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FOREWORD

In 2023, the Asia Pacific region is stretching to the limits its traditional notion of peace; tension is rising across the world and the region. Multinationalism seems to be equally strained and incapacitated to deal with the challenges and provocations that arise each day. The challenges do not just play out on the political stage, or in the high-tech worlds of new technologies or warfare and artificial intelligence, or even outer space. The daily lives of humans living in and experiencing conflict are devastating, dull, drear, desperate.

Questions are asked daily about the relevance and applicability of IHL to modern conflicts and to the Asia Pacific region. Where there are major powers opposing each other with a war of words, where individual service people feel frustration as to lack of capacity, where some States seem to be able to attack their own population with impunity, it is tempting to think that IHL has lost its sting. Yet we do not witness in the news the everyday occurrences that demonstrate that IHL can make a difference – where families are reunited, children are released from detention, wounded people get to hospital in time. And the sting comes from each government and non-State armed group knowing inherently that they should apply IHL because it is enforceable in their own domestic laws and encompasses universal values.

We see the universal nature of IHL in two of the articles in this edition. Pimchanok Palasmith has written on an "Ethical Paradigm of Buddhism: A Buttress for Compliance with International Humanitarian Law". This article notes that both IHL and Buddhism are about governing one's conduct and avoiding evil. In this regard, Palasmith persuades us that ethical doctrines of Buddhism can be used to uphold IHL's universal nature in conflicts in Buddhist majority states.

Taking a truly modern twist on the notion of IHL being founded on traditional and religious principles, Kheda Djanaralieva, in her article, "Prohibition of the use of nuclear weapons under Islamic Law: filling the gap of International Humanitarian Law?" examines how Islamic law can be mobilized to support the prohibition of nuclear weapons. Djanaralieva notes

that particularly given the number of Muslim majority States in the Asia Pacific, and those with nuclear capabilities or ambitions, using Islamic law arguments against nuclear weapons can give weight to IHL's prohibitions.

Two articles address the most vulnerable persons in conflict – children. Yet, children can also be associated with the armed forces and go on to commit atrocities, and there their status becomes more complex. Rebecca Lloyd, in her article, "Child Soldier to Warlord: Sentencing Ongwen in the International Criminal Court", considers the vexed question of Dominic Ongwen, a child soldier-turned-commander in the Lord's Resistance Army in Northern Uganda who had been convicted and sentenced of numerous war crimes in 2021 by the International Criminal Court. Lloyd argues that the Court missed an opportunity to examine more fully the complexities of children as arms bearers and failed to address the impact of being a child soldier on the future actions of Ongwen.

Lance Ryan Villarosa also considers children as war fighters in his article, "Protecting the child who bears arms: How the status of Zones of Peace for Children under Philippine Act No. 11188 distorts International Humanitarian Law". Villarosa argues that the lawmakers thought that they were doing a commendable action in the Children in Situations of Armed Conflict Law in the Philippines when they created the notion of children being "special zones of peace" who can never be attacked. However, the reality of many conflicts means that children are used in conflict and can otherwise become a legitimate target under IHL. He argues that this poses an unacceptable burden on soldiers and might place children under more harm.

Turning from protected people to protected objects, the final article in this edition by Ramindu Perera, "Environmental destruction during armed conflict, anthropocentrism-ecocentrism divide and defining ecocide" addresses a major issue across the world now, namely the protection of the natural environment. Perera argues that the focus on the environment as a people-centred good does not sufficiently address the damage we see to the environment in conflict; we need to think of the environment as a standalone entity in need of protection for itself for there to be any action. He addresses the crime of ecocide which is developing traction in the international community and the strengths and weaknesses of the proposed definition from an ecological perspective.

This is the fourth edition of the Asia Pacific Journal of IHL and this year, it demonstrates our continued commitment to publishing high quality articles on new and emerging issues of IHL or those which address a well-known subject of IHL from an innovative perspective. As an operational legal adviser for ICRC, my focus is on making IHL relevant to each fighter who needs to directly apply IHL in conflict, as well as to governments who need to develop, promote and accept the treaties and fully implement them into domestic law. The articles in this edition will certainly help me in my continued desire to demonstrate the on-going relevance of IHL to everyone in the Asia Pacific region and beyond and I trust it does for our readers too.

I would like to extend my sincere gratitude to the Board of Experts for their continuous guidance in this endeavour. I would also like to express my great thanks to the entire team at the UPIILS for their tireless efforts in producing this edition, guided by Ms Paula Deveraturda. Special thanks go to the Managing Editors, Prof. Rommel J Casis of UPIILS and my colleague, Ms. Sahar Haroon, for their expert guidance, support and partnership in producing this Journal.

KELISIANA THYNNE
International Committee of the Red Cross

PREFACE

The Institute of International Legal Studies (IILS) of the Universities of the Philippines (UP) Law Center and the International Committee of the Red Cross are pleased to release the 2023 Edition of the Asia-Pacific Journal of International Humanitarian Law.

Now on its fourth year of publication, APJIHL continues to be a platform for experts and scholars to forward IHL scholarship in the region. Over the years, the Journal has published peer-reviewed articles exploring intersections between armed conflict and other areas explored by international law, such as environmental protection, cultural heritage and religion, health, humanitarian policy, and human rights, from the perspective of or experience in the Asia-Pacific. Every edition has emphasized the region's perspective and contribution to the development of IHL, with the esteemed members of the Journal's Board of Experts providing strategic direction as the world found itself navigating a different landscape post COVID-19. While the opportunities and challenges for IHL scholarship have likewise evolved, APJIHL continues to pursue its purpose of creating a space for inter-disciplinary discussions necessary in advancing the body of rules in situations of armed conflict.

Four editions of APJIHL have been made possible through the long-standing partnership between UP IILS and ICRC. UP IILS has been a research hub for IHL even prior to the First Edition of the Journal in 2020, while ICRC's mandate has always included the promotion of IHL. APJIHL has been a key addition to the UP Law Center's roster of research and publications – unique and useful in its relevance in not just advancing legal scholarship in Asia-Pacific, but being a starting point for legal reforms in rights protection, international relations, and rule of law. With the publication of the 2023 Edition and the Call for Papers for the 2024 Edition, APJIHL will

continue to stay true to its purpose and provide a platform for voices of those from the region.

UP-IILS would like to thank the research and administrative staff of the UP Law Center who most generously assisted with the editorial and organizational needs of the Journal. This volume would not be possible if not for the continued hardwork and efforts of Associate Editor Atty. Joan Paula Deveraturda, Assistant Editor Prof. Michael B. Tiu, Jr., Copy Editor Bienelle T. Aronales, Editorial Assistants Ella Edralin and Chester Louie Tan, and Alyanna Bernardo who prepared the lay-out. We also dedicate the 2023 Edition to Mr. Mario Dela Cruz – a valuable member of APJIHL who passed away this year.

We would also like to thank the ICRC, particularly Ms. Sahar Haroon and Ms. Kelisiana Thynne whose continued support made this fourth volume possible.

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Child Soldier To Warlord Overnight: Sentencing *Ongwen* in The International Criminal Court

Rebecca Lloyd[*]

In December 2022, the International Criminal Court (ICC) delivered its appeal decision in the case of Dominic Ongwen, a child solider-turned-commander in the Lord's Resistance Army in Northern Uganda who had been convicted and sentenced of numerous war crimes in 2021. The case has reopened a debate about how courts should deal with child soldiers-turned-perpetrators, or CSTPs. The ICC, the author contends, eschewed a protectionist approach towards children, and drew a "bright line" between children as victims, and adults as perpetrators. As the author examines, Ongwen's agency or ability to take action in the conflict setting was not fully explored by the Court. In the author's view, this was an opportunity missed. The author advocates for a more nuanced approach, which foregrounds agency, and places protectionism and "bright line" thinking in the background.

Keywords: Ongwen, International Criminal Law, International Criminal Court, Child Soldier, Sentencing, Appeals Chamber

1. Introduction

> *The phenomenon of perpetrator victims is not restricted to international courts. It is a familiar one in all criminal jurisdictions… But having suffered victimisation in the past is not a justification or an excuse to victimise others.*

[*]Rebecca Lloyd (née Rowling) is a Master of Laws candidate at the University of Melbourne. She is a Principal Prosecutor employed by the Queensland Government. The author thanks the anonymous reviewers for their helpful comments. The author also thanks Dr Shahram Dana, Senior Lecturer at Griffith University, for reviewing a draft of this paper and providing valuable comments: rebeccarowling@gmail.com.

