The specific legal rules generated by this principle, on the other hand, either found within the premises of IHL, international maritime law or IHRL, are established as norms that apply automatically and to the letter in every case to which they pertain. This holds even in those cases whereby their violation is not expected to lead to excessive human suffering.[84]

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[81] Rex D Glensy, "The Right to Dignity", *Columbia Human Rights Law Review*, Vol. 43, No. 1, 2011, p. 68.

[82] Denar Biba, "Dinjiteti Njerëzor", *Jeta Juridike,* Vol. 1, 2016, p. 2.

[83] SOLAS Convention, above note 5, Regulation V/33.1; International Conference for the Safety of life at Sea, "Text of the Convention for the Safety of Life at Sea", 20 January 1914, available at https://archive.org/details/textofconvention00inte?view=theater–page/n5/mode/2up, Art. 37 [hereinafter 1914 SOLAS Convention]; Convention Relating to the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, 37 Stat. 1658, T.S. No. 576, 23 September 1910 (entered into force 1 March 1913), Art. 11 [hereinafter 1910 Salvage Convention]; International Convention on Salvage, 1953 UNTS 165, 28 April 1989 (entered into force14 July 1996), Art. 10 [hereinafter 1989 Salvage Convention]; Convention on the High Seas, 450 UNTS 11, 29 April 1958 (entered into force 30 September 1962), Art. 12(1) [hereinafter 1958 Convention on the High Seas]; UNCLOS, above note 76, Art. 98(1).

[84] Henry Meyrowitz, "The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol 1 of 1977", *International Review of the Red Cross*, Vol. 34, 1994, p. 100; It is worthy of note that in some cultures or part of international jurisprudence, human dignity constitutes a general principle of law "which inspires the interpretation and application of all other norms of the basic law". Others see it as an individual right, "a right to be treated with respect", which is based on human rights and must therefore be protected in the same manner as other rights. In the opinion of this author, human dignity can be both a principle and a right, established in specific norms of international law either implicitly or explicitly. For this distinction, *see* Christian Walter, "Human Dignity in German Constitutional Law", in *The Principle of Respect for Human Dignity*, *European Commission for Democracy through Law*, Proceedings of the UniDem Seminar, Montpelier 1998; Ulfrid Neumann, "Die Menschenwuerde als Menschenbuerde-oder wie man ein Recht gegen den Berechtigten wendet", in Matthias Kettner (ed.), *Biomedizin und Menschenwuerde*, Suhrkamp Verlag, Frankfurt am Main, 2004,

4.1.2. Implementation of Humanity in the Maritime Domain

Hence, through its connection to human dignity, the SAR duty is inherently linked to the human condition *per se* so far as it affects the safety and integrity of all human beings found in the maritime domain. The SOLAS Convention, for example, relieves the masters of vessels from the SAR duty when it is unreasonable for them to proceed to the operation at hand,[85] an element which, it is argued here, reflects the consideration in Article 98(1) of UNCLOS for the safety of the crew and passengers of the concerned vessels. At the same time, and due to this connection, abidance by the SAR duty does not merely affect the humanity of the object, namely, the person in distress, but also reveals and affects the humanity of the subject, i.e., the persons responding (or not) to the distress call.[86] Humanity, therefore, notwithstanding the circumstances, requires the respect of its distinctive elements including human dignity. It also demands action which has a dual effect: it helps recognize and restore the humanity of others and enables us to realize our own humanity.[87]

Indeed, the SAR duty and the instruments regulating its practical application reflect the herald of the applicability of humanity at sea. It is this connection that enshrines the duty with a customary character,[88] allows its characterization as a traditional hallmark of the law of the sea[89] and promotes the implementation of the said instruments in times of naval warfare. In this prism, it should be also kept in mind that "humanity produces negative duties, avoiding action that produces unnecessary and foreseeable harm, and positive

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p. 54; Anja Seibert-Fohr, "Menschenwürde im Internationalen Menschenrechtsschutz", in *Jahrbuch der Braunschweigischen Wissenschaftlichen Gesellschaft*, Cramer, 2018, p. 180.

[85] *See* SOLAS Convention, above note 5, Regulation V/33.1.

[86] *See* HCJ 9232/01, *Foie Gras Verdict*, (IL 2003), Individual opinion of Justice Strasberg-Cohen, p. 23, para. 2; *see also* Muriel Fabre-Magnan, "La Dignité En Droit: Un Axiome", *Revue Interdisciplinaire d'Études Juridiques*, Vol. 58, No. 1, 2007, p. 23.

[87] *See* Michael Barnett, "Human Rights, Humanitarianism, and the Practices of Humanity", *International Theory*, Vol. 10, 2018, p. 333.

[88] *See* Irini Papanicolopulu, "The Duty to Rescue at Sea, in Peacetime and in War: A General Overview", *International Review of the Red Cross*, Vol. 98, 2016, p. 493; Alba Grembi, "Law and Reality in the Aegean Sea: the Duty to Search and Rescue", *Cambridge International Law Journal Blog,* 1 March 2021, available at: http://cilj.co.uk/2021/03/01/law-and-reality-in-the-aegean-sea-the-duty-to-search-and-rescue/.

[89] B.H. Oxman, "Human Rights and the United Nations Convention on the Law of the Sea", *Columbia Journal of Transnational Law*, Vol. 36, 1998, p. 399.

duties, including preventing and alleviating unnecessary suffering."[90] Accordingly, the applicability of the said instruments can only take place in consideration of the special circumstances of each case following the object and purpose of the *lex specialis* when an issue demanding their interplay with this law arises. It is held here that their application in disregard of such special circumstances would also violate the object and purpose of the maritime norms regulating the SAR duty which demand consideration of all human beings in the maritime domain.

4.2. Principles of Humanity in IHL

The due consideration of the principles that jointly comprise the essential humanity in warfare can be understood as respect and protection for the "laws of humanity". These terms are derived from the preamble of the 1899 Hague Convention (II) which incorporates a clause proposed by the Russian delegate to the Peace Conferences, Fyodor Fyodorovich Martens, assuring that:

> in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience.[91]

The phrase "laws of humanity" offers in this case an inherent acknowledgement of a category of universal values based on humanity, comprising a humanitarian status that generates new legal norms and

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[90] *Ibid.*

[91] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 187 CTS 429, 27 July 1899 (entered into force 4 September 1900), Preamble; Theodor Meron finds that a provision included in the 1763 Articles and Ordinances of War for the Present Expedition of the Army of the Kingdom of Scottland captures the spirit of the clause, establishes custom and the law of nature as a residual source and thus enhances the principles of humanity. He considers that the object of the clause resides in the preamble of the Hague Convention of 1899 and constitutes the reassurance that cases not covered by a written provision are not left to the arbitrary judgment of military commanders; *see* Francis Grose, *Military Antiquities Respecting a History of the English Army: From the Conquest to the Present Time*, S. Hooper, 1788, pp. 127, 137, quoted in Theodor Meron, "War Crimes Law Comes of Age", *The American Journal of International Law*, Vol. 92, No. 3, 1988, p. 10; Theodor Meron, "The Martens clause, Principles of Humanity and Dictates of Public Conscience", *American Journal of International Law*, Vol. 94(1), 2000, pp. 78, 79.

contemporary interpretations in light of the social and material circumstances.[92] As Yoram Dinstein suggests, "[w]hat we actually encounter" when dealing with the principle of humanity "are humanitarian considerations, which pave the road to the creation of legal norms and thus explain the evolution of IHL".[93] The ascertainment that these values would offer protection to persons not covered by the Convention itself indicates the critical role that the principles of humanity play in the evolution of IHL and their gradual information by elements of general international law.

The terminology used in the Martens Clause was maintained in the denunciation clauses of the Geneva Conventions.[94] The 2017 ICRC Commentary on GC II reproduces the view that the clause "functions within the triad of sources (treaties, customary law, general principles of law) as it is commonly understood to be expressed in Article 38(1)(a)–(c) of the 1945 ICJ Statute".[95] The Commentary also adds that the phrasing of the clause reflects the general principles of international law as enshrined in the same Article. In its words, "'principles of international law' noted in the Martens Clause as resulting from these elements would consequently be read as similar to the 'general principles of law.'"[96] This view has been also ascertained by the International Court of Justice which, in dealing with cases of armed conflict, regarded elementary considerations of humanity as general principles of law, stressing that the "Geneva Conventions are in some respects a development,

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[92] *See* Final Record of the Diplomatic Conference of Geneva, Vol. II (A), Geneva, 1949, p. 10; Devika Hovell, "The Authority of Universal Jurisdiction", *The European Journal of International Law*, Vol. 29, No. 2, 2018, p. 437; *see also* Antonio Cassese, "The Martens Clause: Half a Loaf or simply Pie in the Sky?", *European Journal of International Law*, Vol. 11, 2000, p. 189.

[93] Yoram Dinstein, "The Principle of Proportionality", in K.M. Larsen, C. Guldahl Cooper and G. Nystuen (eds), *Searching for a "Principle of Humanity" in International Humanitarian Law*, Cambridge University Press, Cambridge, 2012.

[94] Emphasis added; *see* GCI, Art. 63, GC II, Art. 62, GC III, Art 142 and GC IV, Art. 158.

[95] *ICRC Commentary of 2017*, above note 2, para. 3355; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T, Trial Judgment, 14 January 2000, para. 525; Shigeki Miyazaki, "The Martens Clause and International Humanitarian Law", in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, International Committee of the Red Cross, The Hague, 1984, p. 437; Henry Meyrowitz, "Réflexions sur le fondement du droit de la guerre", in Christophe Swinarski (ed.), *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet*, Revue Internationale de la Croix-Rouge, The Hague, 1984, p. 422–424; Spieker, Heike, "Martens Klausel", *Humanitäres Völkerrecht – Informationsschriften*, Vol. 1, 1988, p. 46.

[96] *Ibid.*, para 3358.

and in other respects no more than the expression, of such principles".[97] The Court has also designated the Martens Clause as "an effective means of addressing the rapid evolution of military technology".[98]

The common preamble to the Geneva Conventions proposed by ICRC during the 1948 Stockholm Conference also referred to the duty of Parties to ensure the application of the universal principle of "[re]spect for the personality and dignity of human beings… which is binding even in the absence of any contractual undertaking".[99] The 2017 ICRC Commentary notes that this preamble would set forth "the main principle underlying all the humanitarian Conventions" which unveils the strong connection between human dignity and humanity in warfare.[100] While the preambles were eventually not formulated in this manner due to the difficulty to achieve unanimity on their precise content, there was "no fundamental objection" to the said proposal.[101] Lastly, the San Remo Manual on International Law Applicable to Armed Conflicts at Sea ("SRM") also expressly broadens the scope of rules applicable in situations of naval warfare:

> In cases not covered by this document or by international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of the public conscience.[102]

While the SRM lacks, as a non-binding document, the obligatory effect of international treaty law, it constitutes a restatement of international

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[97] International Court of Justice, Case *Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, para 218; International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, paras 79, 95 [hereinafter Nuclear Weapons case]; *see also ibid.*, Dissenting Opinion of Judge Weeramantry, p. 433 and Dissenting Opinion of Judge Schwebel, pp. 318–319.

[98] Nuclear Weapons case, above note 97, para. 78*; see also* Rupert Ticehurst, "The Martens Clause and the Laws of Armed Conflict", *International Review of the Red Cross*, Vol. 37, Issue. 317, 1997, p. 127.

[99] *ICRC Commentary of 2017*, above note 2, para. 126.

[100] *Ibid.*; *see also* International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Zejnil Delalic*, ICTY IT-96-21-T, Trial Judgment, 16 November 1998, para. 532.

[101] *ICRC Commentary of 2017*, above note 2. Para. 127.

[102] San Remo Manual, above note 7, Rule 2.

law applicable to armed conflict at sea and is thus, for the most part,[103] a codification of customary law. Accordingly, insofar as the specific circumstances of each case accommodate the implementation of the customary provisions codified by the Manual, they are expressly regulated by these provisions.[104] So far as the respective phrases emphasized in the quoted paragraph are concerned, it is characteristic that neither of them is followed by a limitation to the regime of IHL which makes a strong argument for the applicability of maritime conventions in times of naval warfare. Inasmuch as modern practice is concerned, for instance, the actors involved in the Black Sea and the Sea of Azov have raised arguments and adopted practice that indicate the applicability of the SRM and relevant maritime conventions in the present conflict.[105] In its communication to IMO regarding the seizure of the vessel Sapphire, the government of Ukraine notes that the "general provisions [of IHL] and the special rules on military action at sea shall be applicable", including the SRM provisions. On the same note, the Communication of 5 April 2022 to IMO by the Russian Government makes reference to its practice of closing the maritime spaces in the concerned areas in "full compliance" with the UNCLOS, with the "aim of providing for the safety and security of merchant vessels and their crews".[106]

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[103] *See* Wolff Heintschel von Heinegg, "The Current State of Naval Warfare: A Fresh Look at the San Remo Manual", *International Law Studies*, Vol. 82, 2007, p. 269.

[104] It is noteworthy that certain military manuals such as the UK Manual on the law of armed conflict have entirely incorporated the provisions of the SRM as regards warfare at sea; *see* The Joint Service Manual of The Law Of Armed Conflict, 2004, JSP 383 [hereinafter UK Manual].

[105] Most recently, the Parties established, in cooperation with Turkey and the United Nations, the Joint Coordination Centre ("JCC") Istanbul. The purpose of this initiative to facilitate the implementation of the "Black Sea Grain Initiative" to establish a humanitarian maritime corridor to allow ships to export grain and related foodstuffs and fertilizers from Ukraine. *See* IMO, "Joint Coordination Centre for the Black Sea Grain Initiative", *United* Nations, 27 July 2022, available at: https://www.un.org/en/black-sea-grain-initiative/background.

