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

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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

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[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

[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

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]

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[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

[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,

[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.

[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

[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

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[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

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[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

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]

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[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.