Each human being must be taken to be endowed with moral responsibility for their actions.[1]

On 6 May 2021, a majority of two out of three Judges of the International Criminal Court (ICC) sentenced former Lord's Resistance Army (LRA) commander Dominic Ongwen to 25 years in prison.[2] Earlier, on 4 February 2021, he had been convicted of 61 counts of war crimes and crimes against humanity, which included murder, torture, cruel treatment, enslavement, persecution, forced marriage, rape, sexual slavery, forced pregnancy, and conscripting children under the age of 15 and using them to participate actively in hostilities.[3] Ongwen was in his mid-20s during the period of the charged acts that took place in Northern Uganda, which spanned between 1 July 2002 and 31 December 2005.[4] He was abducted by the LRA in Uganda at around nine years old and became a child soldier under the control of people including the notorious LRA leader Joseph Kony. He was trained to commit crimes, including killing people, and rose through the ranks to commander of the Sinia Brigade.[5] It was a landmark decision, not least because Ongwen was himself a victim of the crimes he was convicted of, including conscription of children and enslavement.[6]

In sentencing Ongwen in accordance with the Rome Statute,[7] the ICC considered submissions that his past circumstances as a child soldier who had been abducted into the LRA in mitigation. The ICC noted that the gravity of

[1] International Criminal Court, *Prosecutor v Ongwen (Trial)*, Case No ICC-02/04-01/15, (Trial Chamber), 6 December 2016, (per Fatou Bensouda, Prosecutor).
[2] International Criminal Court, *Prosecutor v Ongwen,* Case No ICC-02/04-01/15, Sentence (Trial Chamber), 6 May 2021 ("*Ongwen Sentence*").
[3] International Criminal Court*, Prosecutor v Ongwen,* Case No ICC-02/04-01/15, Judgment (Trial Chamber), 4 February 2021 ("*Ongwen Trial Judgment*").
[4] Ibid para. 1.
[5] *Ongwen Sentence*, above note 2, paras. 85, 68, 73.
[6] Mark Drumbl, "Victims Who Victimise" *London Review of International Law* Vol. 4 No. 2, 2016, pp. 217, 236 ("Victims who Victimise"); Erin K Baines "Complex political perpetrators: Reflections on Dominic Ongwen" *Journal of Modern African Studies* Vol. 47, No. 2, 2009 pp. 163 -164.
[7] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) ("*Rome Statute'*). See especially Art. 78.

his crimes would warrant a life sentence – the maximum available.[8] While acknowledging that Ongwen committed the crimes as an adult, it concluded that in the circumstances of Ongwen's abduction and early experiences in the LRA, a reduction of a one-third in sentence would "generally be fitting and reasonable," depending on the particulars of each crime.[9] The Defence appealed against Ongwen's conviction and sentence in August 2021.[10] On 15 December 2022, the Appeals Chamber of the ICC handed down its decision, affirming the sentence given by the Trial Chamber.[11]

As will be explored, the ICC has presided over trials of defendants who have been convicted of recruitment, conscription and use of child soldiers. But what about the former child soldiers that have both suffered and perpetrated terrible crimes? This group of offenders, child soldiers-turned-perpetrators (CSTPs), have a unique offending profile: in Kwik's words, they have "walked through two phases of life: as a child soldier and, later, an adult soldier."[12] In 2021, Ongwen became the first CSTP the ICC sentenced. However, he is not the only CSTP who has faced criminal proceedings.[13] Ongwen has been dubbed a complex political perpetrator. He is responsible for his actions, but his accountability is mitigated by the circumstances that gave rise to his victim status.[14] The novel issue the ICC faced raised questions

[8] See, e.g., *Ongwen Sentence*, above note 2, para. 386.
[9] Ibid para. 88.
[10] International Criminal Court, "Ongwen case: hearing on the Defence appeals against verdict and sentence – Practical Information," 11 February 2022, available at https://www.icc-cpi.int/news/ongwen-case-earing-defence-appeals-against-verdict-and-sentence-practical-information (all internet references were accessed on or before January 2023).
[11] International Criminal Court*, Prosecutor v Ongwen*, Case No ICC-02/04-01/15, 15 December 2022, Sentence Appeal Judgment (Appeals Chamber) ('*Ongwen Sentence Appeal*').
[12] Jonathan Kwik "The Road to Ongwen: Consolidating Contradictory Child Soldiering Narratives in International Criminal Law" *Asia Pacific Journal of International Humanitarian Law* Vol. 1, No. 1, 2020, pp. 135, 136.
[13] In March 2022, the trial against Thomas Kwoyelo commenced in the High Court in Kampala. A former child soldier, abducted into the LRA, he faces 93 counts of war crimes and crimes against humanity, including recruitment of child soldiers. He unsuccessfully applied for his case to be transferred to the ICC: Grace Matsiko, "Uganda: Kwoyelo, 13 Years In Custody Without Trial'' *Justice Info Net* , 4 April 2022, available at https://www.justiceinfo.net/en/89875-uganda-kwoyelo-13-years-custody-without-trial.html.
[14] E Baines, above note 6, pp. 180-181.

of a legal and moral nature, which could set a precedent for future cases involving CSTPs.

Part 1 of this article provides the legal background to the proceedings against Ongwen by outlining age thresholds for lawful participation in armed conflict where the trend is a "bright line" approach, with only over-18s responsible for war crimes. It notes that protectionism[15] is the dominant paradigm in key international conventions and treaties concerning children in armed conflict. This is contrasted with a rights-based approach, where children as seen as active participants with evolving capacity.

In Part 2, International Criminal Law's (ICL's) "bright line" approach is further explored in the context of the Ongwen sentence. The Court's language in describing his actions before the age of 18 will be considered, with an emphasis on its protectionist overtones. The ICC also proffered that a large one-third reduction could be appropriate when sentencing CSTPs. The reasons of partly dissenting Judge Raul C. Pangalangan, who would have sentenced him to 30 years, are considered. It is argued that the Court did not fully interrogate Ongwen's agency as a CSTP, which in the author's view was an opportunity missed.

The article posits that the majority of the ICC's reasoning in Ongwen perpetuates a "bright line" approach to criminal liability in ICL, which positions adults as perpetrators and children as victims, in line with a protectionist approach. The Court's reasoning did not reflect the complex life of Ongwen, a CSTP, who had been both a child soldier and an adult perpetrator. Ultimately, the article argues that an assessment of a CSTP's agency should be at the foreground of a court's analysis, with the protectionist and "bright line" approaches in the background, so that CSTPs' complex histories can properly be reflected in sentencing.

[15] Jill Stauffer, "Law, Politics, the Age of Responsibility, and the Problem of Child Soldiers" *Law, Culture and the Humanities* Vol. 16, No. 1, 2020, pp. 42, 44.

2. Part 1: Child soldiers at law and in policy

2.1 International condemnation of the use of child soldiers

An estimated 250,000 to 300,000 children under the age of 18 are soldiers[16] in the world at any given time.[17] Child soldiers are not a monolithic phenomenon.[18] There is no easy formula for the types of conflicts or societies in which child soldiers are involved.[19] Child soldiering is not just an African issue,[20] and child soldiers have been utilised in diverse places such as Columbia, Haiti, the countries of the former Yugoslavia and Sri Lanka.[21] The traditional narrative is that child soldiering violates children's rights, and is linked to the psychological "destruction of childhood."[22] The ICC itself has previously acknowledged that becoming a child soldier can hamper a child soldier's healthy psychological development.[23]

In recent times, there has been a proliferation of treaties and other instruments in International Human Rights Law and International

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[16] The term "child soldiers," where it appears throughout the article without further explanation, is taken to refer to a child under the age of 18 who is engaged in active combat on behalf of an armed group: PW Singer, *Children at War,* Pantheon Books, New York, 2005, p. 7. This also follows the approach of the 1989 Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entered into force 2 September 1990) *("Convention on the Rights of the Child"* or *"CRC"*), which defines as a child as anyone under the age of 18. The United Nations recently reported that unfortunately, the Covid-19 crisis has created further risks of recruitment and use of children in armed conflict through factors including dwindling education opportunities: United Nations, "COVID fuelling risk of recruitment and use of children in conflict, UN and EU warn on International Day" *UN News*, 12 February 2021, available at https://news.un.org/en/story/2021/02/1084502.

[17] Michael Wessells, *Child Soldiers: From Violence to Protection,* Harvard University Press, Cambridge, Massachusetts, 2006, p. 9, cited in Matthew Talbert and Jessica Wolfendale, *War Crimes: Causes, Excuses, and Blame,* Oxford University Press, New York, 2018, p. 113.

[18] Renée Nicole Souris, "Child soldiering on trial: an interdisciplinary analysis of responsibility in the Lord's Resistance Army," *International Journal of Law in Context,* Vol. 13, No. 3, 2008, pp. 316, 318.

[19] David Rosen, "Child Soldiers, International Law and the Globalization of Childhood" *American Anthropologist*, Vol 109, 2007, pp. 296, 298.

[20] Wendy De Bondt and Rozelien Van Erdeghem, "Child Soldiers Caught in a Cultural Kaleidoscope" *The International Journal of Children's Rights*, Vol 30, 2022, pp. 785, 786.

[21] Steven Freeland, "Mere Children or Weapons of War — Child Soldiers and International Law" *University of La Verne Law Review*, Vol 29, 2007, pp. 19, 21.

[22] See PW Singer, above note 18.

[23] International Criminal Court, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Sentencing Judgement (Trial Chamber), 12 July 2012, para. 41.