[106] IMO, *Black Sea and Sea of Azov - Member States and Associate Members Communications,* available at: https://www.imo.org/en/MediaCentre/HotTopics/Pages/Black-Sea-and-Sea-of-Azov-Member-States-Communications.aspx; *see specifically*, IMO, *Communication from the Government of the Russian Federation*, IMO Circular Letter No 4546, London, 5 April 2022, available at: https://wwwcdn.imo.org/localresources/en/MediaCentre/ Hot Topics/Documents/Black Sea and Sea of Azov - Member States and Associate Members Communications/Circular Letter No.4546 - Communication From The Government Of The Russian Federation (Secretariat).pdf.

4.3. The Regimental-less Character of Humanity

Humanity, therefore, a shared principle of humanitarianism and humanitarian law, is an essential principle, "the most important principle of all",[107] from which all other principles derive. It is certainly by virtue of this mother principle that human dignity can be extended to living and non-living human beings, thus attributed to a child in the womb of its mother[108] and the dead[109] both in times of peace and armed conflict. As regards the latter case, humanity has also produced other elements such as the prohibition of adverse distinction and unnecessary suffering,[110] jointly promoting the protection of all persons in need of assistance under the specific circumstances of each case.[111] Dignity is especially felt in IHL through authoritative provisions on the duty to provide humane treatment,[112] respect and protection of the wounded, sick and shipwrecked, including expectant mothers, the infirm, new-born babies,[113] non-renunciation of rights[114] and the dignity of the dead.[115] For situations of naval warfare, the duty to search and collect,

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[107] Jean Pictet, "The Fundamental Principles of the Red Cross", *International Review of the Red Cross*, Vol. 19, 1979, 133.

[108] *Ibid.*

[109] *See, e.g.*, Lydia de Tienda Palop and Brais X. Currás, "The Dignity of the Dead: Ethical Reflections on the Archaeology of Human Remains" in Kirsty Squires, David Errickson and Nicholas Márquez-Grant (eds), *Ethical Approaches to Human Remains: A Global Challenge in Bioarchaeology and Forensic Anthropology*, Springer, Switzerland, 2019, p. 19; *see also* Geoffrey Scarre, "'Sapient trouble-tombs'? Archaeologists' Moral Obligations to the Dead", in S. Tarlow and L. Nilsson Stutz, *The Oxford Handbook of the Archaeology of Death and Burial*, Oxford University Press, Oxford, 2013, p. 665.

[110] *See* Sean Watts, "Are Molotov Cocktails Lawful Weapons?", *Lieber Institute*, 2 March 2022, available at: https://lieber.westpoint.edu/are-molotov-cocktails-lawful-weapons/; the author contends that "two cardinal principles—distinction and unnecessary suffering (or humanity)—guides the regulation of weapons not banned or otherwise regulated by the law of war."

[111] *Ibid.*, p. 143.

[112] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: Rules, Cambridge University Press, Cambridge, 2005, Rule 87, [hereinafter ICRC Customary Law Study].

[113] GC II, Art. 12; AP I Art. 8.

[114] *See* GC I-GC III, Art. 7; and GCIV, Art. 8.

[115] *See* ICRC, *Legal Factsheet: Humanity after life: Respecting and Protecting the Dead*, ICRC, 3 April 2020, available at: https://www.icrc.org/en/document/humanity-after-life-respect-and-protection-dead (accessed on 19 October 2021); *see also* Michael Hauskeller, "Believing in the Dignity of Human Embryos", *Human Reproduction & Genetic Ethics*, Vol. 17, No. 1, 2011, p. 53; Volha Parfenchyk and Alexander Flos, "Human Dignity in a Comparative Perspective: Embryo Protection Regimes in Italy and Germany", *Routlege Taylor and Francis Group*, Vol. 9, No. 1, 2017, p. 45.

admittedly deriving from the duty to respect and protect the persons covered by GC II, has been explicitly extended to the dead.[116] The latter indicates an obligation of belligerent Parties to exercise due diligence to respect the dignity of the dead, the violation of which would affect the humanity of all the involved actors.[117] Therefore, as deduced from this section, whether under the prism of IHL, the IMO Conventions or IHRL, humanity plays an essential role in the protection of distressed persons in circumstances whereby their lives and dignity are endangered.

5. The Protection of SAR Operations: The Case of Article 27 GC II

5.1. Coastal Rescue Craft

As already noted above, the main object of GC II is to ameliorate the condition of the wounded, sick and shipwrecked persons protected under the scope of Article 13 and, for States Parties to the Additional Protocols of 1977, under Article 8(a) and (b) of AP I. Its purpose is to maintain the counterbalance between the principles of military necessity and humanity at sea. On this basis, Article 27(1) of GC II provides that:

> Under the same conditions as those provided for in Articles 22 and 24, small craft employed by the State or by the officially recognized lifeboat institutions for coastal rescue operations, shall also be respected and protected, so far as operational requirements permit.[118]

According to the 2017 ICRC Commentary, the emphasized terms as well as the exclusion of the said craft from Article 34 of GC II serves to relieve "the enemy from the procedural safeguards in the second sentence of Article 34(1)—due warning, a time limit and a warning that has remained unheeded".[119] As the 1960 Commentary on GC II points out, these terms—and the effects that derive from them—owe their existence to reasons of

[116] *See* GC II, Art. 18(1).
[117] M. Fabre-Magnan, above note 86, p. 23; *see also* UN Human Rights Committee, *Manuel Wackenheim v. France (Deliberations on the Merits)*, U.N. Doc. CCPR/C/75/D/854/1999, 2002, para 7.4.
[118] GC II, Art. 27(1) (emphasis added).
[119] *ICRC Commentary of 2017*, above note 2, para. 2206.

military security[120] as the respective vessels "are small and may be very rapid".[121] Therefore, they do not enjoy a high threshold of protection as applied by military necessity in other cases.[122] On the other hand, the M-SAR Convention requires that responsible authorities take "urgent steps to ensure that the necessary assistance is provided" to persons in distress at sea.[123] These steps entail the use of SAR units involving trained personnel and suitable equipment,[124] and other available facilities[125] including "public and private recourses including cooperating aircraft, vessels and other craft and installations".[126]

It is important at this point to note that SAR aircraft are not covered by Article 27 nor do they qualify as medical aircraft under Article 39 of GC II, and they must not "be used to search for the wounded, sick and shipwrecked within areas of combat operations, unless pursuant to prior consent of the enemy".[127] Another significant point that must be made concerns the distinction between SAR operations under the scope of GC II and combat SAR operations during which belligerents attempt to recover downed aircrews and isolated personnel with a view to allowing them to resume service which are not protected under IHL.[128] In the case of the SAR vessel Sapphire seized during its operations in the Black Sea, it can be assumed that since the concerned master and crew were under the impression that the persons to be collected were deceased, they were in pursuit of a humanitarian mission.

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[120] Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 2: *Geneva Convention relative to the Treatment of Prisoners of War Geneva, 1960, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, ICRC, p. 190.

[121] Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II (A), p. 202.

[122] *ICRC Commentary of 2017*, above note 2, para. 2206.

[123] M-SAR Convention, above note 11, Annex paras 2.1.1 and 2.1.9.

[124] *Ibid.*, para. 1.3.8.

[125] *Ibid.*, para. 1.3.7.

[126] *Ibid.*, para. 1.3.3.

[127] *ICRC Commentary of 2017*, above note 2, para. 2184; *see also* Manual on International Law Applicable to Air and Missile Warfare (2009), Rule 1(u), para. 5.

[128] John Pike, "Combat Search and Rescue (CSAR)", *Military Analysis Network*, 28 March 1999, available at: https://fas.org/man/dod-101/sys/ac/csar.htm; *see also* US DoD Manual, above note 63, para. 4.9.2.3; W. H. Boothby and W. Heintschel von Heinegg, above note 62, p. 80; Alba Grembi, "Dissemination of International Humanitarian Law in Greece: A Maritime Perspective", *Journal of International Humanitarian Legal Studies*, Vol. 13, 2022, p. 47.

5.1.1. Operational Requirements under the Principles of Humanity

So far as "operational requirements" are concerned, since Article 27 affords greater consideration to military interests in general, one would concentrate on the principle of humanity to determine the meaning of the terms. This determination could then define whether the specific circumstances may turn the counterbalancing scale further toward humanitarian considerations in each case.[129] While humanity cannot be utilized for a general definition of operational requirements, it can be used to define the limits of these requirements in light of the special circumstances of each case and the overall purpose of GC II. Indeed, calls to operational requirements under the prevailing circumstances cannot justify military conduct that would aggravate the principle of humanity (including the principle of human dignity) manifestly and excessively in relation to these requirements in each case. Therefore, a decision to prevent rescue craft from performing SAR operations would necessitate a previous examination by a reasonable commander of whether, under the prevailing circumstances, the said conduct would violate his State's and his own duties under GC II and maritime law.

For example, Article 18 requires that Parties take, without delay after each engagement, "all possible measures to search for and collect the shipwrecked, wounded and sick". On the other hand, Regulations 2.1.1 and 2.1.10 of the M-SAR Convention require that Parties, through their responsible authorities, take urgent steps "[o]n receiving information that any person is, or appears to be, in distress at sea" to render assistance to such persons irrespective of their status. With this in mind, one could argue that it is the SAR duty *per se* that would fall under the temporal scope of Article 18 (which requires that the Parties "take" all possible measures after each engagement—a duty to act) as opposed to the taking of precautions to rescue through, *inter alia*, an examination of alternatives and the exercise of due diligence to ensure the protection and respect of persons that applies in all circumstances.[130] The conflict between the two provisions could be then solved on a case-by-case basis through the evaluation of the possible measures

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[129] *Ibid.*; *see also* above section 3.

[130] *See* Article 12(1) of GC II; namely, it falls within the author's opinion that an examination of alternatives falls under the duty to protect the persons, which applies in all circumstances; *see also ICRC Commentary of 2017*, above note 2, para. 1406; Riccardo Pisillo-Mazzeschi, "The Due Diligence Rule and the Nature of the International Responsibility of States," *German Yearbook of International Law*, Vol. 35, 1992, p. 41.

or urgent steps that can be taken to search for and collect protected persons before preventing the SAR services to exercise their duties, either before or during an active engagement.[131] Generally, an interpretation considering both regimes should follow a consideration (under the effect of the principle of humanity and, in particular, human dignity) of the gravity of the condition of the persons in distress and the risk to their lives and well-being, as compared with the risks against operational requirements by the involved SAR facilities. In any case, consideration must be given to all the involved Parties, thereby abiding by the object and purpose of IHL and maritime law norms on the SAR duty.

5.1.2 Finding Alternate Sources of Rescue and Protection

Alternatives to the overall prevention of SAR operations could arise through cooperation with rescue coordination centres and sub-centres of neutral States.[132] Under Regulation V/33.2 of the SOLAS Convention, coastal organisations of enemy belligerents may requisition enemy merchant vessels for SAR purposes. Such requisitioning must take place after consultation, and so far as possible, with the masters of ships which respond to the distress alerts. Therefore, this process could also be involved in cases where the Parties to a conflict refuse to provide consent for the operation of SAR aircraft given that the requisitioned merchant vessels refrain from committing acts harmful to the enemy and do not otherwise qualify as military objectives.[133]

Under Article 21 of GC II, appeals could also be directed to masters of neutral merchant vessels. The latter, having the obligation to abide by the orders of belligerents to stop and submit to visit and search,[134] would be unable to proceed to SAR operations without such appeal. Given the obligation of such vessels to assume SAR operations irrespective of the flag they fly under

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[131] *Ibid.*, para. 1636; *see*, for a discussion, Martin D. Fink and Wolff Heintschel von Heinegg, "Controlling Migrants at Sea During Armed Conflict", in R. Bartels, et al. (eds), *Military Operations and the Notion of Control Under International Law*, Springer, The Hague, 2020, p. 225.

[132] M-SAR Convention, above note 11, Annex, Chapter 3; *see also* Agreement for the establishment of the JCC Istanbul by the Russian Federation and Ukraine, above note 105.

[133] Limitation of Naval Armament, 1363 TS 919, 25 March 1936 (entered into force 29 July 1937), Rule 2 [hereinafter London Protocol]; San Remo Manual, above note 7, Rule 60; Yoram Dinstein, "Legitimate Military Objectives Under the Current Jus in Bello", *International Law Studies*, Vol. 78, 2015, p. 163.

[134] San Remo Manual, above note 7, Rule 67.

maritime norms,[135] an appeal could also be made by rescue organisations under safety guarantees in their capacity as State organs and in view of their mandate to coordinate SAR services under the M-SAR Convention.[136] However, lacking such appeal, these masters could not be reasonably required to proceed to SAR operations for cases linked to the armed conflict since this could endanger the safety of their ship, its crew and passengers.[137] Nevertheless, they would still have a choice to proceed to such operations *ex proprio motu*. In this case, permission by the concerned belligerents would be imperative under the law of neutrality.[138]

A warship's commander and the belligerent Party would also be bound by negative obligations to refrain from conduct that would result in the distressed persons being subjected to physical or mental harm such as refusing or avoiding cooperation with neighbouring States when circumstances so permit or attacking enemy vessels during their SAR operations.[139] This is especially the case for situations whereby the persons find themselves in distress for reasons that relate to an armed conflict since the SAR duty in IHL derives from the duty to respect and protect the concerned persons.[140] This duty applies in all circumstances as stipulated in Article 12 of GC II.[141] Therefore, the Parties and their organs, i.e., the considered commanders, may be required to take steps in urgent cases where the lives of the persons are or appear to be in grave and imminent danger[142] during an active engagement[143] and to take all possible measures to ensure that such persons are searched for and collected without delay. However, it should be stressed that it is the particular circumstances of each situation that will make the protection of SAR operations by the coastal rescue craft imperative in order to maintain the

[135] *See* UNCLOS, above note 76, Art. 94(5).