Humanitarian Law (IHL) and a flurry of jurisprudence of international criminal courts and tribunals, extensively regulating[24] the use of child soldiers.[25] However, the definition of a child, and at what age a child can legally participate in hostilities, has been contentious.[26] The 1989 *Convention on the Rights of the Child* (CRC),[27] created a "child's rights regime." It is one of the world's most widely ratified treaties,[28] and provides in Article 1 that a child for the purposes of the CRC is anyone under the age of 18. Article 38 of the CRC requires States to take "all feasible measures" to ensure that any persons under 15 do not take an active part in hostilities[29] and to refrain from recruiting any person under 15 into their armed forces.[30] Further, Article 38(1) also requires States Parties to undertake to respect and ensure respect for the rules of IHL applicable in armed conflicts which are relevant to the child. In IHL, the situation is primarily governed by the 1949 Geneva Conventions and the Additional Protocols thereto.[31] Similarly, at IHL, the age of 15 serves

[24] Matthew Happold, 'Child Soldiers in International Law: The Legal Regulation of Children's Participation in Hostilities' *Netherlands International Law Review*, Vol. 48, 2000, p. 27.
[25] J Kwik, above note 12, pp. 140-141.
[26] Sandhya Nair, "Child Soldiers and International Criminal Law: Is the Existing Legal Framework Adequate to Prohibit the use of Children in Conflict?" *Perth International Law Journal*, Vol. 2, No. 40, 2017.
[27] *Convention on the Rights of the Child*, above note 16.
[28] Julie McBride, *The War Crime of Child Soldier Recruitment*, Asser Press, The Hague, 2014, pp. 15, 98.
[29] See Art. 38(2).
[30] See Art. 38(3).
[31] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed
Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); supplemented by 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) ("Additional Protocol I"); Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts , 1125 UNTS 609, 8 June 1977 (entered into force 12 July 1978) ("Additional Protocol II").

as a cut-off.[32] The CRC's four guiding principles are as follows: non-discrimination, the best interests of the child, the right to be heard and the right to life.[33] CRC Article 14 also provides a child's right to freedom of thought, conscience and religion, in line with their evolving capacities.[34] In the CRC, a balance was struck between recognising children's vulnerability, whilst also recognising their evolving competence and agency, along a continuum. [35] According to Derluyn et al, the CRC and children's rights law generally overemphasise children's vulnerability and need for protection, at the expense of acknowledgement of agency.[36]

Throughout the years, the internationally accepted minimum age for recruitment of children in armed conflict has trended towards a rise from 15 to 18 years.[37] Concomitantly, the language of several of the instruments has emphasised the special vulnerability of children and their status as victims. The *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*,[38] dated 2000, reinforces the CRC.[39] It did not

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[32] Cecile Aptel, "The Protection of Children in Armed Conflict" in Ursula Kirkelly and Ton Liefarrd (eds) *International Human Rights of Children,* Springer, New York, 2019, p. 524. Additional Protocol I (above note 31) asserts that State Parties shall take all feasible measures to ensure children under 15 do not take an active part in hostilities (Art. 77(2)). In respect of non-state armed forces, Additional Protocol II (above note 31) provides an absolute prohibition on States parties recruiting children under the age of 15 or allowing them to take part in hostilities (Art. 4(3)(c)).

[33] W De Bondt and R Van Erdeghem, above note 20, p. 813.

[34] Mark Drumbl and John Tobin, "The Optional Protocol on Children and Armed Conflict" in John Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary*, Oxford University Press, Oxford, 2019, p. 1685 ("The Optional Protocol").

[35] As noted by the Committee, "the more the child knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for him or her have to transform direction and guidance into reminders and advice, and later to an exchange on an equal footing. Similarly, as the child matures, his or her views shall have increasing weight in the assessment of his or her best interests." See: CRC Committee, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1), at UN Doc. CRC/C/GC/14, 29 May 2013.

[36] Ilse Derluyn, Wouter Vandenhole , Stephan Parmentier and Cindy Mels, "Victims and/or perpetrators? Towards an interdisciplinary dialogue on child soldiers'" *BMC International Health and Human Rights* Vol 1, 2015, p. 4.

[37] J Kwik, above note 12, p. 140.

[38] *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,* UNGA Res 54/263, UN Doc A/RES/54/263, 25 May 2000.

[39] It operates as a separate multilateral treaty to the CRC but reinforces the CRC: M Drumbl and J Tobin, "The Optional Protocol," above note 36, p. 1667.

completely achieve a "straight 18" approach, with Article 3 requiring States to increase the minimum age of voluntary recruitment from that set out under CRC Article 38, of 15 years of age, while failing to specify the age.[40] Article 4(1) requires States to raise the age to 18 for participation in hostilities and for voluntary recruitment. The idea of children as victims in need of protection is further echoed in non-binding instruments such as the 1997 *Capetown Principles*,[41] which posit that a minimum age of 18 years should be established "for any person participating in hostilities and for recruitment in all forms into any armed forces and armed groups." The 2007 *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, known colloquially as the Paris Principles,[42] proclaim at Principle 3.6 that children "should be considered primarily as *victims* of offences against international law; not only as perpetrators" (emphasis added).

Similarly, at ICL, while adults who recruit and use child soldiers are punished,[43] child soldiers under 18 are almost universally spared from responsibility. At ICL, the age of 18 is effectively the threshold for criminal responsibility.[44] The situation is similar in the *ad hoc* tribunals.[45] Almost all

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[40] One common view is that this means that the minimum age has effectively been raised to 16: M Drumbl and J Tobin, "The Optional Protocol," above note 36, p. 1710.

[41] Symposium on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa, "Cape Town Principles And Best Practice On The Prevention Of Recruitment Of Children Into The Armed Forces And Demobilization And Social Reintegration Of Child Soldiers In Africa" *UNICEF*, 2013, available at https://openasia.org/en/wp-content/uploads/2013/06/Cape-Town-Principles.pdf.

[42] Paris Principles Steering Group, "Principles And Guidelines On Children Associated With Armed Forces Or Armed Groups" *UNICEF*, 2007, available at https://www.unicef.org/mali/media/1561/file/ParisPrinciples.pdf.

[43] See Art. 8 of the Rome Statute, which identifies as a war crime the "conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities."

[44] The Rome Statute, in Art. 26, excludes from its jurisdiction persons who were under 18 at the time of the alleged commission of the crime.

[45] For example, the statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda did not cite a minimum age for criminal responsibility, but no one under 18 has appeared before the Tribunals. See *Statute of the International Criminal Tribunal for the Former Yugoslavia* (entered into force 25 May 1993); *Statute of the International Criminal Tribunal for Rwanda* (entered into force 8 November 1994). The *Statute of the Special Court of Sierra Leone* (entered into force 12 April 2002), limited the Court's jurisdiction to defendants over 15 years at the time of the alleged offence, specifically stating

United Nations member states have agreed to formal processes to protect child soldiers from prosecution.[46] There is therefore an "impunity gap,"[47] whereby children between 15 and 18 can lawfully, at least under IHL and the CRC, in certain circumstances take part in armed conflict, but cannot be prosecuted for war crimes.

The common justification of the age of 18 as the cut-off for criminal responsibility, is that it is the generally accepted transition point to adulthood in modern societies.[48] However, the consensus in literature is that this is a Western view, and the choice of 18 as the onset of adulthood is not the case in all countries and cultures and obscures local cultural norms.[49] Rosen asserts that the "straight 18" position is an example of how a political agenda can be represented as an existing cultural norm. While child soldiers are a diverse group, Rosen posits that existing and competing definitions of childhood have been abandoned in favour of a single international standard. He posits that IHL adheres to "bright line" distinctions between childhood and adulthood that are, on the whole, indifferent to context.[50] In the author's view, excessive focus on chronology, in the words of Tobin and Drumbl, "may leave

in Art. 7 that should any person who was between 15 and 18 at the time of the alleged offence come before the court, amongst other things, he or she shall be treated with dignity and a sense of worth. However, the Special Court of Sierra Leone's first Chief Prosecutor said that prosecution of children under the age of 18 would never occur, as they did not bear the greatest responsibility. None have been prosecuted. See: Mark Drumbl and John Tobin, "Article 38 The Rights of Children in Armed Conflict" in John Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary*, Oxford University Press, New York, 2019, p. 1532; Gus Waschefort, *International Law and Child Soldiers*, Hart Publishing, Oxford, 2015, p. 137.

[46] Romeo Dallaire, *They Fight Like Soldiers, They Die Like Children,* Hutchinson, London, 2010, 124.

[47] This has been the subject of scholarly discussion, which is outside the scope of this paper. See, e.g., "International Criminal Court Continues Series Of Judgments Condemning Crimes Against Child Soldiers" *World Future Council*, available at https://www.worldfuturecouncil.org/judgments-against-child-soldiers; Linda Van Brakel, "Minding the Impunity Gap: Child Soldiers, International Law and Human Rights Policy," LLM thesis, Utrecht University, 2013.

[48] PW Singer, above note 18, p. 7.

[49] See, e.g., R Dallaire, above note 48, p. 157 and M Talbot and J Wolfendale, above note 17, p. 116.

[50] D Rosen, above note 21, p. 297.

unaddressed the thorny reality that agency and development operates along a continuum rather than a bright line."[51]

Agency here is defined as the extent a person is able to take action within a given context,[52] and also throughout this article, as personal autonomy. As will be advanced in the next section, ICL's sentencing regime appears to disregard the agency of a CSTP before their eighteenth birthday, which is problematic as it does not contextualise a CSTP's development of autonomy during their formative years.

2.2. Protectionism

As discussed above, the laws regulating the recruitment and use of children in conflict emphasise the need to protect children. As Rosen posits, the laws regarding child soldiers do not "consider any framework for understanding the agency of children other than extreme protectionist constructions of childhood."[53] Hanson agrees, and argues that "[c]ompeting emancipatory perspectives towards children or particular local understandings of childhood… were hardly invoked when the provisions regarding child soldiers were developed; the only framework of childhood for understanding the agency of children was a protectionist one."[54] The "faultless passive victim" trope, according to Drumbl, contradicts international human rights law's struggle to advance children's autonomy. He says this ubiquitous stereotype of the child soldier as a victim arouses sympathy.[55] Protectionism does not sit neatly with the rights-based approach that underpins the CRC. That is because protectionism assumes children have no agency.[56] The concept of children gradually gaining competence underpins the CRC.