[136] M-SAR Convention, above note 11, Annex, paras 2.3.2, 2.4 and 3.1.6.

[137] SOLAS Convention, above note 5, Regulation V/33.1; 1910 Salvage Convention, above note 83, Art 11; 1914 SOLAS Convention, above note 83, Art. 37; 1989 Salvage Convention, above note 83, Art. 10; 1958 Convention on the High Seas, above note 83, Art. 12(1); UNCLOS, above note 76, Art. 98(1).

[138] 1914 SOLAS Convention, above note 83, Regulation V/33.1; *see* Convention on Maritime Neutrality, 135 UNTS 187, 20 February 1928 (entered into force 21 January 1931), Art. 12.

[139] M-SAR Convention, above note 11, para. 3.1; for a discussion on this issue, *see* A. Grembi, above note 128, pp. 45–46.

[140] *ICRC Commentary of 2017*, above note 2, paras 1616 and 1665.

[141] *Ibid.*, para. 1409; GC II, Art. 12(1).

[142] *See* M-SAR Convention, above note 11, para. 1.3.13 concerning the definition of distress.

[143] *See*, *e.g.*, Law of Armed Conflict Manual (ZDv)15/2, Joint Service Regulation, 2013, Germany, para. 605, which has eliminated the temporal scope of Article 18 [hereinafter German Manual].

counterbalance between military necessity and humanity, thus avoiding a violation of the object and purpose of GC II.

In the view of this author, if the involved commanders or the Parties to the conflict have knowledge that the adoption of such alternative measures will be impossible or delayed and nevertheless proceed to impede an ongoing SAR operation, they will have committed a wilful breach of GC II's object. Should this action lead to the persons' perishing, it would result in a breach of the Convention's object and purpose. Additionally, this act could lead to a grave breach on the ground of wilful killing by omission under Article 51. It is therefore this paper's argument that in particular situations whereby the lives of the wounded, sick and shipwrecked are in grave danger and it falls within the commanders' abilities to prevent their death, not doing so could lead to a breach of their obligations under Articles 12 and 51 which are legal obligations reflecting the object and purpose of GC II. This, again, is if (based on the specific circumstances of the case) the concerned commander has had a valid opportunity to accommodate a rescue operation during or after an active engagement but has not done so based solely on operational requirements and disregarding the humanitarian considerations of the case. If this decision, taken in the commander's knowledge that an alternative could not have been found promptly, led to the persons' perishing, it could be found under the judgement of a competent tribunal to constitute a substantive breach of Articles 12 and 51 of GC II. Additionally, it would lead to a breach of its object and purpose since these provisions were drafted with the counterbalance of military necessity and humanity in mind.[144]

The same holds true, *mutatis mutandis*, for the duty to prevent the wounded, sick and shipwrecked persons from being harmed.[145] Human dignity could expand this notion to include harm caused through loss at sea and, thus, exposure to the degrading conditions of this environment. This is important insofar as an omission to evaluate accordingly could also lead to a grave breach of the Convention on the ground of wilfully causing great suffering or serious injury to body or health.[146] The concerned causal act in

[144] This is not to say that a breach of the object and purpose of GC II would *per se* be a war crime, but that a violation of the actual obligations of GC II entail a violation of its object and purpose, and, vice-versa, that a violation of its object and purpose entails the violation of the actual legal obligations of GC II.

[145] *ICRC Commentary of 2017*, above note 2, para. 1406.

[146] GC II, Art. 51.

this case does not pertain to the prevention of the SAR operations by the coastal rescue craft, but to the failure to ensure that an alternative possible measure is adopted "without delay."[147] Since not only the safety of distressed persons but also of the crew and passengers of the rescuing vessel would be at stake, it should also be considered whether the said action would lead to unexpected danger against the latter. Under a binary reading of the two regimes, this danger should be of such unpredictable nature as it would have made the master of the vessel deem the operation unreasonable had he foreseen the gravity of the assumed risk.[148]

5.1.3. Cases of Distress with no Connection to the Conflict

It is worth noting that the combined reading of the two regimes[149] confirms that civilian status is not an element affecting the duty of the Parties to provide SAR services to persons that find themselves in distress for reasons related to the armed conflict. For persons in distress on grounds that do not relate to the armed conflict,[150] however, the provisions of the M-SAR Convention and other rights affected by the implementation of the SAR duty at sea including the right to life under human rights law[151] should be seen as *lex specialis*. An interpretation of this law in accordance with the above would exempt a warship's commander from the requirement to provide SAR services following the reality of naval warfare and his mandate under this light.[152] However, it would also render the prevention of SAR operations based on Article 27 unlawful since neither the situation in consideration nor the persons

[147] *Ibid.*, Art. 18(1).

[148] *Ibid.*, Art 30(4); *ICRC Commentary of 2017*, above note 2, paras 1650 and 2271-2272; *see* SOLAS Convention, above note 5, Regulation V/33.1; UNCLOS, above note 76, Art. 98 (1); M-SAR Convention, above note 11, Chapter 2; *see also* US DoD Manual, above note 63, para. 7.4.4.1.

[149] *See* M-SAR Convention, above note 11, Annex para 2.1.10; GC II Art. 13; and AP I, Art. 8(a) and (b).

[150] *See* Wolff Heintschel von Heinegg, "Naval Warfare: A Role for International Human Rights Law?", in Robert Kolb, Gloria Gaggioli, Pavle Kilibarba (eds), *Research Handbook on Human Rights and Humanitarian Law: Further Reflections and Perspectives*, Research Handbooks in Human Rights Series, Edward Elgar Publishing, 2022, pp. 131, 142.

[151] *See* Elizabeth Wicks, "The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties", *Human Rights Law Review*, Vol. 12, Issue 2, 2012, p. 199.

[152] SOLAS Convention, above note 5, Regulation V/1.1; 1910 Salvage Convention, above note 83, Art. 11; *see also* 1914 SOLAS Convention, above note 83, Art. 37; Recommendations of the Conference as Regards Safety of Navigation, No. 2 and 6, p. 120; 1989 Salvage Convention, above note 83, Art. 4.

in distress would fall under his mandate and scope of jurisdiction.[153] On the other hand, should the distressed persons fall under the jurisdiction of the belligerent Party to which the warship commander belongs by their presence, for example, in its region of SAR responsibility,[154] the former is bound to follow its obligations under the M-SAR Convention by taking urgent steps to rescue persons in distress.

5.1.4 The SAR Vessel "Sapphire" under the Prism of International Law

In its Communication to the IMO, the Ukrainian Government has made several statements regarding the law applicable in the situation of the SAR vessel Sapphire and its seizure by the Russian warship. One of these statements concerns the nature of the seized vessel and its status under IHL which, as opined in the communication:

> [S]quarely falls under with definition of the vessels engaged in humanitarian missions, in particular vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations, as set out in para c) ii) 136 of the mentioned San Remo Manual.

On the other hand, paragraph 136(c)(ii) of the SRM applies only to "vessels granted safe conduct by agreement between the belligerent parties". Therefore, this rule would not be applicable at the time of the vessel's seizure lacking such an agreement between the Russian Federation and Ukraine. Moreover, the said vessel does not qualify as a hospital ship as, *inter alia*, it lacks the necessary minimum capacity for providing medical treatment[155] and its size differs considerably from that of hospital ships. Therefore, in the

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[153] *Ibid.*, p. 143; *see also* Committee on Human Rights, *General Comment No. 36 on Art. 6 of the International Covenant on Political and Civil Rights, On the right to life*, Geneva, 2018, 30 October 2018, para. 63; European Court of Human Rights*, Hirsi Jamaa and Others v. Italy,* App. No 27765/09, 23 February 2012; *see also* Pasquale De sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo*, Giappichelli, Torino, 2002; European Court of Human Rights, *Medvedyev and others v. France*, Application No. 3394/03, Judgment, 28 March 2010, para. 8; European Court of Human Rights, *Öcalan v. Turkey*, Application No. 46221/99, Judgment, 12 March 2003, p. 125; European Court of Human Rights, *Issa and others v. Turkey*, Application No. 31821/96, Merits, 16 November 2004.

[154] On the requirement of the M-SAR Convention to establish such regions of responsibility, *see* Regulations 2.1.3–2.1.8; for information concerning the respective regions established by the time of writing, *see* https://sarcontacts.info/.

[155] GC II, Art. 22; *ICRC Commentary of 2017*, above note 2, para. 1939;

absence of more information from the Ukrainian government, the vessel should be considered as coastal rescue craft[156] falling under the limited protection of Article 27 GC II and, accordingly, the analysis conducted in this section.

In this light, what is most interesting among the respective statements is the consideration of civilian crew aboard rescue craft as civilians falling under the scope of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War ("GC IV").[157] The 2017 ICRC Commentary on Article 36 of GC II also asserts that the question of the protection of the civilian crew of coastal rescue craft "is regulated, in principle, by the Fourth Convention: at all times, regardless of whether they are engaging in rescue operations, they are protected against capture on the basis of this Convention, which allows their internment only in specific circumstances".[158] Thus, the concerned crew could be captured "only if the security of the Detaining Power makes it absolutely necessary."[159] However, a disparate expert view must also be noted, according to which GC IV does not apply at sea and neither covers persons who are detained on board a warship.[160] As GC II and AP I remain silent on the issue,[161] the Ukrainian government could ensure a more direct path to the protection of this personnel by reaffirming the recommendation made in 1984 by the Special Working Committee of the International Lifeboat Conference:

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[156] This is despite the fact that it does not follow the colour-related guidelines of Article 43(1) of GC II: "[t]he ships designated in Articles 22, 24, 25 and 27 shall be distinctively marked as follows: (a) All exterior surfaces shall be white. (b) One or more dark red crosses, as large as possible, shall be painted and displayed on each side of the hull and on the horizontal surfaces, so placed as to afford the greatest possible visibility from the sea and from the air."

[157] *See* Communication of Ukraine to the IMO, above note 6, p. 2; Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) [hereinafter GC IV]; *see also* San Remo Manual, above note 7, para. 167; Jean de Preux, "Protection du sauvetage maritime côtier", in Christophe Swinarski (ed.), *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet*, Revue Internationale de la Croix-Rouge, The Hague, 1984.

[158] *ICRC Commentary of 2017*, above note 2, para. 2476.

[159] GC IV, above note 157, Art. 42.

[160] Heintschel von Heinegg, above note 150, p. 139.

[161] *See also* Article 49(3) limiting the scope of Part IV, Section I concerning the general protection against effects of hostilities. This rule has been revised by customary law; *see* Jean Marie Henckaerts, "Study of Customary International Law: A Contribution to the Understanding of Respect for the Rule of Law in Armed Conflict", *International Review of the Red Cross*, Vol. 87, No. 857, 2005, pp. 175, 191; ICRC Customary Law Study, above note 112, Rules 1, 14, 15 and 16.

> Crews of State or officially recognized lifeboat institution rescue craft should be 'respected and protected' in the same manner as religious and medical personnel (see Articles 36 and 37 of the Second Geneva Convention) during the time they are involved in rescue operations. The same protection should apply to personnel of fixed installations when involved in rescue operations.[162]

This would be significant, since under Article 36 "medical and hospital personnel of hospital ships and their crews… may not be captured during the time they are in the service of the hospital ship." On the other hand, should the Ukrainian government maintain its position on the applicability of GC IV in similar instances, it should also keep in mind that the Russian government may adopt the above-mentioned position, thus considering GC IV non-applicable at sea. This would complicate matters as the scope of applicability of the conventional duty to provide humane treatment incorporated in Article 75 of AP I on fundamental guarantees is limited by Article 72 to "civilians in the Power of the Party to the conflict" and covered under the scope of GC IV.[163] Therefore, the most appropriate approach would be to add that this duty irrespectively applies in the maritime domain *qua* customary law.[164]

Be that as it may, it should be noted that a breach of the duty to treat civilians and persons *hors de combat* humanely can be invoked in cases where there is, among others, a violation against their dignity—in line with what has been said above—or ill-treatment.[165] The respective Communication to the IMO does not seem to provide evidence on the characterisation of their treatment as inhumane based on similar criteria but on the mere fact of the vessel's seizure and the crew's capture. However, even if such vessels comply with the conditions of capture provided in paragraph 137 of the SRM,[166]

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[162] Minutes of the Meeting of the Special Working Group with the International Committee of the Red Cross, held at the Henry Dunant Institute, Geneva, 16–17 April 1984, Appendix D, para. 3.

[163] *See* Heintschel von Heinegg, above note 150, p. 139.

[164] ICRC Customary Law Study, above note 112, Rule 87.

[165] *Ibid;* see also rules 33-39.

[166] This paragraph exempts vessels listed in paragraph 136 from capture only if they: "(a) are innocently employed in their normal role; (b) do not commit acts harmful to the enemy; (c) immediately submit to identification and inspection when required; and (d) do not

binding conventional law as it stands would not render this seizure in itself unlawful had operational requirements so demanded, much less inhumane. In light of the above analysis, such a characterisation could be based upon a violation of Article 18 of GC II in the case that deceased persons existed in the area who could not be successfully collected due to the SAR vessel's seizure. Indeed, this could be argued to also constitute a violation of the dignity of the dead. However, the Communication does not allude to Article 18 but to the SOLAS Convention which, contrary to the impression provided thereon, does not refer to an obligation to collect the dead. This shortcoming has been amended by the 2016 edition of the IAMSAR Manual which makes reference to the "recovery of the dead"[167] and is, however, excluded from the Communication's regards.