[51] M Drumbl and J Tobin, "The Optional Protocol," above note 36, p. 1685.
[52] E Baines, above note 6, p. 165, citing Vigh.
[53] D Rosen, above note 21, p. 297.
[54] Karl Hanson, "International Children's Rights and Armed Conflict" *Human Rights and International Legal Discourse* Vol. 5, No. 1, 2011, pp. 40, 43, 50
[55] Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy*, Oxford University Press, Oxford, 2012, pp. 6 – 9, 36, 208 ("Reimagining").
[56] J Stauffer, above note 17, p. 44.

However, children's evolving competency does not appear to have been properly explored in the context of child soldiering[57] or in ICL.

2.3. Can child soldiers demonstrate agency?

The opening extract from Bensouda's opening statement, quoted at the beginning of this article, places Ongwen's moral responsibility at the foreground. Indeed, evidence suggests that child soldiers can show agency. The 2008 Survey for War Affected Youth study involving child soldiers from Northern Uganda (the SWAY study), cited by Drumbl, drew from a sample of males, including (but not limited to) abductees who were under 18 at the time of abduction.[58] It noted that among returnees, the vast majority had escaped, rather than having been rescued or released.[59] Stauffer noted that nearly one-third escaped in the disruption of battle or an ambush.[60] The research findings appeared to support the view that "however forcible the recruitment, some agency remains with the child or young adult."[61]

In Ongwen's case, it is arguable that he could have made other choices from the few good ones available to him.[62] As the Court said, "This must be acknowledged for fairness towards the many other people who, in circumstances oftentimes very similar to those in which Dominic Ongwen found himself, made choices different than him."[63] The purpose of this paper is not to advocate for changes to the relevant statutes which prevent children 18 from being prosecuted for war crimes – for example, the Rome Statute. Rather, it is argued that recognising children's agency in the context of armed conflict is important, especially when their past as a child soldier is a major factor in mitigation in sentencing. It presents a more nuanced view of development than the "bright line" and protectionist approaches. While stopping short of proposing a "blueprint" of how agency could factor into the

[57] W De Bondt and R Van Erdeghem, above note 22, p. 812.
[58] M Drumbl, "Reimagining," above note 60, p. 67.
[59] Ibid.
[60] J Stauffer, above note 17, p. 45.
[61] M Drumbl, "Reimagining," above note 60, p. 69.
[62] E Baines, above note 6, pp. 163, 182.
[63] *Ongwen Sentence*, above note 2, para. 85.

sentencing processes, Part 2 argues that an analysis of young Ongwen's agency was lacking in the sentencing decision.

3. Part 2: Ongwen in the International Criminal Court

3.1. Background

This article argues that the ICC's reasoning treated Ongwen not as a perpetrator and an adult, but as a victim and a child.[64] In particular, that the Court considered Ongwen's past as a child soldier as a circumstance in mitigation through a protectionist lens, which failed to account for his complex prior life as a child soldier and any agency he possessed. The author contends that, had the Court included an analysis of Ongwen's agency during his formative years, that would have contextualised his criminal activity in adulthood.

At the outset, it is noted that Ongwen is the third of three offenders sentenced by the ICC for the recruitment and use of child soldiers. The other two defendants received sentences of varying lengths. In 2012, the ICC sentenced Thomas Lubanga Dyilo (Lubanga), former President of the Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo of the Democratic Republic of the Congo (DRC). He was convicted of two charges of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities,[65] and was sentenced to 14 years' imprisonment.[66] In 2015, Bosco Ntaganda was found guilty of 18 counts of war crimes, including three counts of enlisting and conscripting of children under the age of 15 years and using them to participate actively in

[64] Mark Drumbl, '"Getting" an Unforgettable Gettable: The Trial of Dominic Ongwen' *Justice in Conflict*, 5 February 2021, available at https://justiceinconflict.org/2021/02/05/getting-an-unforgettable-gettable-the-trial-of-dominic-ongwen/.

[65] International Criminal Court, *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment, (Trial Chamber), 5 April 2012. He was found guilty of two charges, which related to separate timeframes, respectively, from early September 2002 to 2 June 2003 and from 2 June to 13 August 2003.

[66] International Criminal Court, *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Sentencing Judgment (Trial Chamber), 12 July 2012. The sentence was appealed. The 14-year sentence was upheld by the Appeals Chamber on 1 December 2014: International Criminal Court, *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgement (Appeals Chamber), 1 December 2014 ("Lubanga Sentencing Appeal Judgment").

hostilities, in the Ituri region of the DRC. [67] On 17 November 2019, he was sentenced to 30 years' imprisonment, the maximum available under the Rome Statute.[68]

3.1.1. Sentencing framework

The Rome Statute has the power to impose a term of imprisonment on a convicted person, up to life. Article 76 states, "[i]n the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence." Pursuant to Article 77 of the Rome Statute, the Court has the power to impose on a person who has been convicted of a crime under the Statute, either imprisonment, which may not exceed a maximum of 30 years ((1)(a)), or a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person ((1)(b)).[69] The sentencing framework is set out in Article 78 of the Rome Statute, and Rule 145 of the Court's *Rules of Procedure and Evidence* ('the Rules').[70]

Article 78(3) of the Statute mandates a two-step[71] sentencing process: to pronounce a sentence for each crime of which the convicted person was convicted, and a joint sentence specifying the total period of imprisonment. According to Article 78(1), in imposing a sentence, the Court may take into

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[67] International Criminal Court *Prosecutor v Ntganda*, Case No. ICC-01/04-02/06, Judgment (Trial Chamber), 8 July 2019.

[68] International Criminal Court*, Prosecutor v Ntganda,* Case No. ICC-01/04-02/06, Sentencing Judgment (Trial Chamber), 7 November 2019. This was appealed and the sentence was upheld by the Appeals Chamber on 30 March 2021: International Criminal Court, *Prosecutor v Ntganda*, Case No. ICC-01/04-02/06 (Sentencing Appeal Judgment (Appeals Chamber), 31 March 2021.

[69] Art. 110(3) of the Rome Statute sets a high threshold, at 25 years, for a review when a period of life imprisonment is imposed. See Diletta Marchesi, 'Imprisonment for Life at the International Criminal Court' *Utrecht Law Review* Vol. 14, No. 1, 2018, p. 97.

[70] International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3, 9 September 2002 ("*The Rules"*). For a critical examination of the ICC sentencing framework and Rule 145 see Shahram Dana, "Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing" *Journal of International Criminal Law & Criminology* Vol. 99, No. 4, 2009, pp. 905-924.

[71] *Ongwen Sentence*, above note 2, para. 136.

account factors such as the gravity of the crime and the individual circumstances of the convicted person,[72] echoing the language of Article 77. Pursuant to Rule 145(1)(a), the Court must bear in mind that the totality of the sentence "must reflect the culpability of the convicted person." Rule 145(2) sets out mitigating and aggravating factors the Court must take into account.[73]

As acknowledged by the Trial Chamber in *Prosecutor v Jean-Pierre Bemba Gongo* (Bemba),[74] the Court must first identify and assess the relevant factors in Article 78(1) and Rule 145(1)(c)[75]. It must then balance all relevant factors[76] pursuant to Rule 145(1)(b) and pronounce a sentence for each crime, as well as a joint sentence specifying the total period of imprisonment.[77] In Ongwen, the Court noted the Lubanga Appeals Chamber's statement that the Court's texts do not lay down any explicit requirements for how the factors should be balanced, noting that "the weight given to an individual factor and the balancing of all relevant factors in arriving at the sentence is at the core of a Trial Chamber's exercise of discretion."[78]

[72] This is echoed in Rule 145(3), which refers to these factors and adds, "as evidenced by the existence of one or more aggravating circumstances."
[73] See Rule 145(1)(b), which requires the Court to balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime.
[74] International Criminal Court, *Prosecutor v Jean-Pierre Bemba Gongo*, Case No ICC-01/05-01/08, Sentencing Judgment, (Trial Chamber), 21 June 2016, para. 12 ("*Bemba Sentence"*).
[75] A number of factors for the Court's consideration are set out at Rule 145(1)(c), including relevantly, 'and the age, education, social and economic condition of the convicted person.
[76] Stated to include any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime.
[77] The sentencing court in Bemba acknowledged there were several possible approaches, but ultimately considered that the Rule 145(1)(c) factors were relevant to an assessment of the Article 78(1) factors, noting that some of the Rule 145(1)(c) factors may instead be relevant to an assessment of the mitigating and aggravating circumstances identified in Rule 145(2). *Bemba Sentence,* above note 79, para. 13.
[78] *Ongwen Sentence*, above note 2, para. 50, citing Lubanga Sentencing Appeal Judgment, above note 71, para. 43.

3.1.2. Parties' submissions

The Prosecution contended for a joint sentence for all the crimes of at least 20 years, but lower than 30 years.[79] The Prosecution submitted that the extreme gravity of Ongwen's crimes, numerous aggravating circumstances, and Ongwen's key role in the crimes, would ordinarily warrant a sentence at the highest range available under Article 77(1) of the Rome Statute. However, it submitted that one circumstance which merited a reduction in the sentence was Ongwen's abduction into the LRA. The prosecution conceded Ongwen's years as a child and adolescent in the LRA must have been extremely difficult. While noting that Ongwen's circumstances did not directly diminish his responsibility, and that any sympathy for his misfortune should be balanced with respect for the victims,[80] it submitted that, in its view, the circumstances warranted approximately a one-third reduction in the length of the sentence to be imposed on Ongwen.

Counsel for the defence advocated for a sentence of 10 years. The Defence noted circumstances that militated in favour of a lenient sentence for Ongwen,[81] including that he was abducted during a developmental age and continued to develop in the bush in an unfavourable environment under the control of Joseph Kony.[82]

Citing the relevant test in Articles 77(1)(b) and 78(3) of the Rome Statue, and Rule 145(3) of the Rules, the Court said that the representatives for the victims asked for a life sentence as a single joint sentence.[83] The Court said that the victims noted that the crimes for which Ongwen was convicted were committed as an adult, after rising through the ranks of the LRA and becoming commander of the Sinia Brigade.[84] The victims' representatives said they did not intend to minimise the fact that Ongwen was abducted at a young age and faced many sufferings, but that, in their view, such did not

[79] *Ongwen Sentence*, above note 2, para. 9.
[80] Ibid para. 66.
[81] Ibid para. 10.
[82] Ibid para. 67.
[83] *Ongwen Sentence,* above note 2, para 383.
[84] Ibid para. 68.

justify the path he chose to take in the LRA or warrant any reduction of his sentence.[85] They opined that Ongwen would not have committed the crimes he did between 2002 and 2005 had he escaped from the LRA or chosen to behave in a different manner while in a position of power in the LRA.[86]

3.1.3. Sentencing process

The ICC followed the "two-step" sentencing process outlined above. In the core of the judgment, the Court pronounced sentences for each of the charges, including the highest individual sentence of 20 years of imprisonment. The ICC considered the gravity of the crime and the circumstances of the defendant, noting that Ongwen was in no way forced to commit the crimes.[87] In determining the length of each individual sentence, the Court said that it was required to strike a balance between competing considerations. It then went on to list a number of circumstances which it said must be given a certain weight, including his upbringing in the LRA – in particular his abduction as a child, the interruption of his education, the killing of his parents, and his socialisation in the extremely violent environment of the LRA.[88] The Court accepted that Ongwen's prior history as a child soldier who had been abducted was relevant as a mitigating factor.[89]

At various times throughout the 139-page decision, it appeared that the Court was going to sentence Ongwen to life imprisonment, but that his history as a child abductee saved him.[90] Ongwen's childhood circumstances were compelling, the Court said (repeated in its entirety here as it usefully sums up the Court's reasoning):[91]

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[85] Ibid.
[86] Ibid.
[87] Ibid para. 86.
[88] Ibid para. 87.
[89] Ibid para. 370.
[90] Carmel Rickard, "Ongwen Sentenced by ICC: Court's Intricate Balancing Task" *African Lii,* 6 May 2021, available at https://africanlii.org/article/20210506/ongwen-sentenced-icc-court's-intricate-balancing-task.
[91] *Ongwen Sentence,* above note 2, para 388.

> The fact that Dominic Ongwen did not, at first, choose to be part of the LRA, but was abducted and integrated into it when he was still a child, whose education was thus abruptly interrupted and replaced by socialisation in the extremely violent environment of the LRA, in no way justifies or rationalises the heinous crimes he wilfully chose to commit as a fully responsible adult; however, these circumstances, in the view of the Chamber, make the prospective of committing him to spend the rest of his life in prison (despite the hypothetical early release or reduction of sentence after 25 years of imprisonment under Article 110 of the Statute) excessive.

Ultimately, the majority of Judge Bertram Schmitt and Judge Péter Kovács decided to reduce what they said would otherwise have been a life sentence or a sentence of up to 30 years, to 25 years, due to Ongwen's circumstances.[92] The Court noted that the object of sentencing was not revenge as such,[93] but rather, retribution and deterrence, which it said were the primary purposes of sentencing.[94] It said Ongwen's history in the LRA as an abductee was one circumstance that set the case apart from others tried before the Court, and therefore some reduction in the sentence was warranted.[95]

In the Trial Chamber, the majority of the Court said Ongwen's circumstances included 'the circumstances, purported by the Defence to act in mitigation of the sentence to be imposed on Dominic Ongwen, concerning his childhood and, more generally, his personal background, his current family circumstances and his alleged good character,[96] and in turn focussed

[92] See, e.g., Ibid para. 386.
[93] Ibid para. 389.
[94] Ibid. For a critical reflection of deterrence on perpetrators like Ongwen see Shahram Dana, "The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?" *Penn State Journal of Law & International Affairs* Vol. 3, No. 1, 2014, p. 30
[95] *Ongwen Sentence,* above note 2, para. 389.
[96] Ibid paras. 65 – 88.

on his abduction as a child as his most relevant "individual circumstance," cross-referring to its discussion regarding his abduction as a child several times in arriving at individual sentences,[97] as part of the "two-step" sentencing process. In the author's view, the majority's focus on young Ongwen's passive victimhood during his youth missed an opportunity to answer an important question: what agency did young Ongwen possess while he grew up within a setting of extreme brutality?[98] As a CSTP, he may have demonstrated agency and autonomy in his decision-making, leading to higher moral capability and less mitigating factors in sentencing. The inquiry is complex, but in leaving this out, the Court omitted a factor that was highly relevant to the sentencing exercise.

Ultimately, the majority decided to reduce to 25 years what they said would otherwise have been a life sentence or a sentence of up to 30 years, as a result of all the relevant circumstances.[99] The Court accepted that Ongwen possessed agency as an adult. It stressed that the issue was not whether Ongwen should be held criminally responsible in light of his personal history, as he had been found guilty of committing the relevant crimes when he was a fully responsible adult.[100]

Earlier on in the decision, the Court supported the Prosecution's recommendation to consider Ongwen's circumstances, as a "broad indication," as warranting approximately a one-third reduction, in the length of the sentences that Ongwen would otherwise receive, obviously depending on the particulars of each crime.'[101] Perhaps the Court's use of general words was an attempt to underscore the case-by-case basis of its sentencing task, but its equivocalness undermines its potential value as a possible sentencing precedent. Further, the majority did not apply a one-third reduction – that is, a reduction from the maximum of 30 years to 20 years. It simply reduced his sentence from a hypothetical life sentence as noted above, or a maximum of 30 years, to 25 years. In the author's view, that limits the one-third rule's

[97] See, e.g., Ibid, paras. 152, 156, 168.
[98] E Baines, above note 6, p. 164.
[99] See, eg, *Ongwen Sentence*, above note 2, para. 386.
[100] Ibid para. 69.
[101] *Ongwen Sentence,* above note 2, para. 88.

potential usefulness in the future. Further, if the majority had reduced the sentence from the maximum of 30 years to 20 years, the resulting sentence would be quite low, in comparison to others such as Ntaganda, although he was not a CSTP, as will be discussed below. If applied, it would have advanced a strong protectionist agenda towards CSTPs.

3.2. The ICC's "intricate balancing exercise"[102]

The majority's sentence sits in the middle of the prosecution's 20-to-30-year range, which indicates that the Court was persuaded by the prosecution's submissions. It is well above the defence's contended-for 10-year sentence and is less than the victims' proposed life sentence and less than the maximum of 30 years. The closest ICC sentencing comparator is Ntaganda, who received a 30-year sentence for similarly reprehensible crimes, although it is noted he was only convicted of 18 counts as opposed to Ongwen's 61. While not explicitly referred to by the Court as comparable, the Ntaganda sentencing decision lends weight to the view that a life sentence, namely, a sentence of 30 years, was certainly open to the ICC's sentencing court in Ongwen. Unlike Ongwen, Ntaganda did not have a prior history as a child soldier who had been abducted.

One of the judges, Judge Raul C. Pangalangan would have sentenced Ongwen to 30 years, the maximum available. In his partly dissenting opinion, he acknowledged Ongwen's unfortunate circumstances of being abducted as a child.[103] Invoking the language of Article 78(1) of the Rome Statute, Judge Pangalangan's primary rationale for an elevated sentence was balancing the rights of the victims and the "extreme gravity of the crimes."[104] The author notes that that is a separate axis of sentencing, which is unrelated to the CSTP victim and perpetrator dichotomy. He pointed out that the majority found that the "extreme gravity" threshold[105] required for a term of life

[102] C Rickard, above note 90.
[103] International Criminal Court, *Prosecutor v Ongwen*, Case No ICC-02/04-01/15, Annex to Sentence, (Trial Chamber) 6 May 2021, (Judge Pangalangan) ("Partly Dissenting Opinion of Judge Raul C. Pangalangan") para. 10.
[104] Partly Dissenting Opinion of Judge Raul C. Pangalangan, above note 103, para. 13.
[105] *Ongwen Sentence*, above note 2, para. 384.

imprisonment had been met. He concurred with this, notably the degree of Ongwen's culpable conduct and the deep and permanent physical and psychological harm caused to the victims and their families. He opined, "the mere fact of not imposing a life sentence pursuant to Article 77(1)(b) of the Statute and Rule 145(3) of the Rules already takes into account the truly unfortunate personal situation of Dominic Ongwen."[106]

The author's view is that this reflects a more precise reading of the Statute than the majority's reasons. As the majority acknowledged, a term is life imprisonment is an exceptional punishment, when both normative criteria of grave crimes and individual circumstances are met.[107] Weighing up Ongwen's main mitigating factor of his traumatic upbringing, Judge Pangalangan plausibly noted the scale and cruelty of the crimes meant that any sentence that is not life imprisonment was defensible. A harsher sentence, in the author's view, could subtly foreground agency by emphasising that Ongwen could have made better choices. It is contended this was an opportunity missed.