5.2. Fixed Coastal Installations

The M-SAR Convention requires that Parties "help ensure the provision of adequate shore-based communication infrastructure, efficient distress alert routeing, and proper operational coordination to effectively support search and rescue services".[168] Such centres consummate the implementation of the duty of Parties to abide by their SAR obligations. In times of armed conflict, these centres and sub-centres qualify as fixed coastal installations which also include "hangars, repair shops, fuel depots, offices, employees' quarters, sickbays, stocks of relief and medical supplies, slip docks and equipment for launching coastal rescue craft".[169] However, despite their general significance for the effective performance of the SAR duty, Article 27(2) of GC II provides a less strict standard of protection in their case even compared to the protection of coastal rescue craft. Specifically, protection applies to fixed coastal installations used exclusively by such craft for their humanitarian missions "so far as possible".[170]

As the 2017 ICRC Commentary has noted, belligerents are bound by their IHL obligations of targeting only military objectives, taking all feasible precautions and refraining from attacks that "would be indiscriminate, in

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intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required".

[167] IMO-ICAO, *International Aeronautical and Maritime Search and Rescue Manual,* Vol II: Mission Co-ordination, 2016, Sec. 6.19.

[168] M-SAR Convention, above note 11, Annex para 2.1.3.

[169] *ICRC Commentary of 2017*, above note 2, para 2218.

[170] *Ibid.*, para. 2220.

particular because they are expected to inflict excessive incidental civilian damage".[171] In this author's view, an analogous reading to the above could be also applied *mutatis mutandis* concerning the destruction and appropriation of fixed coastal installations. Thus, what is possible according to the circumstances should be interpreted in light of the principles of humanity, and especially the dignity of protected persons and seafarers at sea. It should also be regarded that, under Article 51 of GC II, destruction or appropriation of property not justified by military necessity and carried out unlawfully and wantonly is a grave breach of the Convention. A wanton act has been defined as an act "unreasonably or maliciously risking harm while being utterly indifferent to the consequences".[172] Accordingly, to decide whether destruction or appropriation of the fixed coastal installations would be a wanton act, it should be considered if it would have irreversible consequences on the protection of persons under GC II. It could be, for example, that such consequences involve hindering the successful coordination of future assistance to persons in distress at sea and the overall ability of the enemy to adopt all possible measures to search for and collect the persons protected under GC II without delay, thus increasing the suffering caused by the war and, ultimately, protracting the evils of warfare.

It should be considered that the terms "so far as possible" pertain to the protection of the installation *per se*, as opposed to the duty of the Party to the conflict to evaluate, based on reliable information, the consequences of the destruction of the installation upon its obligations under IHL and general international law. As an example, each Party to the M-SAR Convention must ensure that they are capable of receiving distress alerts promptly and reliably on a 24-hour basis through equipment used for this purpose within their SAR regions of responsibility.[173] To this end, they must ensure immediate relay of such alerts to the appropriate rescue coordination centre or sub-centre and provide assistance with SAR communications, as appropriate.[174] However, ensuring that this process is adequately fulfilled in times of conflict does not only determine the abidance of the Parties by their maritime law obligations but also their duty to search for and collect the protected persons "without delay" under Article 18 of GC II.

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[171] *Ibid.*

[172] Bryan A. Garner, *Black's Law Dictionary*, 10th ed., Thomson Reuters, 2014, p. 1815; this definition has also been used by the *2017 ICRC Commentary*, above note 2, para. 3127.

[173] M-SAR Convention, above note 11, Annex para 4.2.1.

[174] *Ibid.*, para 4.2.1.1.

Indeed, hindering the receipt of distress alerts on a 24-hour basis through the destruction of fixed installations which convey such information and ensure the successful coordination of rescue operations[175] will have the adverse consequence of generally impeding or, at best, delaying SAR communications. In this case, the attacking Party would risk rendering the future fulfilment of these obligations by belligerent and neutral States in the respective region impossible. This may result in delaying SAR services during or after active engagements directed toward persons that find themselves in distress for reasons either related or unrelated to the armed conflict, thereby also affecting civilians of neutral status that find themselves in distress for reasons unrelated to the armed conflict.[176] Unless the attacking Parties have evaluated the alternative possible measures to be adopted *vis-à-vis* the considered SAR region, they will have not only breached their respective obligations under GC II and the M-SAR Convention but also the general law of the sea which requires the establishment, operation and maintenance of adequate and effective SAR services.[177] On the other hand, should the enemy belligerent exercise effective control over these installations, its jurisdiction over the persons in distress within the SAR region pertaining to this installation would also entail a duty to respect and ensure respect for rights under IHRL.[178]

[175] *See* Draft for the International Lifeboat Conference, Manual for the protection of Coastal Rescue Craft and their Fixed Coastal Installations in Period of Armed Conflicts, Special Working Group, Geneva, 17 April 1984, p. 21.

[176] *ICRC Commentary of 2017*, above note 2, para. 2216.

[177] *See* 1958 Convention on the High Seas, above note 83, Art. 12(2); UNCLOS, above note 76, Art. 98(2).

[178] International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, ICJ Reports 2006, paras 160 and 177; *see also* International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, ICJ Reports 2022, para. 65; European Court of Human Rights, *Banković and Others v. Belgium and 16 Other Contracting States*, Application no. 52207/99, 12 December 2001, para. 80; UKHL 26, Al Skeini and Others v. Secretary of State EWCA Civ 1609 (2007); M. Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", *American Journal of International Law*, 2005, 122; Marco Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, Oxford Monographs in International Law, Oxford University Press, Oxford, 2013, p. 515.

6. Conclusion

While the law is the subject of a technical creation, the source of the values and policies that inform the law-making process are also external.[179] In this manner, elements emanating from international law constitute essential guidelines for a reliable, up-to-date interpretation of IHL. The fact that principles of humanity manifest values of international law, thus performing a law-making function, designate a nature that appertains to general principles of international law. In this sense, respect for—and the duty to ensure respect for—human dignity which has reached a *jus cogens* character is an obligation that also manifests this nature.[180] In other words, human dignity and other values included in the notion "laws of humanity" perform the informing function necessary for the evolution of IHL through their contact with general international law.

Of course, the penetration of the IHL regime by general international law norms is not without tension and debate as discussions concerning the interplay between IHRL and IHL have demonstrated.[181] However, this tension is rather indicative of evolving alterations in the process of interpretation of IHL norms and principles than a sign of uncompromising

[179] *See* Kieran Tranter, "The Law and Technology Enterprise: Uncovering the Template to Legal Scholarship on Technology", *Law, Innovation & Technology*, Vol. 3, No. 1, 2011, p. 69; the author stresses that "[l]aw is to be made, but the values and policies that inform this law-making should come from elsewhere."

[180] The necessary majority for the recognition of a *jus cogens* norm exists in the case of human dignity as demonstrated by an extensive study of national constitutions conducted by Shulztiner and Carmi. According to the latter, 162 States had incorporated as of December 2012 the concept in their constitutions, i.e., 84 per cent of the signatory members of the UN; *see* Statement of the Chairman of the Drafting Committee Mr. Aniruddha Rajput, *Peremptory Norms of General International Law (Jus Cogens)* adopted by the International Law Commission at its Sixty-ninth Section, 2017, Draft Conclusion 7, available at: https://legal.un.org/ilc/documentation/english/statements/2017_dc_chairman_statement_jc.pdf, pp. 11-12; Doron Shulztiner and Guy E Carmi, "Human Dignity in National Constitutions: Functions, Promises and Dangers", *The American Journal of Comparative Law*, Vol. 62, No. 2, 2014, p. 461.

[181] *See* Françoise J. Hampson, "The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body", *International Review of the Red Cross*, Vol. 90, 2008, p. 549; Waseem Ahmad Qureshi, "Untangling the Complicated Relationship between International Humanitarian Law and Human Rights Law in Armed Conflict", *Penn State Journal of Law & International Affairs,* Vol. 6, No. 1, 2018, 240; M. Sassoli, above note 68, pp. 102, and 433–443.

stability in this law.[182] Modern practice shows that the ground for such an evolution *vis-à-vis* the protection of SAR operations at sea has increasingly become fertile. Similar to the Ukrainian and the Russian governments, other States may be willing to explicitly authorize the maritime and law of the sea conventions in times of naval warfare in the future, if only to legitimize their purposes and de-legalize their enemy's actions within the premises of public conscience. Respectively, this willingness could allow other international actors to repeat the attempts made in the past for the evolution of GC II through maritime norms to the benefit of persons in distress at sea during naval warfare. Future attempts to exploit international law for similar purposes could be then limited through the express specification of contemporary obligations of States, as deduced from the interplay of the applicable maritime law and IHL norms at sea.

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[182] R. E. Vinuesa, "Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law", *Yearbook of International Humanitarian Law*, Vol. 1, 1998, p. 169; Nancie Prud'homme, "Lex Specialis: Oversimplifying a more Complex and Multifaceted Relationship?", *Israel Law Review*, Vol. 40, 2007, p. 356; Cordula Droege, "The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict", *Israel Law Review*, Vol. 40, 2007, p. 310; Cordula Droege, "Elective Affinities? Human Rights and Humanitarian Law", *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 526; Noam Lubell, "Challenges in Applying Human Rights Law to Armed Conflict", *International Review of the Red Cross*, Vol. 87, 2005, p. 751.

Commissions of Inquiry as Bulwarks Against Impunity

Sarthak Roy[**]

> *"Who controls the past controls the future. Who controls the present controls the past."*
>
> *George Orwell*

Commissions of Inquiry encompass a wide range of bodies across the international legal and political landscape. From fact-finding missions, Commissions of Inquiry now confront institutional normative shifts of magnitude in the areas of international humanitarian, human rights, and criminal law. This article traces their historical evolution, the language and exercise of their mandates, and their potential to address the issue of accountability in the evolving contexts that international law finds itself operating.

Keywords: IHL, Commissions of Inquiry, United Nations, Fact-finding Commissions, International Criminal Law

1. Setting the Context

In the aftermath of the escalation of the hostilities in Ukraine, the United Nations Human Rights Council ("UNHRC") at its emergency special session decided by an overwhelming majority in its resolution of 4 March 2022 "to urgently establish an ongoing independent, international commission of inquiry".[1] Ranging from the Ivory Coast to Darfur, Libya, Syria, North

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[1] UNHRC Res. A/HRC/49/1, 4 March 2022.

Korea, Eritrea, South Sudan and Sri Lanka, United Nations ("UN")-mandated commissions of inquiry, independent investigative mechanisms and fact-finding missions (hereinafter collectively referred to as "COIs") are increasingly being relied on to respond to and investigate alleged violations of international human rights law ("IHRL"), international humanitarian law ("IHL") and international criminal law ("ICL"), and their documentation and recommendations have considerably strengthened the international law protection to combat mass atrocities.[2] In his landmark Agenda for Peace, then UN Secretary-General ("UNSG") Boutros-Ghali reemphasized the importance of fact-finding as a tool for preventive diplomacy and encouraged an increased resort to fact-finding by the UN's primary organs.[3]

Once the UN came into existence, such bodies were created mainly by the UN Security Council ("UNSC"),[4] the UN General Assembly ("UNGA"),[5] the UNHRC,[6] its predecessor, the Commission on Human Rights,[7] the UNSG[8] and the High Commissioner for Human Rights ("OHCHR").[9] States and regional organisations[10] have also established different types of bodies that may fit in the general category of COI. Even human rights treaty instruments allow for inquiry over violations which can only be conducted if States Parties to respective treaties recognize the competence of the relevant committee for this purpose. As Dapo Akande observes, "in the absence of universal compulsory jurisdiction by international judicial bodies, these commissions of inquiry are a way in which the international community can obtain an authoritative determination of whether these violations have taken place and who is responsible."[11]

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2 M. Cherif Bassiouni and C. Abraham (eds), *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies*, Intersentia, Cambridge, 2013, p.8.

3 Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council, An Agenda for Peace; Preventive diplomacy, peacemaking and peacekeeping, UN Doc. A/47/277–S/24111, 31 January 1992, paras 23 and 25.

4 UNSC Res. 780, 6 October 1992.

5 UNGA Res. A/RES/52/135(1), 27 February 1998.

6 UNHRC Res. A/HRC/RES/S-15/1, 25 February 2011.

7 Report of the Fourth Special Session, U.N. Doc. E/CN.4/RES/1999/S-4/1, 1999.

8 The United Nations Secretary-General ("UNSG") established in 2000 the International Commission of Inquiry for Togo to look into allegations of extrajudicial killings in 1998.

9 Fact-finding mission on the situation of human rights in Mali, U.N. Doc A/68/53, 21 March 2013.

10 Report of the Commission of Inquiry into the Events of December 17, 2001, in Haiti, OEA/Ser.G, CP/INF 4702/02, 1 July 2002.

11 Dapo Akande and Hannah Tonkin, "International Commissions of Inquiry: A New Form of Adjudication?", *EJIL: Talk!,* 6 April 2012, available at: https://www.ejiltalk.org/

1.1. Hallmark of COIs

Questions often arise on whether COIs primarily act as fact-finders or as *de facto* law-applying authorities.[12] Bassiouni approaches this question thus: "Commissions of Inquiry are fact-finding mechanisms intended to correct violations of human rights and humanitarian law by investigating and reporting on a particular situation and providing recommendations to the mandating body."[13] Moreover, the consistent recourse to inquiry suggests a widespread assumption or intuition that COIs are useful.[14] For the purpose of this paper, the minimal qualifying features of a COI are the following: (i) they are *ad hoc* and temporary, designed and implemented to address specific situations; (ii) they engage with matters that raise questions of international law and contribute towards its development; (iii) they are established by a "public" body—whether by one or more States or by an international organisation; and (iv) their findings and conclusions are non-binding (thus, distinguishing COIs from most of the activities of international courts and tribunals).

However, once a COI has been established, does it make a difference? Do they function as self-standing institutions or should they also operate in tandem with other accountability mechanisms? Do their terms of reference permit only backward-looking issues of accountability? Or can they address future-looking issues and problem-solving? Overall, in its elaborate efforts at preventing impunity, can COIs also contribute to the progressive development of related areas of international law?

In attempting to answer the questions above, this paper begins by tracing the history and spawning of COIs over the last two and a half centuries. Subsequently, the paper focuses upon the evolution of their mandates over time, the use of relevant provisions, their interpretation and application to the facts and the interplay between IHRL, IHL and ICL in the

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international-commissions-of-inquiry-a-new-form-of-adjudication/ (accessed 3 December 2021).

[12] Larissa J. van den Herik, "An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law", *Chinese Journal of International Law*, Volume 13, Issue 3, 2014, pp. 507–537.

[13] Bassiouni and Abraham, above note 2, p. 8.

[14] Antonio Cassese, "Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding", in A. Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford, 2012, pp. 302– 303.

final reports of COIs. The penultimate segment of the paper addresses some of the fundamental scepticisms that remain associated with COIs. The paper concludes by highlighting that, despite the fracturing of the global political order, there is widespread "consciousness that instead of imposed amnesia, atrocities must be addressed", the existence of COIs provides a "contagion of accountability against atrocities", since "sweeping them under the carpet" is not a viable option.[15]

2. Evolution of COIs from the Lens of History

The growth and evolution of COIs can be divided into three phases. The genesis of COI as a new construct of dispute settlement can be traced back to the Maine explosion of 1898 in Cuba which resulted in the death of 266 American crew members on board a United States ("US") battleship. Friedrich Martens propounded that an impartial establishment of the facts and circumstances would answer these questions and help cool off emotions in the context of already estranged relations over Cuba.[16] Shortly thereafter, prominent leaders from fifty-nine States participated in a peace conference at The Hague which led to the creation of 1899 Hague Convention for Pacific Settlement of Disputes ("Hague I Convention") under which the States agreed to institute an International Commission of Inquiry as a means for settlement of their international differences or conflicts "involving neither honour nor vital interests, and arising from a difference of opinion on points of fact".[17] The mechanism for an international commission of inquiry was further developed under the 1907 Hague Convention on Pacific Settlement of Disputes ("Hague II Convention") in the Second Hague Peace Conference which set the procedural rules for the composition and functioning of the commission.[18]

Subsequently, in the second phase, COIs were created to primarily investigate a wide range of flotilla attacks during a volatile period of global politics culminating with the creation of the League of Nations. They included the following:

- the creation of the Dogger Bank commission by agreement following an incident in which the Russian Baltic fleet mistook

[15] Payam Akhavan, *In Search of A Better World: A Human Rights Odyssey,* House of Anansi Press Inc., Toronto, 2017, p. 81.
[16] Van Den Herik, above note 12, p. 510.
[17] *Ibid*.
[18] *Ibid*.

British vessels for Japanese warships, resulting in British fatalities. The COI investigated the facts of the incident and indemnified the British in a report handed down on 26 February 1905;[19]

- the establishment of the Tavignano inquiry in the aftermath of an incident which occurred during the Turco-Italian war of 1911-1912. The Commission set up by virtue of the Hague II Convention was tasked to investigate an incident which involved the arrest of the French vessel Tavignano and two other vessels which were also fired upon in what Italy claimed was the high seas and what France claimed was Tunisian waters. The COI, in its report on 23 July 1912, concluded that though the arrest may or may not have been carried out in Tunisian waters, the firing incidents certainly happened in Tunisian waters;[20]
- the formation of the Tiger inquiry to examine an incident involving a German submarine which had sunk a Norwegian ship allegedly carrying contraband. The COI had to decide where the act took place. The final report of the COI was released on 9 November 1918 and it found Germany liable and directed it to pay six million dollars;[21]
- the establishment of the Tubantia inquiry to investigate the sinking of the Dutch steamer Tubantia which was carrying eighty passengers and 280 crew members on its way towards South America. In its final report on 27 February 1922, it was determined that the Dutch vessel was sunk by a torpedo fired from a German submarine. However, the report did not conclusively answer whether the act of firing the torpedo was accidental or intentional;[22] and
- the formation of the Red Crusader inquiry involving the arrest and pursuit of a United Kingdom ("UK")-registered trawler (Red Crusader) by a Danish warship exercising Danish and Faroese fisheries jurisdiction (Niels Ebbesen). The COI released its report

[19] R.N. Lebow, "Accidents and Crises: The Dogger Bank Affair", *Naval War College Review*, Volume 31, 1978, p. 66.

[20] International Commission of Inquiry, *Capture of the "Tavignano" and cannon shots fired at the "Canouna" and the "Galois" (France vs. Italy),* 1916 The Hague Court Reports 413, 23 July 1912.

[21] Van Den Herik, above note 12, p. 513.

[22] International Commission of Inquiry, *Loss of the Dutch Steamer "Tubantia" (Germany v. The Netherlands)*, 16 American Journal of International Law 485, ICI Report of 27 February 1922, p. 8.

> on 23 March 1962 and concluded that the Danish fire on the escaping trawler failed a proportionality test as it was not the least harmful means available and therefore "exceeded legitimate use of armed force".[23] The 1961 Red Crusader incident has now become a milestone in the development of law and practice of hot pursuit, and the use of force, in maritime law enforcement operations.[24]

Afterwards, COIs of a different nature were set up within the multilateral framework of the League of Nations governed by Articles 11, 12, 15 and 17. Some of the prominent inquiries under the aegis of the Council concerned: (1) the Aaland Island affair of 1921;[25] (2) the frontier dispute between Iraq and Turkey of 1924-1926;[26] (3) the Greco-Bulgarian incident of 1925;[27] (4) the Northern Chaco affair of 1928-1935;[28] and (5) the Sino-Japanese conflict of 1931-1935.[29]

Entrusted with a distinct role of resolving ongoing or past disputes either independently or as part of a larger institutionalized structure, these COIs blended inquiries with techniques of conciliation or used inquiry as a precursor or substitute to arbitration. However, despite the use of legal terms, Van Den Herik observed that in this phase "the inquiries functioned as mechanisms of peace rather than as instruments of law fully embedded in a legal framework and procedure".[30] Additionally, during times of volatile international legal order, findings from these inquiries faced a lot of political pushbacks and criticisms. For instance, after the Lytton Report on the

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[23] Report of 23 March 1962 of the Commission of Enquiry established by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark, 29 RIAA 521, 15 November 1961, p. 539.

[24] Jan Martin Lemnitzer, "International Commissions of Inquiry and the North Sea Incident: A Model for a MH17 Tribunal?", *European Journal of International Law*, Vol. 27, No. 4, 2016, pp. 923–944

[25] Report presented to the Council of the League by the Commission of Rapporteurs, Doc. no. 21/68/106, 1921.

[26] Nevin Cosar and Sevtap Demirci, "The Mosul Question and the Turkish Republic: Before and After the Frontier Treaty,1926", *Turkish Yearbook of International Law*, Volume 35, 2004, p. 43.

[27] James Barros, *The League of Nations and the Great Powers, The Greek-Bulgarian Incident 1925*, Clarendon Press, Oxford, 1970, p. 89.

[28] "Report of the League of Nations Commission on the Chaco Dispute between Bolivia and Paraguay", *American Journal of International Law*, Volume 28, Issue S4, 1934, p. 137.

[29] Arthur K. Kuhn, "The Lytton Report on the Manchurian Crisis", *American Journal of International Law*, Volume 27, 1933, p. 96.

[30] Van Den Herik, above note 12, p. 519.

Manchurian crisis,[31] Japan rejected the Commission's finding branding it an aggressor, leading to its 1933 departure from the League of Nations and wrecking any prospects for reconciliation.[32]

2.1. COIs in Contemporary Times

Ultimately, the final phase in the development of COIs coincides with the emergence of the UN. Pursuant to Article 34 of the UN Charter, the UNSC was entrusted with investigatory powers geared towards prevention of any situation which might endanger international peace and security.[33] Unlike the UNSC, the UNGA was not vested with an express power to investigate. However, subject to Article 12 of the UN Charter, the UNGA can establish fact-finding bodies pursuant to Articles 10, 11, 14 and 22. The UNGA has used its implied investigative powers to report on situations, such as apartheid in South Africa,[34] the circumstances surrounding the 1961 deaths of Patrice Lumumba[35] and Dag Hammarskjöld,[36] as well as the assassination of the prime minister of Burundi.[37]

In instances where international politics paralysed the UNSC or the UNGA, the UNHRC increasingly stepped in to establish various COIs to investigate human rights abuses. Despite not being specifically vested with the powers of establishing COIs, the HRC's implied powers permit it to address and respond to human rights violations and make recommendations on the protection of human rights. As Chinkin observes, "the principal idea underlying human rights inquiries is that exposure may contribute to better compliance."[38]

Aside from these UN bodies, the UNSG can also set up a COI under Article 99 of the UN Charter, which provides that "the Secretary-General

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[31] A. Kuhn, above note 34, p. 96.

[32] "The Japanese Reply to the Lytton Report", *Current History (1916-1940)*, Volume 37, No. 4, 1933, pp. 504–512, available at: http://www.jstor.org/stable/45335063.

[33] T. Schweisfurth, "Article 34", in Bruno Simma, et al. (eds.), *The Charter of the United Nations: A Commentary,* Oxford University Press, Oxford, 2012, p. 1089.

[34] UNGA Res. 616 A (VII), 5 December 1952.

[35] UNGA Res. 1601 (VX), 15 April 1961.

[36] UNGA Res. 1628 (XVI), 26 October 1961.

[37] UNGA Res. 1627 (XVI), 6 November 1961.

[38] Christine Chinkin, "UN Human Rights Council Fact-FindingMissions: Lessons from Gaza", in M.H. Arsanjani, et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, Martinus Nijhoff, 2010, pp. 475–198.

may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." By virtue of this provision, the UNSG has exercised fact-finding powers in Zimbabwe,[39] Timor-Leste[40] and Fiji,[41] among others. Recently, in the midst of the ongoing Russian invasion in Ukraine, the UNSG launched a fact-finding mission to investigate the deadly 29 July 2022 incident at Olenivka, Ukraine, following requests from the governments of Ukraine and the Russian Federation.[42] Both countries accused each other concerning the attack on Olenivka prison in Donetsk Oblast which killed fifty-three Ukrainian prisoners on 29 July 2022.[43] The UNSG appointed Lieutenant General (Retired) Carlos Alberto dos Santos Cruz of Brazil to lead the fact-finding mission, with other members being Ingibjörg Sólrún Gísladóttir of Iceland and Issoufou Yacouba of Niger.[44]

The European Union also intervened for the first time in 2008. By its decision of 2 December 2008, the Council of the European Union established an Independent International Fact-Finding Mission on the Conflict in Georgia ("IIFFMCG").[45] In this conflict, heavy fighting had erupted in and around the town of Tskhinvali in South Ossetia in August 2008 between forces from Georgia and Russia along with the presence of South Ossetian and Abkhaz military units.[46]

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[39] Anna Kajumulo Tibaijuka, *Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina*, United Nations, 2005.

[40] Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste, 2 October 2006, pp. 109–34.

[41] UN Press Release, "Secretary-General Dispatches Fact-Finding Mission to Fiji", *United Nations*, 2007, available at: https://www.un.org/press/en/2007/sgsm10955.doc.htm.

[42] UN Press Release, "Members of Fact-finding Mission regarding Incident at Olenivka, Ukraine, on 29 July 2022", *United Nations*, 2022, available at: https://www.un.org/sg/en/content/sg/personnel-appointments/2022-08-22/members-of-fact-finding%C2%A0mission-regarding-incident-olenivka-ukraine-29-july-2022%C2%A0.

[43] The Kyiv Independent News Desk, "UN announces fact-finding mission to investigate Olenivka tragedy", *The Kyiv Independent*, 3 August 2022, available at: https://kyivindependent.com/uncategorized/un-announces-fact-finding-mission-to-investigate-olenivka-tragedy.

[44] *Ibid.*

[45] Council Decision 2008/901/CFSP of 2 December 2008 concerning an independent international fact-finding mission on the conflict in Georgia OJ L 323, 3.12.2008, p. 66–66

[46] Independent International Fact-Finding Mission on the Conflict in Georgia, "Report", Volume I, pp. 1-33, available at https://www.echr.coe.int/Pages/home.aspx?p=home.

For the purpose of specifically investigating grave breaches and other serious violations of the Geneva Conventions, the International Humanitarian Fact-Finding Commission ("IHFFC") was established under Article 90 of Additional Protocol I ("AP I") to the Geneva Conventions in 1991. Pursuant to the Geneva Conventions and AP I, the IHFFC is mandated to enquire into alleged grave breaches and also facilitate through its good offices the restoration of an attitude of respect for the Conventions and AP I.

Unlike many other COIs, the IHFFC is a permanent international body based in Bern, Switzerland and is composed of fifteen members including medical doctors, judges, high ranking military experts, diplomats and international law scholars elected for a five-year period.[47]

The IHFFC has a consent-based mechanism, be it during peacetime or when an armed conflict has broken out, with declarations being made by States of becoming a Party to AP 1 and thus allowing all Parties to resort to the Commission. It is also worth highlighting the International Committee of the Red Cross' ("ICRC") landmark Customary International Law Study, which indicates that "States must investigate war crimes allegedly by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects."[48] However, with States being recalcitrant about international recognition of an armed conflict, the IHFFC remained idle for years.[49] Nonetheless, the IHFFC was granted observer status by the UNGA in October 2009[50] and in the very same year the UNSC called for its possible use in Resolution 1894.[51]

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[47] C. Azzarello, C. and M. Niederhauser, "The Independent Humanitarian Fact-Finding Commission: Has the 'Sleeping Beauty' Awoken?", *ICRC Humanitarian Law & Policy Blog*, 9 January 2018, available at: https://blogs.icrc.org/law-and-policy/2018/01/09/the-independent-humanitarian-fact-finding-commission- has-the-sleeping-beauty-awoken/.