3.3. The ICC's "bright line" approach

The author contends that the sentencing Court commented on the activities of young Ongwen, using both a protectionist lens and "bright line"' language. In the author's view, this failed to highlight the degree of agency the young Ongwen possessed. Citing a witness' evidence that highlighted his status as an innocent child before his abduction, the Court noted the evidence of Joe Kakanyero, who was abducted together with Ongwen, who said that he had been "a very good child," calm and well-behaved.[108] The ICC cited testimony that even though he was still young at the time, Ongwen was soon trained in how to be a soldier.[109] The Court said that Ongwen's early experiences in the

[106] Partly Dissenting Opinion of Judge Raul C. Pangalangan, above note 103, para. 15.
[107] See also Rule 145(3) of the Rules, which states "Life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances."
[108] *Ongwen Sentence*, above note 2, para. 72.
[109] Ibid para. 78.

LRA "brought to him great suffering, and led to him missing out on many opportunities which he deserved as a child."[110]

The Court's language shifted when it details his conduct after he turned 18,[111] around when he began his rise through the LRA's ranks,[112] to that which emphasised his agency. As noted in the sentencing judgement (footnotes omitted; emphasis added):[113]

> … [B]y around 1996, when Dominic Ongwen was approximately 18 years old, his *performance* as an LRA fighter started to be *recognised in the LRA*, and Dominic Ongwen *began his rise through the ranks.* … [B]y the late 1990s, Dominic Ongwen was already a significant member of the LRA *with some status*….

The Court then expressly acknowledged, through its language, that the age of 18 is age at which his responsibility crystallised (emphasis added): "whereas during the first years following his abduction, Dominic Ongwen's stay in the LRA was extremely difficult, he was soon noticed for his good performance as a commander – already in the mid-1990s, *at approximately 18 years old*."[114]

As noted, in adopting witnesses' language, the Court adopted a protectionist lens for young Ongwen. Conveniently in line with the "bright line" approach, the author argues that the Court also did not refer to any crimes committed before the abduction, rape and forced marriage Ongwen committed close to his eighteenth birthday. The Court did not hear evidence of any crimes committed while Ongwen as under 18.[115] In contrast, the ICC did not reserve sympathy for Ongwen in his activities as an adult, describing

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[110] Ibid para. 83.
[111] Ongwen was born in approximately 1978. See *Ongwen Sentence*, above note 2, para. 71.
[112] Ibid para. 79.
[113] Ibid paras. 79 - 80.
[114] Ibid para. 84.
[115] Everisto Benyera, "Child victim, Loyal war spirit medium or war criminal: shifting the geography and logic of historical accountability in Dominic Ongwen's ICC trial" *African Identities* Vol. 1, 2021, p. 7. The author notes that the Court was also jurisdictionally precluded from considering any crimes possibly committed by Ongwen before he turned 18.

them in detail, and noting that his actions were condemned in the eyes of the international community.[116] It was as if Ongwen went from child soldier to warlord overnight. That does not reflect the continuum of development of young people explored above and espoused in the CRC.

Problematically, the young Ongwen's agency was unfortunately not fulsomely addressed by the ICC. One school of thought is that Ongwen was a victim of the political system of the LRA:[117] that Ongwen was robbed of a chance to develop his own conscience when he was indoctrinated by the LRA,[118] and was groomed to commit the crimes of which he was convicted. The other school of thought is that Ongwen had agency that he did not exercise – reflected in his decision to stay with the LRA.[119] In its reasons, the ICC emphasised the former school of thought, to the detriment to the latter. The Court observed there were opportunities for Ongwen as an adult to voluntarily escape from the LRA, noting other high-ranking commanders who left.[120] The Court conceded his development had not been impaired.[121] However the Court did not analyse the Defence's point that he chose to take a certain path to become an LRA leader, presumably before he was 18. The Court, unfortunately, likewise, did not take the issue of Ongwen's possible moral awakening in his youth any further.

The Court had scope within the sentencing paradigm to explore Ongwen's agency in more detail than it did. In particular, Article 78(1) of the Rome Statute and Rule 145(1)(b) of the Rules, focus on an individual's circumstances, and therefore accommodate offenders with complex background profiles, such as Ongwen. As noted above, when discussing Ongwen's abduction as a child as an individual circumstance in mitigation, "the majority simply said: "The Chamber considers that the issue of Dominic

[116] See, e.g., *Ongwen Sentence*, above note 2, para. 389.
[117] E Benyera, above note 115, p. 12.
[118] Ibid p. 6.
[119] This is acknowledged by E Benyera, above note 115, p. 6.
[120] *Ongwen Sentence*, above note 2, para. 86.
[121] The Court noted medical evidence tendered at trial that Ongwen had attained the highest level of moral development and had above average intelligence, and that he had matured developmentally 'against all odds', and that favourable early experiences had contributed to his resilience: Ongwen *Sentence*, above note 2, para. 81.

Ongwen's personal history is relevant among the factors bearing – as a circumstance concerning the convicted person – on the appropriate gradation of the sentence to be imposed on him."[122] The author's view is that the Court missed an opportunity[123] to interrogate the concept of Ongwen's potential agency in his youth in its reasoning. While it is outside the scope of this paper to propose a fulsome conception of agency for judicial consideration, it is suggested that one aspect could be whether young Ongwen developed the capacity to appreciate the immorality of his conduct,[124] and if so, at what point in time that occurred. That is, exploring Stauffer's[125] query of at what point Ongwen passed the line between too young to be responsible and old enough to have known better.

The Chamber also considered a number of other purported mitigating factors, which skirted around the issue of young Ongwen's agency. Defence posited, both in the Trial Chamber and before the Sentencing Court, that Ongwen committed the crimes in a state of "substantially diminished mental capacity" at the relevant time, and that this amounted to a defence under Article 31 of the Statute. In the Trial Chamber, the Defence made submissions on the status of Ongwen as a former victim of the LRA. The Court said that Ongwen was responsible for the criminal activities he participated in, as they took place when he was an adult. Regarding Ongwen's abduction and early treatment by Kony, the Court said that it did not amount to duress in respect to his crimes committed as an adult, as it occurred outside the period of the charges[126]. The Trial Chamber of the ICC found that as an adult, Ongwen exercised agency, was not completely dominated by Kony, and was a self-confident commander who took his own decisions depending on what he thought right or wrong.[127]

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[122] Ibid para. 70.
[123] Indeed, Benyera laments that the ICC sent a message that the circumstances under which one became a child soldier are irrelevant as long as one committed atrocities as an adult. E Benyera, above note 115, p. 13.
[124] R Souris, above note 20.
[125] J Stauffer, above note 17, p 43.
[126] W De Bondt and R Van Erdeghem, above n 22, p. 809.
[127] *Ongwen Trial Judgment*, above no 3, paras. 2602, 2672. Defence counsel raised that Ongwen sustained duress throughout his time in the LRA, because of Kony's actions and punishments, which it said was a mitigating factor in sentencing, although not a complete defence under

During the sentencing hearing, Defence attempted to relitigate a number of these issues. The Court rejected a series of submissions and found, "it is clear that Dominic Ongwen suffered following his abduction into the LRA, even though – as found in the Trial Judgment – this trauma did not lead to a mental disease or disorder and had no lasting consequences from that viewpoint."[128] The Court said while it was greatly impressed by the account given by Ongwen at the sentencing hearing, speaking for one hour and 45 minutes about the events to which he was subjected upon his abduction when he was 9, it concluded that Ongwen's current mental health could not be taken into account as a mitigating circumstance with respect to his sentencing.[129] In finding that Ongwen was lucid and spoke fluidly, the Court lent further weight to the hypothesis that Ongwen developed normally during his formative years in the LRA – during his youth and young adulthood. The Court, which was jurisdictionally precluded from prosecuting Ongwen for activities that occurred before he was 18, then took a protectionist approach to his activities before his eighteenth birthday. It did not explore his developing agency as a child. Indeed, the Court's reasoning did not seem to deem Ongwen's experience as a child solider truly relevant to the case, which left many questions unanswered.[130]

3.4. The Appeals Chamber

The Appeals Chamber upheld Ongwen's 25-year sentence. The Court consisted of presiding Judge Luz del Carmen Ibáñez Carranza, and Judges Piotr Hofmański, Solomy Balungi Bossa, Reine Alapini-Gansou, and Gocha Lordkipanidze. The Court, in its reasoning, considered a number of arguments raised by defence. Relevant to the discussion in this paper, these

Art. 31(1)(d). The Chamber also rejected this argument saying duress would have to be proven during the period of the charges, not when he was a child: paras. 111, 2592.

[128] *Ongwen Sentence*, above note 2, para. 84.

[129] Ibid para. 105. It is noted that the Trial Chamber's reliance on Ongwen's statement was challenged by the Defence before the Appeals Court, who argued that the Trial Chamber erred by using Ongwen's unsworn statement, which he made in court, against him. That was ultimately rejected. See paras. 272 – 276.