[48] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, *Volume 1: Rules*, Rule 158, Cambridge University Press, Cambridge, 2005; Noam Lubell, Jelena Pejic and Claire Simmons (eds), *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*, The Geneva Academy of International Humanitarian Law and Human Rights and the International Committee of the Red Cross, September 2019.

[49] Marco Sassoli, "Challenges and opportunities to increase respect for IHL: specificities of the Additional Protocols", in Fausto Pocar (ed.), *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives*, International Institute of Humanitarian Law, 2017.

[50] UNGA Res. A/RES/64/121, 15 January 2010.

[51] UNSC Res. 1894, 11 November 2009.

Ultimately, it was only in 2017, that a situation was referred for investigation to the IHFFC when an Organization for Security and Cooperation in Europe ("OSCE") armoured vehicle patrolling through Eastern Ukraine exploded resulting in the death of an OSCE paramedic.[52] Aside from forensic investigation by IHFFC's independent forensic team ascertaining the *modus operandi* of the attack, the IHFFC also provided a legal analysis of the incident outlining the indiscriminate nature of the attack being a violation of IHL. Later, the IHFFC also came close to initiating an inquiry in the context of the Colombian conflict but it ultimately fell through.[53] Despite suggestions for amendments made by ICRC towards the IHFFC being able to act on its accord away from State seizure, it has not materialized yet. This conundrum came to the fore when in October 2019, Russian President Vladimir Putin signed an executive order revoking the statement accompanying Russia's ratification of AP I, accepting the competence of the Article 90 IHFFC.[54] According to the Kremlin, it was disappointed that the IHFFC did not include a Russian representative even though Russia continued to make annual contributions to the budget of the Commission.[55] Additionally, it was felt that there was a risk of the Commission's powers being abused by unscrupulous States for political purposes.[56]

In recent years, there has thus been a shift in the work of COIs—whereas historically they focused on finding facts, the modern phase has witnessed COIs' strengthening demands for accountability especially when there is a dearth of effective international remedies. Moreover, contemporary situations of armed conflict, often being of an internal nature, is usually characterized by the frequent failure by domestic judicial and public institutions to investigate, mediate or resolve the underlying circumstances.

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[52] Independent Forensic Investigation Team, "Executive Summary of the Report of the Independent Forensic Investigation in relation to the Incident affecting an OSCE Special Monitoring Mission to Ukraine (SMM) Patrol on 23 April 2017", *Organisation for Security and Co-Operation in Europe*, 7 September 2017, available at: https://www.osce.org/home/338361.

[53] Robert Heinsch, "The Future of the International Humanitarian Fact-Finding Commission: A Possibility to Overcome the Weakness of IHL Compliance Mechanisms?", in Dra an Djukić and Niccolò Pons (ed.), *The Companion to International Humanitarian Law,* Brill | Nijhoff, 2018.

[54] Reuters Staff, "Russia's Putin revokes Geneva convention protocol on war crimes victims", *Reuters*, 17 October 2019, available at: https://www.reuters.com/article/us-russia-warcrimes-convention-idUSKBN1WW2IN.

[55] *Ibid*.

[56] *Ibid*.

Additionally, the UNSC has been consistently hamstrung by veto-wielding representatives upholding self-serving strategic interests by blocking resolutions with dire consequences on civilian lives and property.[57] With the International Criminal Court ("ICC") also limited in its jurisdictional reach, COIs are often described as "second-best options".[58]

Beyond documentation and earmarking of accountability, COIs also act as tools for awareness and generate pressure on Parties to follow the rules of IHL. Therefore, as Federica D'Alessandra highlights, lately COIs have witnessed a proverbial "Accountability Turn",[59] which would be dealt with in depth in the subsequent section by surveying the constitutive language of a few mandates which have established COIs and other such mechanisms since the mid-2000s.

3. Analysis of Mandates

The language of the constituting mandates of COIs has evolved from purely fact-finding to documenting IHRL abuses and determining IHL and ICL violations. Analysis of these mandates shows that they have varied on the basis of the area, nature of violations and time period covered. As one commentator observes, unlike traditional COIs which were meant to "pacify and defuse a conflict, contemporary human rights commissions rather aim to stir, to evoke action, to opine and to condemn".[60] By analysing some of the mandates, this section identifies the engagement of COIs with international law; in particular, it has been observed that contemporary COIs have often been mandated to work as *de facto* law-applying authorities alongside their fact-finding exercises,[61] since most of these bodies interpret their mandates making inroads into legal analysis, by identifying the applicable legal framework, discussing the relevant norms and characterizing the facts in their

[57] Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes,* Cambridge University Press, 2020

[58] Julia Crawford, "What's behind the rise of evidence-gathering bodies", *Justiceinfo.net*, 30 November 2018, available at: https://www.justiceinfo.net/en/39637-what-s-behind-the-rise-of-evidence-gathering-bodies.html.

[59] Federica D'Alessandra, "The Accountability Turn in Third Wave Human Rights Fact-Finding", *Utrecht Journal of International and European Law*, Volume 33, No. 84, 2017, pp. 59-76.

[60] Van Den Herik, above note 12, pp. 507–537.

[61] Larissa van den Herik and Catherine Harwood, "Commissions of Inquiry and the Charm of International Criminal Law: Between Transactional and Authoritative Approaches", in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding*, Oxford University Press, Oxford, 2016, pp. 233-254.

light.[62] In that pursuit, the substantial analysis offered below would also identify the possible interplay between IHRL and IHL norms, and the work of COIs.

3.1 Juridification of COIs' Mandates

A COI's mandate indicates its perceived role as an exclusive fact-finding mission[63] or as a mission which also undertakes judicial exercise.[64] They outline violations and legal rules that ought to be taken into account while investigations are carried out. Contemporary COIs have used international law as a reference point for selecting which facts are relevant. Experts have observed that there is now a trend towards "juridification of the mandates",[65] which is retained on the basis of two elements:

- commissions' mandates "refer to legal standards as a yardstick for collection and evaluation of relevant facts"; and[66]
- COIs "are increasingly expressly mandated to make legal findings and determinations".[67]

In other words, the work of a COI is based on the analysis of facts in tandem with the applicable law. It goes without saying that mandates generally provide references to a wide spectrum of violations and the related set of applicable laws. Here, it is pertinent to highlight examples that indicate a recent general shift towards "juridification of mandates". Then UN Secretary-General Kofi Annan, in his letter to the UNSC on the establishment of the UN Headquarters Board of Inquiry for the 2008/2009 Gaza Strip incidents, expressly underlined that the Commission would not act as a judicial body or court of law and that it would not make legal findings or consider questions of legal liability.[68] Earlier, the Commission of Experts for the former Yugoslavia interpreted its mandate as providing the UNSG only with conclusions on the evidence of violations without an analysis of the legal

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[62] Micaela Frulli, "Fact-Finding or Paving the Road to Criminal Justice?", *Journal of International Criminal Justice*, Volume 10, 2012, p. 1323.
[63] Fact-finding Mission regarding Incident at Olenivka, above note 42.
[64] UNHRC Res. A/HRC/49/1, above note 1, para.11.
[65] Van Den Herik, above note 12, p. 531.
[66] *Ibid.*
[67] *Ibid.*
[68] Security Council (2009), UN Doc. A/63/855-S/2009/250.

issues or legal findings in connection with particular cases.[69] Instead, it stated that it was the prerogative of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") to come to definitive legal conclusions in relation to particular cases and situations.[70] Similarly, the Democratic Republic of Congo Mapping Exercise held that "the legal classification of the acts of violence identified ultimately relies on a judicial process."[71]

Subsequently, the trend started shifting when the mandate of the UN Commission on Timor-Leste (2006) requested the Commissioners to "recommend measures to ensure accountability for crimes and serious violations of human rights";[72] in Libya (2011) the COI members had to "identify those responsible, to make recommendations, in particular, on accountability measures", all with a view to ending impunity;[73] in the Syrian Arab Republic (2011) the Commissioners were tasked to "identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable";[74] in the Occupied Palestinian Territory (2014) the COI members had to "make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring that those responsible are held accountable".[75] The latest Myanmar and Syrian COIs were also asked to provide recommendations on accountability measures with a view to ending impunity. The Myanmar Commission (2018) recommended prosecuting the senior military officials named in an international criminal tribunal for genocide, crimes against humanity and war crimes,[76] while the Syrian COI (2016) has repeatedly called for the UNSC to "refer urgently the situation in

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[69] Letter dated 24 May 1994 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/1994/674.

[70] *Ibid.*, p. 41.

[71] UN Office of the High Commissioner for Human Rights, "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003", *United Nations Digital Library*, August 2010, p. 463, available at: https://digitallibrary.un.org/record/709895?ln=en.

[72] Report of the Independent Special Commission of Inquiry for Timor-Leste Established by UNHRC Res S-4/1, UN Doc. S/2006/822, 2006, Annex, p. 4(c).

[73] UNHRC Res. A/HRC/RES/S-15/1, above note 6, para. 11.

[74] UNHRC Res. A/HRC/RES/ S-17/1, 23 November 2011, para. 13.

[75] UNHRC Res. A/HRC/RES/S21/1, 23 July 2014, para. 13.

[76] UNHRC Res. A/HRC/RES/39/2, 3 October 2018.

Syria to the International Criminal Court, or to establish an ad hoc tribunal with relevant geographic and temporal jurisdiction".[77]

Just days after the Russian invasion of Ukraine, the OSCE's Moscow Mechanism was invoked by Ukraine with the support of forty-five participating States.[78] Three experts were appointed for a Special Mission which was mandated to identify the possible violations of OSCE commitments, abuses of IHL, as well as IHRL.[79] Additionally, they also had to ascertain *jus in bello* violations concerning war crimes and crimes against humanity with a view to presenting it to relevant accountability mechanisms, as well as national, regional or international courts or tribunals that have, or may in future have, jurisdiction.[80]

Therefore, some of the common features of the mandates which establish modern COIs are observed to be as follows:

- Investigation and establishment of facts;
- Legal examination of relevant facts;
- Collection and storage of evidence for prospective judicial proceedings; and
- Recommendations to various stakeholders.

4. Interplay of IHRL, IHL and ICL Norms

Throughout the last decade and a half, various COIs have made either explicit or implicit references to IHRL, IHL, and sometimes even to ICL. COIs which are mainly established by the UNHRC not only use IHRL as a frame of reference but also refer to other branches of international law. Although now a settled practice, questions have nonetheless been raised as to the propriety

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[77] UNGA RES/71/248, 21 December 2016.

[78] Wolfgang Benedek, Veronika Bilkova and Marco Sassòli, "Summary of the Report by a Mission of Experts under the OSCE Moscow Mechanism", *EJIL:Talk!,* 19 April 2022, available at: https://www.ejiltalk.org/violations-of-international-humanitarian-and-human-rights-law-war-crimes-and-crimes-against-humanity-committed-in-ukraine-since-24-february-2022-summary-of-the-report-by-a-mission-of-experts-under-t/.

[79] OSCE, Report On Violations Of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022, 13 April 2022, ODIHR.GAL/26/22/Rev.1.

[80] *Ibid*.

thereof.[81] It is largely accepted and also expressed by the International Court of Justice ("ICJ") in its widely noted *Wall* opinion[82] that IHL and IHRL may apply in parallel, depending on the specific circumstances of each situation. In a situation of armed conflict, IHL standards provide for a more comprehensive and unbiased account of a conflict that examines the acts perpetrated by all sides. In a case of a non-international armed conflict, mere reliance on IHRL would predominantly highlight a State's actions while paying less attention to the acts of non-State actors who have "limited direct obligation under this area of law".[83] Notwithstanding challenges relating to extradition and jurisdiction, reference to ICL norms not just serves accountability purposes, but also induces the international community to take actions. Therefore, due to the mutual correlation, IHL and ICL have been incorporated in the reports of several COIs despite their mandates making references only to general human rights violations.

Acts such as rape and torture may amount to crimes against humanity or war crimes, depending on the context, the victims and the extent (widespread or systematic practice)[84] of the acts. For example, the Cote d'Ivoire Commission was mandated to investigate "allegations of serious abuses and violations of human rights".[85] However, the final report includes a brief examination of violations of both IHL[86] and ICL[87] in addition to human rights violations. This addition was justified by the Report, indicating the legal framework of the COI, and that Côte d'Ivoire was Party to most international and regional instruments relating to IHRL and IHL.[88] It was

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[81] D. Richmond-Barak, "The Human Rights Council and the Convergence of Humanitarian Law and Human Rights Law", in W. Banks (ed.), *Shaping a Global Legal Framework for Counterinsurgency: New Directions in Asymmetric Warfare,* 2012, pp. 3–23.

[82] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* ICJ Rep 136, 2004, p. 106.

[83] United Nations Secretary-General, "Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka", *refworld*, 31 March 2011, available at: https://www.refworld.org/docid/4db7b23e2.html.

[84] International Criminal Tribunal for Yugoslavia, *Naletilić and Martinović*, ICTY Trial Chamber, ICTY-IT-98-34-T, 2003, p. 236; International Criminal Tribunal for Rwanda, *Akayesu,* ICTR Trial Chamber, ICTR-96-4-T 579, 1998.