[130] W De Bondt and R Van Erdeghem, above note 22, pp. 812 - 813.

included alleged errors in the Trial Chamber's failure to rule on mental incapacity as a mitigating or personal circumstance, as well as its reliance on Ongwen's personal statement,[131] and alleged errors by disregarding evidence on duress as a mitigating circumstance.[132] Having not found any error in the findings below, the Appeals Chamber dismissed both of these grounds of appeal. The majority of the Court did not examine whether the Trial Chamber exercised its discretion properly when taking into account the individual circumstances of Mr Ongwen related to his abduction.[133] In the author's view, the majority did not incorporate any greater acknowledgement of the victim-perpetrator continuum.

In her partly dissenting judgement, Judge Ibáñez Carranza opined Ongwen's personal circumstances as a child solider should be given significant weight as a circumstance in mitigation in sentencing.[134] Judge Ibáñez Carranza stated that Ongwen's abduction and his early traumatic experiences in the coercive environment of the LRA had a long-lasting impact on his personality, brain formation, future opportunities and the development of his moral values. Judge Ibáñez Carranza discussed the legal framework for the protection of children in armed conflicts, the long-lasting effects of being a victim of the crime of conscription and use in hostilities of children below the age of 15 years, and Ongwen's status as a victim-perpetrator.[135] While not explicitly foregrounding agency, Judge Ibáñez Carranza eschewed a rights-based approach by opining that Ongwen's abduction and hardships endured as a result of his conscription into the LRA deprived him of the enjoyment of basic rights as a child,[136] and, as in particular noted by the *amici*,[137] the rights owed to him under the CRC.[138] The findings reached by medical experts,[139]

[131] *Ongwen Sentence Appeal*, above note 11, paras. 195 – 282.
[132] Ibid paras. 283 – 300.
[133] Ibid para. 12.
[134] International Criminal Court *Prosecutor v Ongwen*, Case No ICC-02/04-01/15, Annex to Sentencing Appeal, (Appeals Chamber) 15 December 2022, (Judge Luz del Carmen Ibáñez Carranza) ("Partly Dissenting Opinion of Judge Luz de Carmen Ibáñez Carranza").
[135] Ibid para. 91.
[136] Ibid para. 101.
[137] These included Professor Baines, whose work is cited elsewhere in this paper.
[138] Partly Dissenting Opinion of Judge Luz de Carmen Ibáñez Carranza, above note 134, para. 109.
[139] Referred to as P-0445 and P-0447.

were relevant in determining the impact that Ongwen's abduction as a child and his upbringing in the LRA had on his personality, the development of his brain and moral values, and future opportunities.[140] Citing an expert's conclusion in a report that it meant that Ongwen could not be blamed for falling to escape negative influences in his environment,[141] Judge Ibáñez Carranza stated:[142]

> The above shows that Mr Ongwen's early abduction and the traumatic experiences he went through as a result of his conscription into the LRA, violent indoctrination, being forced to carry out and participate in criminal acts as a child and as an adolescent, had damaging and long-lasting consequences. …these experiences negatively affected his personality, brain formation, future opportunities and the development of his moral values. … it is undoubtedly correct to accord significant weight in mitigation to these circumstances.

Judge Ibáñez Carranza noted it was meaningful to acknowledge Ongwen's status as a victim, abducted whilst he was still a defenceless child,[143] and also emphasised that sentencing serves various purposes, including notably retribution and prevention, espousing the benefits of restorative justice.[144] As a separate issue, Judge Ibáñez Carranza found that the sentence was affected by double-counting errors,[145] and was of the view that a new sentence should be imposed – one that is "long enough to acknowledge the gravity of those crimes and to recognise the suffering of the victims while at the same time ensuring fairness and proportionality to Mr Ongwen's culpability and his individual circumstances."[146]

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[140] Partly Dissenting Opinion of Judge Luz de Carmen Ibáñez Carranza, above note 134, para. 137.
[141] Ibid para. 139.
[142] Ibid para. 147.
[143] Ibid para. 151.
[144] Ibid para. 192.
[145] Ibid para. 68.
[146] Ibid para. 197.

3.5. The importance of agency

The partly dissenting judgements, of Judge Pangalanan, at sentence, and Judge Ibáñez Carranza, on appeal, respectively, implicitly show how important the issue of Ongwen's agency is to the sentencing exercise. One view is that a harsher sentence could have been meted out. Indeed, as discussed, that is the view of partly dissenting Judge Pangalangan on sentence. However, on appeal, Judge Ibáñez Carranza opined that it was appropriate to reverse the joint sentence of 25 years of imprisonment and remand the matter to the Trial Chamber for it to determine a new sentence, in the name of ensuring fairness and proportionality to Mr Ongwen's culpability and his individual circumstances,[147] as noted above. The question must be asked: did young Ongwen develop a sense of morality, and choose to stay in the LRA anyway? Judge Pangalangan's choice of words was that while his life could have taken a very different path if he had not been abducted, Ongwen "did not initially choose to be part of the LRA."[148] The subtext is that at some point, he might have left. In contrast, Judge Ibáñez Carranza cited medical evidence that stated Ongwen could not be blamed for falling to escape negative influences in his environment.[149] Ongwen's ability to take action prior to turning 18 may have impacted the sentence. If explored by the majority, if could have resulted in a higher sentence, or a lower sentence, as advocated for by Judge Ibáñez Carranza. In the author's view, this was an opportunity missed by the majority.

Unsurprisingly, in light of the Court's reasoning, views amongst commentators about Ongwen's sentence are varied. One view is that the ICC's approach in sentencing Ongwen was quite punitive when regard is had to the fact that he was a victim and experienced child soldiering from a young age.[150] Others go so far as to note that while the victim status of child soldiers is emphasised by the ICC, it is apparently not considered relevant when the

[147] Partly Dissenting Opinion of Judge Luz de Carmen Ibáñez Carranza, above note 134, paras. 197 - 198.
[148] Partly Dissenting Opinion of Judge Raul C. Pangalangan, above note 103, para. 10.
[149] Partly Dissenting Opinion of Judge Luz de Carmen Ibáñez Carranza, above note 134, para. 139.
[150] W De Bondt and R Van Erdeghem, above note 22, p. 811.

child is later prosecuted as an adult for crimes committed in adulthood.[151] If this view is correct, then, if the full circumstances of a CSTP's victimhood are taken into consideration in sentencing by the ICC, a greater reduction in sentence could be available to CSTPs. The divergence of opinions about the punishment Ongwen should have received is perhaps, the author speculates, a product of the Court's dissatisfying reasoning.

The author posits that perhaps the limited way in which the ICC addressed Ongwen's unusual story as a CSTP was, at least, partially due to fundamental limitations of ICL. On a broader level, scholars have criticised the ability of ICL to properly address the victim-perpetrator duality, particularly when sentencing defendants in relation to mass atrocities.[152] As has been advanced above, while the ICC relied on various aggravating and mitigating factors, it failed to properly and deeply explore the transition from Ongwen as a formerly abducted child soldier, to Ongwen as a culpable adult defendant.

4. Conclusion

In Ongwen, the ICC was confronted with a novel case: an adult offender who was being sentenced for some of the same crimes he was the victim of two decades earlier in his childhood. As has been explored, the laws that prevent under-18s from being prosecuted are protectionist in nature and depict a "bright line'' approach, which paints child soldiers as victims until the date of their eighteenth birthday. The framework does not form a neat template when sentencing CSTPs, who often have complex histories and come of age in conflicts.

In Ongwen, the majority of the Court adopted a "bright line" approach to criminal liability. It used protectionist language in describing Ongwen's activities prior to his abduction, which highlighted his innocence, then shifted to language which portrayed him as a warlord after he turned 18.

[151] Ibid p. 810.
[152] M Drumbl, "Victims who Victimise," above note 6 p. 218. This echoed his thesis, advanced in his 2012 book, "Reimagining", above note 60.

That narrative is silent regarding any agency Ongwen might have possessed during his formative period. The author submits that the Court, therefore, did not fully illuminate Ongwen's individual circumstances in all their complexity. Furthermore, the ICC's Sentencing Court's positive comments about a possible one third reduction in sentence for CSTPs furthered this protectionist agenda towards former child soldiers. However, this discount was not actually applied, so it is difficult to assess how far the ICC might take this in the future. In the author's view, the Court's reasons do not fully grapple with the complexities of sentencing CSTPs, who have suffered victimisation in their childhood. Indeed, they highlight the weak points in ICL, namely, its dichotomous nature which sees only victims or perpetrators, and the inflexibility of its sentencing mandate.

In the Appeals Chamber, the partly dissenting Opinion of Judge Luz de Carmen Ibáñez Carranza prototypically rejected the dichotomic bright-line approach. Unfortunately, this was not taken up by the majority of the court. As has been observed, the Ongwen decision represented an opportunity missed for the Court to explore a CSTP's capacity for moral decision-making during his youth. Instead, the majority of the Court used the language of a passive victim, to describe Ongwen's time in the LRA prior to turning 18.

Reimagining the ICC's task of sentencing Ongwen, with an acknowledgement that child soldiers can possess agency, would help the public understand how CSTPs, who have walked two phases of life, are to be dealt with in sentencing. The rights-based approach in the CRC[153] should be at the forefront of this exercise, as it positions child soldiers as competent survivors with autonomy.[154] Paradoxically, one consequence of this is that CSTPs who are sentenced might receive harsher sentences. While it is not the author's view that Ongwen necessarily deserved a harsher sentence, it is noted that jurists should consider if hefty sentences for CSTPs are appropriate, from a policy perspective.