[85] UNHRC Res. A/HRC/RES/16/25, 13 April 2011, para.10.

[86] Rapport de la Commission d'enquête Internationale Indépendante sur la Côte d'Ivoire, UN Doc A/HRC/17/48, 14 June 2011, paras 88–90.

[87] *Ibid.*, at paras 91–93.

[88] *Ibid.*, at para. 10.

later supported by the fact that the commissioners perceived the three types of legal rules as complementary.[89]

The COI for Libya detailed the various international legal standards applicable to the country's changing national situation. Three periods were identified that, "in legal terms [can] be demarcated as (i) 'peacetime', (ii) 'non-international armed conflict', and (iii) 'co-existing international armed conflict'".[90] Subsequently, its Second Report considered that "[w]ith the end of armed conflict (Phase III), international human rights law became predominant."[91] Furthermore, Philip Kirsch, who chaired the Libya Commission, affirmed that:

> we did not think it was stepping outside the mandate. We concluded the broad human rights legal framework encompassed human rights and international humanitarian law as *lex specialis* applicable in times of armed conflicts. Also, the resolution that created the commission required us to establish the facts and circumstances not only of human rights violations but also "of the crimes perpetrated", regardless of their nature.[92]

The final conclusion from the OSCE Mission's recent report ascertained that during the period of investigation, violations occurred on both the Ukrainian and Russian sides with clear patterns of IHL violations by Russia which were greater in scale and nature.[93] Despite not being provided with physical access, the Mission obtained information from various sources and examined two specific attacks in great detail. The Mission concluded that the 9 March 2022 attack on Mariupol Maternity House and Children's Hospital was undertaken by Russia with full knowledge and no warning, thereby constituting a clear violation of IHL and those responsible for it having committed a war crime.[94] Subsequently, the report also determined that the 16

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[89] *Ibid.*, at paras 88–93.

[90] Report of the International Commission of Inquiry to investigate all Alleged Violations of International human rights law in the Libyan Arab Jamahiriya, UN Doc A/HRC/17/44, 1 June 2011, paras 60-80.

[91] *Ibid.*, at para. 5.

[92] R. Grace, "The Design and Planning of Monitoring, Reporting, and Fact-Finding Missions", *Center for Human Rights and Humanitarian Studies; US Institute of Peace; Harvard Program on Negotiation*, 2013.

[93] OSCE, above note 80.

[94] OSCE, above note 80.

March 2022 strike on the Mariupol Drama Theatre constituted "most likely an egregious violation of IHL" leading to the death of approximately 300 people including women and children.[95] In its treatment of IHRL, the report took note of the view expressed by the UNHRC in its General Comment 36 where it underlined that "every killing in furtherance of an act of aggression violates the human right to life of the person killed, whether or not that killing also violates international humanitarian law."[96]

4.1. COIs and the development of International Law

When armed with a broader mandate to make determinations on the applicable legal regimes, clarifications by COIs of the different stages, degrees and types of violence can facilitate the growth of interrelated areas of law and confirm the idea that IHL is a *lex specialis* applicable when the required threshold of intensity of violence and organisation of armed groups are met. Considering the fact that COIs are not monolithic institutions, it could be considered that the determination of these elements based on factual evidence may be one of their main functions since factual elucidation helps determine relevant legal applicability.[97] Moreover, if the mandate so allows, the risk of not making a comprehensive analysis of IHL and ICL norms alongside IHRL violations might attract criticism from various stakeholders and affected parties.[98] This supports the idea that these three branches of international law have been developed to protect the rights of persons affected by a conflict and that these legal regimes "are complementary and mutually reinforcing".[99] By attracting more credibility to their work, COIs can ensure that its reports serve as advocacy tools, the main purpose being one of inducing compliance or, alternatively, instigating external action designed to halt human rights violations.[100]

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[95] *Ibid.*

[96] Adil Haque, "The OSCE Report on War Crimes in Ukraine: Key Takeaways", *Just Security*, 15 April 2022, available at: https://www.justsecurity.org/81143/the-osce-report-on-war-crimes-in-ukraine-key-takeaways/#:~:text=The%20report%20was%20written%20by,conflict%20between%20Russia%20and%20Ukraine.

[97] Marco Odello, "The Interplay between International Human Rights Law and International Humanitarian Law in the Practice of Commissions of Inquiry", in Christian Henderson (ed.), *Commissions of Inquiry— Problems and Prospects,* Hart Publishing, 2017.

[98] Grace, above note93.

[99] Outcome of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict: Report of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/11/31, 4 June 2009, para. 5.

[100] Chinkin, above note 38.

This returns us to the initial issue: although COIs in contemporary times extensively utilize law to the facts elucidated, these mechanisms do not by themselves create binding legal obligations. Being neither courts of law nor creating legal liabilities or other legal affects, COIs' use of international law nevertheless helps bolster the validity of facts elucidated which may then foster political impacts. In the words of Politis, "non-binding and non-legal determinations can have legal implications in terms of attribution and responsibility."[101] Irrespective of the blurring of the fact-law distinction, the flexibility afforded to COIs allow them to assess not just previous issues of accountability but facilitate a review of long-standing issues that, if unaddressed, risk flaring up in future.

5. Criticisms and Drawbacks

Despite the growth and contributions made by various COIs, they are not beyond criticism from various stakeholders. Here, we shed light on certain deficiencies of COIs which, in the long run, can prove counterproductive due to lack of political legitimacy.

5.1. Procedural and Structural Challenges

First, and unlike formal judicial organs, COIs are not bound by a standard of proof "beyond reasonable doubt", the principle of equality of arms nor the principle of individual criminal responsibility.[102] Instead, due to the flexibility afforded to COIs, they apply lower evidentiary thresholds such as "reasonable suspicion",[103] "preponderance of evidence"[104] or "balance of probabilities".[105] In several circumstances, this has led to widespread outcry with fingers being

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[101] N. Politis, "Les Commissions internationales d'enquête", *Revue générale de droit international public*, 1912, pp. 149-153.

[102] M. Aksenova, and M. Bergsmo, "Defining the purposes, mandates and outcomes of fact-finding commissions beyond international criminal justice", *FICHL Policy Brief Series No. 38*, 2015, available at: https://www.toaep.org/pbs-pdf/38-aksenova-bergsmo.

[103] "Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste", *OHCHR*, 2 October 2006, paras 12 and 110.

[104] Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, U.N. Doc. A/HRC/15/21, 27 September 2010.

[105] Full Report of the International Commission of Inquiry to investigate all alleged violations of international law in Libya, annexed to Report of the International Commission of Inquiry on Libya, U.N Doc. A/HRC/19/68, 28 January 2014.

pointed towards the validity of the findings. For instance, the UNHRC-mandated COI for the Israeli flotilla raid of 2010 simply stated that, "[t]he Mission found the facts set out below to have been established to its satisfaction."[106] This standard was even lower that than the lowest standard of "reasonable grounds" required by the ICC to issue arrest warrants. Türkiye, being a party to the dispute, was upset by the findings of the COI which concluded that Israel's naval blockade was in keeping with international law and that its forces had the right to stop Gaza-bound ships in international waters. Nevertheless, Türkiye argued that the conclusion overstepped the mandate of the four-member panel appointed by the UNSG and was at odds with other UN decisions.[107]

However, in recent years, course correction has been undertaken with the standard of proof used by COIs established by UNHRC being elevated to "reasonable grounds".[108] For instance, the International, Impartial and Independent Mechanism for Syria established by the UNGA stated in its terms of reference that:

> these procedures shall be based on international law and standards, notably the right to a fair trial and other due process provisions under international human rights law, as well as on the jurisprudence, procedural standards and best practices of the international criminal tribunals.[109]

Juxtaposed to the aspect of "standard of proof" is the issue of premature determination of accountability that some COIs have been accused of previously. Oftentimes, by going beyond the monitoring mandate, these COIs have acted as quasi-judicial bodies, engaged in what Van der Herik refers to as the "judicialisation of factual findings".[110] Fingers have been pointed at an apparent blurring of lines between an international criminal court and a COI.[111] Reports documenting incidents of IHL violations as

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[106] U.N. Doc. A/HRC/15/21, above note 105.

[107] Neil MacFarquhar and Ethan Bronner, "Report Finds Naval Blockade by Israel Legal but Faults Raid", *New York Times*, 1 September 2011.

[108] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc A/HRC/40/70, 31 January 2019.

[109] UNGA RES/71/248, 21 December 2016.

[110] Van Den Herik, above note 12.

[111] R. Grace and Coster Van Voorhout, "From Isolation Eo Interoperability: The Interaction of Monitoring, Reporting, and Fact-finding Missions and International Criminal Courts

crimes against humanity, war crimes or genocide are based only on victim and witness interviews or extracted from other non-governmental organisation ("NGO") or UN reports. This ultimately has a cascading affect since it raises questions of authenticity and impartiality at subsequent criminal trials. For example, to open an investigation on the situation of the Republic of Côte d'Ivoire, the ICC Prosecutor relied on reports from COIs "to gain information on the exact locations where crimes were committed, the pattern of attacks, and indicate indicia of state involvement through the instigation of xenophobia and the fanning of ethnic and political hate".[112] However, the ICC pre-trial chamber in *Laurent Gbagbo* while raising concerns about the ICC Prosecutor's sole reliance on the NGO reports, UN reports and press articles, declared them as being "anonymous hearsay" from outside entities.[113]

Moreover, many of these reports document facts as violations of IHL without hearing the defence side, due to concerned States' refusal to provide information. Nevertheless, this should not give COIs a free pass to not adhering to the principles of presumption of innocence and the right to legal representation of the defendant.[114] Otherwise, when these reports with their premature pronouncement of accountability are made publicly available, they have a potential to influence the minds of judges in prospective criminal proceedings.

For the relevant methodology, there is often no consistent pattern of mandates providing the applicable legal rules for COIs. While some make general references to violations of international law, references are often made to IHL or IHRL or ICL or all of them. On several occasions, COIs end up making legal conflations by failing to make appropriate distinctions between the various branches of law which might be at play in a particular situation.[115] In some instances, instead of adequately identifying the type of armed

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and Tribunals", *The Hague Institute for Global Justice*, 2014, available at: https://www.thehagueinstituteforglobaljustice.org/wp-content/uploads/2015/10/working-paper-4-fact-fin ding.pdf.

[112] International Criminal Court, *Situation in the Republic of Ivory Coast, Request for an Authorization of Investigation Pursuant to Article 15*, ICC-02/11-3, 2011.

[113] International Criminal Court, *Prosecutor v. Laurent Koudou Gbagbo (Pre-Trial Chamber)*, Decision adjourning the hearing on the confirmation of charges pursuant to Art 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, 2013.

[114] Grace and Voorhout, above note 112.

[115] Report of the Secretary General`s Panel of Experts on Accountability in Sri Lanka, above note 84, p.185.

conflict, COIs would end up focusing on the types of violations, while in other cases members of a COI could re-interpret or expand their original mandates to include overlapping violations of international law in a particular conflict. Boutruche has criticized this approach as being legally inadequate and insufficiently sensitive to the intricacies of the interplay between the two fields of law.[116] At this point it would be worth reflecting upon a very pertinent question that Marco Odello raises:

> if the situation in the specific country is changing, should the commission of inquiry wait for a new mandate or, either implicitly or explicitly, interpret its mandate and include in its terms of reference the possible determination of the existence of an armed conflict, based on the facts which are under its consideration? Would this lead to an ultra vires situation or would it be a necessary fine-tuning of the powers that derive from the function of the commission of inquiry?[117]

The answer likely lies in the nature and scope of the constituted COI. If the COI is vested only with powers of collection and consolidation of facts without any scope for determining possible responsibilities and accountability for violations, then the COI would be exceeding its given mandate. However, if the original mandate allows for broader functions, including the possibility of determination of violations of international law and identification of responsible individuals, then the role of COI can be consequential whilst being allowed to collect facts and make legal qualifications of the situation on the ground.

Time and again, individual members of COIs are often questioned over their independence and impartiality. Following his comments in an interview in July 2022, human rights expert Miloon Kothari faced a diplomatic maelstrom. Mr. Kothari is one of the three members of a COI set up by UNHRC under Resolution S-30/1 to investigate alleged violations of IHL and IHRL in the Occupied Palestinian Territory, including East Jerusalem.[118] In the said interview Mr. Kothari stated:

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[116] T. Boutruche, "Selecting and Applying Legal Lenses in Monitoring, Reporting and Fact-Finding Missions", *HPCR Working Paper*, 2013.

[117] Odello, above note 98.

[118] UNHRC Res. A/HRC/S-30/1, 28 May 2021

> I would go as far as to raise the question of why [Israel is] even a member of the United Nations. Because … the Israeli government does not respect its own obligations as a UN member state. They, in fact, consistently, either directly or through the United States, try to undermine UN mechanisms,[119]

Led by Israel, the USA, UK and several other Western governments, Mr. Kothari and other members of the COI were promptly undermined for being "biased", "selective" and "antisemitic".[120]Accusations were also levelled against the chair of the COI, Ms Navi Pillay for some of her previous comments decrying Israel's "ever-expanding discrimination and systemic oppression of the Palestinian people."[121]

Notwithstanding the political sensitivity associated with COIs, members should be appointed only when they "have a proven record of independence and impartiality" and that "prior public statements" could not impact their "independence and impartiality" or "create perceptions of bias".[122] According to Professor Thomas M. Franck, the late New York University scholar and former president of the American Society of International Law, this requirement implies that "the persons conducting an investigation should be, and should be seen to be, free of commitment to a preconceived outcome."[123] The credibility and impact of fact-finding depend

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[119] David Kattenburg, "Apartheid is not sufficient: an interview with UN Human Rights Commissioner Miloon Kothari", *Mondoweiss*, 25 July 2022.

[120] Rosa Freedman, "'Biased', 'Selective', 'Antisemitic': Accusations against the UN Commission of Inquiry on Israel and the Occupied Palestinian Territories", *EJIL: Talk!,* 1 August 2022, available at: https://www.ejiltalk.org/biased-selective-antisemitic-accusations-against-the-un-commission-of-inquiry-on-israel-and-the-occupied-palestinian-territories/.

[121] Navi Pillay, "General statement about colonization, discrimination, and apartheid, delivered at the United Nations International Day of Solidarity with the Palestinian People Seminar: The Year of O.R. Tambo and The Palestinian Struggle under Apartheid Rule, Pretoria, South Africa," *Youtube* 29 November 2017, available at: https://www.youtube.com/watch?v=nF61qfb5J-k.

[122] OHCHR, "Commissions of Inquiry and Fact-Finding Missions on International Human Rights Law: Guidance and Practice", 2015, p. 106, available at: https://www.ohchr.org/documents/publications/coi_guidance_and_practice.pdf.

[123] T.M. Franck & H.S. Fairley, "Procedural Due Process in Human Rights Fact-Finding by International Agencies", American Journal of International Law, Volume 74, 1980, pp. 313.

upon the extent to which it is perceived to have been objective, fair and impartial.

5.2. Substantive Challenges

Lately COIs tasked with investigation of alleged IHL violations stem not from UNSC directives but are instead established by UNHRC. Due to the overlapping nature of IHRL and IHL violations, many of these COIs apply these two sets of rules in situations of armed conflict. In such circumstances, experts have highlighted that the focus on human rights violations and the involvement of human rights law experts in COIs established by UNHRC tasked to investigate violations committed in the context of an armed conflict, may lead to distortion with respect to the evaluation of the lawfulness of the conduct of military operations.[124]

Previously, a COI established by UNHRC framed a mandate to investigate violations committed only by one of the parties to an armed conflict. Such was the case with the much-disparaged Commission led by Richard Goldstone which investigated alleged violations committed by Israel during Operation Cast Lead in Gaza,[125] and also an earlier COI in Lebanon.[126] While the Goldstone Report did not reveal serious violations committed by Hamas, it is worth mentioning that Israel could have saved itself a lot of trouble had it cooperated with the inquiry from the start and allowed access to the West Bank for investigations.[127] Nevertheless, any politically imbalanced mandates may have serious consequences for the credibility and impartiality of the findings involving legal assessment of facts and conduct.

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[124] T. Boutruche, "Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice", *Journal of Conflict and Security Law,* Volume 16, 2011, p. 105.

[125] Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 15 September 2009, p. 25.

[126] J. Stewart, "The UN Commission of Inquiry in Lebanon: A Legal Appraisal", *Journal of International Criminal Justice*, Volume 5, 2007, p.1039.

[127] OHCHR Press Release, "UN Fact Finding Mission finds strong evidence of war crimes and crimes against humanity committed during the Gaza conflict; calls for end to impunity", 15 September 2009, available at: https://www.ohchr.org/en/press-releases/2009/10/un-fact-finding-mission-finds-strong-evidence-war-crimes-and-crimes-against?LangID=E&NewsID=91.

Most COIs being established focus more on accountability and compliance with international law, disregarding the will of the States in focus. The Myanmar and Syrian governments have consistently opposed the establishment of COIs to investigate their internal conflicts, claiming that these would breach their territorial integrity and sovereignty.[128] This has led to access being extremely limited and thus leading to the same structural flaws highlighted previously.

In concluding this section, stakeholders should consider issues arising from shortcomings that have been identified. Can the UNHRC continue to remain the appropriate body to establish a COI to investigate situations where serious IHL violations are going on? If there are lingering doubts, would it not be more prudent for COIs established by the UNHRC to be composed of a multidisciplinary team with investigators, forensic experts, anthropologists and legal experts, instead of an exclusive grouping of only human rights experts? Funding would be a constant challenge, but lessons can be learned from the IHFFC which includes diverse teams of experts as part of its commissions. Most importantly, concerted diplomatic outreach ought to ensure that other political organs such as the UNSC and the UNGA share the burden of establishing COIs instead of shifting the onus for global accountability only on the UNHRC. This would in turn prevent some of the widespread criticism that many UNHRC-established COIs face. In the interim, COIs being established should imbibe in their workings the fundamental principles of IHRL and IHL, namely, "do no harm, independence, impartiality, transparency, objectivity, confidentiality, credibility, visibility, integrity, professionalism and consistency".[129]

6. Conclusion

While reminding the world that human rights is and will continue to remain at the core of the UN, Kofi Annan in his seminal memoir provides an antidote to complacency by underlining that:

> When civilians are attacked or killed because of their ethnicity, the world looks to the UN to speak up for them. When women

[128] Report of the independent international fact-finding mission on Myanmar, U.N. Doc. A/HRC/39/64, 12 September 2018; Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/40/70, 31 January 2019.

[129] OHCHR, above note 123, pp. 33-35.

> and girls are denied their right to equality, the world looks to the UN to take a stand.[130]

This paper has attempted to reveal that in the face of impunity, *ad hoc*, impartial and independent COIs can act as bridges between the enforcement of international laws and political will (or the lack thereof).

6.1 COIs and Global Governance

Despite potential pitfalls relating to various concerns on the provision of fair trial, COIs provide first-hand accounts of the conflict, situation of victims and the degree of involvement of various parties to a conflict. Due to this structural and operational flexibility COIs can have a positive effect on various aspects surrounding a conflict situation. By documenting atrocities, COIs strengthen advocacy campaigns as they bear witness to people's suffering. By focusing on truth-seeking and preservation of historical facts, COIs play a critical role in transitional justice initiatives by potentially:

> contribut[ing] to the embedding of a new human rights culture through the active dissemination of personal testimonies which can sensitise the public to past violations, assist[ing] in rewriting of school textbooks and other educational materials, and lead[ing] to recommendations for new forms of human rights practice.[131]

Creating a record of past abuses is indeed "helpful with the prosecution of perpetrators, identification of victims for reparations programs, and the planning of memorials".[132] By reinforcing the notion of "individual" as opposed to "group" responsibility, COIs pave the way for post-war inter-ethnic reconciliation whilst absolving groups of collective guilt that might have the potential of spurring nationalist narratives for the next war.[133]

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[130] Kofi Annan, *Interventions: A Life in War and Peace*, Penguin Group, p. 89.
[131] Elisabeth Baumgartner and others, "Documentation, Human Rights and Transitional Justice", *Journal of Human Rights Practice*, Volume 8, 2016, p. 1.
[132] *Ibid*.
[133] Akhavan, above note 15, p. 81.

From Côte d'Ivoire[134] to Darfur[135] and Libya,[136] COIs have not just functioned as a self-standing institutional arrangement but operated at the services of judicial mechanisms such as the ICC and various regional human rights courts.[137] For instance, the ICC was assisted in its criminal investigations by material from the Waki Commission Inquiry Report into Post-Election Violence concerning the post-2007 presidential election upheaval in Kenya.[138] That Commission placed the names of those deemed most culpable of the violence concerned within a sealed envelope which was then sent to the Panel of Eminent African Personalities chaired by former UNSG Annan, then was eventually transferred to the Prosecutor of the ICC.[139] Alongside factual and legal assessments of circumstances, various COIs have also provided recommendations for the future resolution of disputes.[140] The Independent Fact-Finding Mission ("IFFM") had a great impact in recent years when it determined the need for Myanmar to be held liable for the crime of genocide against the Rohingyas.[141] The IFFM's report outlining systematic stripping of human rights and dehumanisation of the Rohingyas[142] formed the basis of The Gambia's application before the ICJ followed by its extensive analysis by the World Court in its declaration of Provisional Measures.[143]

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[134] International Criminal Court, *Situation in Côte d'Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire*, ICC-02/11–14, 2011, p. 16.

[135] ICC Press Release, "ICC – The Prosecutor of the ICC opens investigation in Darfur", ICC-OTP-0606-104, 2005, available at: https://www.icc-cpi.int/Pages/item.aspx?name=the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur.

[136] UNHRC Res. A/HRC/RES/S-15/1, 25 February 2011.

[137] European Court of Human Rights, *A.H. and J.K. v. Cyprus*, Applications nos. 41903/10 and 41911/10, 2015, p.121.

[138] "Report of the Commission of Inquiry into Post Election Violence", 2008, available at: https://www.worldcat.org/title/report-of-the-commission-of-inquiry-into-post-election-violence-cipev/oclc/263606369.

[139] International Center for Transitional Justice, "The Kenyan Commission of Inquiry into Post-Election Violence", available at: https://www.ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf.

[140] J.-N. Agnieszka, "Fact-Finding", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2011.

[141] Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2, 17 September 2018.

[142] *Ibid.*, para. 1440.

[143] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (*Gambia v Myanmar)*, Provisional measures, ICJ GL No 178, ICGJ 540, 23 January 2020.

Reports of COIs have also led to the coherent development of international law. One of the ground-breaking contributions of the "Bassiouni Commission", created by UNSC in the aftermath of the wars in Yugoslavia, was to facilitate the gradual recognition of sexual crimes as not just war crimes but as systematic methods or means of warfare.[144] Various international tribunals tried many cases on this basis.[145] The latest report of the South Sudan Commission, in its forty-six pages of analysis, anchored around 140 witness statements and 234 documents, makes a significant contribution to the development of jurisprudence on starvation in conflict as a method of warfare.[146] "Starvation" implicates not just civil and political rights but also economic, social and cultural rights ("ESCR") such as the right to food.[147] While previous scholarly works have focused primarily on the interactions between civil and political rights and their related IHL rules, this report makes consequential jurisprudential contributions towards the interactions between ESCR obligations alongside relevant IHL provisions.[148] Similarly, the OSCE Mission on Ukraine also outlined several ESCR violations stemming from the devastating Russian invasion. In its report, the Mission deplored the negative impact that Russian aggression has had on the rights to education, to health, to social security, to food and water and to a healthy environment.[149] Hence, by including ESCRs within its mandate COIs can help provide crucial insight into the causes of past conflict and address socioeconomic grievances which can then reduce the chances of future rights violations.[150]

Findings from COIs that identify potential instigators and perpetrators of serious crimes can further a deterrent effect particularly towards those not yet implicated. Although a thorough study ought to be completed in this area, the possibility of being named and shamed, imposed with sanctions and travel

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[144] Final Report of the Commission of Experts Established Pursuant to SC Resolution 780 (1992), UN Doc. S/1994/674, 27 May 1994, Part IV, Section F.

[145] M. Bergsmo, A. Butenschn Skre, and E.J. Wood (eds), *Understanding and Proving International Sexual Crimes*, TOAEP E-Publishers, 2012.

[146] "There is nothing left for us": starvation as a method of warfare in South Sudan, U.N. Doc A/HRC/45/CRP.3, 2020, p. 25.

[147] Tom Dannenbaum, "A Landmark Report on Starvation as a Method of Warfare", *Just Security,* 13 November 2020, available at: https://www.justsecurity.org/73350/a-landmark-report-on-starvation-as-a-method-of-warfare/.

[148] "There is nothing left for us": starvation as a method of warfare in South Sudan, above note 147, p. 8.

[149] OSCE, above note 80.

[150] Sam Szoke-Burke, "Not Only Context: Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights", *Texas. Internationall Law Journal*, Volume 50, 2015, pp. 477-483.

bans or the stigma of possibly indictment may deter potential wrongdoers. According to the 2019 report by the IFFM, "45 companies and organizations provided the Tatmadaw with USD 6.15 million in financial donations that were solicited in September 2017 by senior Tatmadaw leadership in support of the clearance operations."[151] Following the release of the report, the European Union also began reassessing trade sanctions to potentially deny Myanmar tariff-free access to the world's largest trading bloc.[152] The report also raised prospects for bringing domestic criminal charges for corporate complicity in crimes against humanity in jurisdictions across the world.

In conclusion, it is evident that COIs encompass a wide range of bodies across the international legal and political landscape. From being fact-finding missions, COIs now confront institutional normative shifts of magnitude. Yet in a world besieged by great power competition, universality of justice remains a work in progress. As this paper has indicated, international courts and tribunals, often hamstrung by the non-cooperation of States render a "reflexive" resort to COIs remarkable.[153] While not a panacea for all forms of violation, COIs are a force for good by being "at least something" as well as providing a basis for "rethinking accountability".[154] As the article demonstrates, documentations and recommendations from several COIs have considerably strengthened international law protection to combat mass atrocities. Findings from reports of COIs have the potential of being the basis on which universal jurisdiction cases can be pursued or political traction generated for preventing and halting mass atrocities through the principle of "Responsibility to Protect". Notwithstanding the ambivalent and often unintended consequences, this article underscores that faith in COIs as a bulwark against impunity remains paramount. As David Koller forewarned: "In the absence of empirical answers… one can either act on the basis of faith or refuse to act until [the] questions can be answered."[155]

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[151] Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, above note 142.

[152] Simon Adams, "The UN Security Council, the Rohingya Genocide and the Future of International Justice", *Opinio Juris,* 27 August 2020, available at: http://opiniojuris.org/2020/08/27/rohingya-symposium-the-un-security-council-the-rohingya-genocide-and-the-future-of-international-justice/.

[153] Michael A Becker, Sarah M H Nouwen, "International Commissions of Inquiry: What Difference Do They Make? Taking an Empirical Approach", *European Journal of International Law*, Volume 30, Issue 3, 2019, p. 833.

[154] *Ibid*. at 840.

[155] Koller, "The Faith of the International Criminal Lawyer", *New York University Journal of International Law and Politics*, Volume 40, No. 4, 2008, p. 1019.