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[153] See W De Bondt and R Van Erdeghem, above note 22, p. 813, where it is argued the CRC should be at the heart of the debate about sentencing former child soldiers, including the four guiding principles: non-discrimination, the best interests of the child, the right to be heard and the right to life.

[154] J McBride, above note 30, p. xi.

The author suggests perhaps the ICC should prepare sentencing guidelines, to assist in sentencing CSTPs in the future, which could highlight agency as a possible factor in sentencing. In terms of a direction of travel, it will be interesting to observe if the future Court adopts any part of Judge Luz de Carmen Ibáñez Carranza's reasoning, in particular, in relation to the strong emphasis on his individual circumstances as a child solider, as a factor in mitigation, militating against a sentence at the top of the penalty range. As Kan[155] astutely observed, the Ongwen case will have "an insurmountable impact on future proceedings," in setting the scene and guiding the reaction to former child soldiers in both international and in domestic courts. The Ongwen decision issues a clarion call for greater attention to how CSTPs should be dealt with in sentencing.

[155] Gamaliel Kan, "The Prosecution of a Child Victim and a Brutal Warlord: The Competing Narrative of Dominic Ongwen," *SOAS Law Journal* Vol. 5, No. 1, 2018, pp. 70–74, cited in W De Bondt and R Van Erdeghem above note 22, p. 804.

Prohibition of the use of nuclear weapons under Islamic Law: filling the gap of International Humanitarian Law?

Kheda Djanaralieva

« *Quoique toutes ces notions soient des notions contemporaines, qu'on ne pouvait pas en imaginer l'existence dans les sociétés en place au VII*ème *siècle, l'Islam les couvre cependant toutes sans distinction aucune. "…" Les lois de la guerre en Islam, étant toutes fondées sur la miséricorde, la clémence, la compassion et tirant leur force obligatoire de l'Autorité divine, leur champ d'application s'étend,* à travers le temps et l'espace*, aux conflits armés de tout genre, de toute espèce et de toute dénomination* ».[1]

For the numerous States that have not ratified the Treaty on the Prohibition of Nuclear Weapons, international humanitarian law fails to prohibit the use of nuclear weapons. Given the role played by some Muslim States in the nuclear weapons realm, this article discusses how Islamic law can be mobilized to support the interdiction of the use of such weapons of mass destruction. As the above quotation illustrates, even though Islamic law flourished centuries ago, Islamic laws apply through time and space and can therefore be used to assess modern issues related to armed conflicts by using analogical reasoning.

Keywords: Islamic Law, International Humanitarian Law, Nuclear Weapons

[1] Discussing notably nuclear wars, see Hamid Sultan, « La conception islamique », in *Les dimensions internationales du droit humanitaire*, Institut Henry-Dunant/UNESCO, Geneva, 1986, pp. 51 and 52 (emphasis added): "Although all these notions are contemporary ones and could not have been imagined in the societies of the seventh century, Islam covers them all without distinction. "…" Since the laws of war in Islam are all based on mercy, clemency and compassion and derive their binding force from Divine Authority, their scope of application extends, throughout time and space, to armed conflicts of all kinds and denominations" (own translation).

1. Introduction

Nuclear weapons, i.e., "explosive devices whose energy results from the fusion or fission of the atom",[2] have not been used since 1945.[3] One could thus argue that the debate surrounding the use of such weapons of mass destruction is purely theoretical. However, while international humanitarian law still fails to provide the necessary means to completely ban their use, the International Campaign to Abolish Nuclear Weapons highlighted that the possibility of using nuclear weapons has concerningly been normalized in the past few months.[4] For instance, recent declarations from incumbent Russian President Vladimir Putin stating that "all means in his possession" would be used to defend the Russian territory demonstrate that nuclear weapons still constitute a not-so-secret card up politicians' sleeve.[5] In addition, and more specific to the scope of this article, the International Atomic Energy Agency – a nuclear watchdog – has recently expressed concerns over the Islamic Republic of Iran's uranium enrichment activities.[6] It is noteworthy that in order to deny similar allegations made by the said Agency, Ayatollah Ali Khamenei (Supreme Leader of Iran) consistently mentioned Islam.[7] He also referred to his own *fatwas*,[8] in which he stated – while remaining relatively

[2] International Court of Justice, *Legality of the use by a State of nuclear weapons in armed conflict*, Advisory Opinion, *ICJ Reports 1996*, para. 35 (hereinafter: *Nuclear Weapons* advisory opinion).
[3] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham – UK / Northampton – USA, 2019, p. 394, para. 8.404.
[4] International Campaign to Abolish Nuclear Weapons, *Why condemn threats to use nuclear weapons?*, Briefing paper, 12 October 2022, available at: (all internet references were accessed on 26 July 2023).
[5] The Visual Journalism Team, "Putin threats: How many nuclear weapons does Russia have?", *BBC News*, 7 October 2022, available on.
[6] Tara John and Sugam Pokharel, "Nuclear watchdog says Iran enriching up to 60% at underground Fordow nuclear facility", *CNN*, 22 November 2022, available at: https://edition.cnn.com/2022/11/22/middleeast/iaea-iran-enrichment-fordow-intl/index.html.
[7] Seyed Hossein Mousavian, "Globalising Iran's Fatwa Against Nuclear Weapons", *Survival: Global Politics and Strategy*, Vol. 55, No. 2, 2013, pp. 148-149.
[8] A *fatwa* is defined as a legal response to a particular issue which can be binding "if adopted as such by a person as a matter of conscience, or if adopted as enforceable law by a legitimate authority such as a judge" (Khaled Abou El Fadl, "What type of law is Islamic law?", in Khaled Abou El Fadl, Ahmad Atif Ahmad, Said Fares Hassan (eds.), *Routledge Handbook of Islamic Law*, Routledge, London, 2019, p. 24).

vague – that the production, stockpiling and use of nuclear weapons would be contrary to various Islamic religious principles, notably the prohibition of indiscriminate killing.[9] One can therefore grasp the concrete and current challenges at stake when it comes to Islamic law and the use of nuclear weapons, even though this topic is an area understudied by modern Muslim scholars.[10]

This article thus pragmatically explores how *sharīʿah* law (Islamic law), i.e., rules provided by God to His messengers,[11] comprises various principles that *in fine* prohibit actors bound by Islamic law from using nuclear weapons, consequently filling the gap left by international humanitarian law. This is even more important given that Muslim-majority States play a significant role in the nuclear weapons realm. Pakistan is among the limited group of the nine nuclear powers, and the international community also keeps an eye on other Muslim-majority States considered as "nuclear-capable".[12] Some words of precision are called for regarding the distinction between Muslim States and Islamic States. Whereas the latter's legal systems are based on sources of Islamic law, the former comprise States with a Muslim majority population that do not necessarily exclusively apply *sharīʿah* law.[13] This distinction is therefore important when assessing if a Muslim-majority State is bound by religious edicts.

Beyond States, Islamic law is relevant to counter the threat posed by some non-State armed groups such as al-Qaeda, provided that they would acquire the necessary technological and financial capacities to constitute a

[9] Tavakol Habibzadeh, "Nuclear Fatwa and International Law", *Iranian Review of Foreign Affairs*, Vol. 5, No. 3, 2014, p. 151.
[10] Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Macmillan, New York, 2011 (reprint July 2015), p. 125.
[11] *Ibid.*, p. 72.
[12] Sohail H. Hashmi, "Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation", in Sohail H. Hashmi and Steven P. Lee (eds), *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives*, Cambridge University Press, Cambridge, 2004, p. 321.
[13] On this distinction, see Maurits Berger, "Islamic Views on International Law", *Culture and International Law*, 2008, p. 109.

nuclear threat.[14] While such non-State armed groups have neither the right to become parties *per se* to international humanitarian law treaties, nor the right to participate in their drafting process[15], they often consider Islamic law as the primary source of law.[16] This would explain the fundamental role played by religious leaders when negotiating with such groups, as emphasized by the International Committee of the Red Cross.[17]

In terms of methodology, beyond traditional international humanitarian law sources, this article examines some primary sources of Islamic law such as verses from the *Qur'an*, the *sunnah* – tradition of Prophet Muhammed – and pertinent *hadiths*. However, since nuclear weapons did not exist at the time of the revelation of the *Qur'an* and the life of Prophet Mohammed – the seventh century –, no rule explicitly prohibits or authorizes their use as such. The discrepancy between Islamic law of armed conflict and the contemporariness of nuclear weapons implies that the author will proceed by analogy (*qiyās*), which is a secondary source of Islamic law.[18] This method seeks to identify "a *Sharīʿah* concept under review in the texts as the original case (*asl*)" and to extend it "to a new case if the latter has the same effective cause (*illah*) as the original".[19] The value of such analogical deduction lies in the possibility to apply the revealed law even to new legal situations, "thereby

[14] For instance, regarding al-Qaeda, see Sammy Salama and Lydia Hansell, "Does Intent Equal Capability? Al-Qaeda and Weapons of Mass Destruction", *Nonproliferation Review*, Vol. 12, No. 3, November 2005.

[15] For the extent to which non-State armed groups are bound by international humanitarian law, see Sandesh Sivakumaran, "Binding Armed Opposition Groups", *The International and Comparative Law Quarterly*, Vol. 55, No. 2, April 2006.

[16] Anne Quintin and Marie-Louise Tougas, "Generating Respect for the Law by Non-State Armed Groups: The ICRC's Role and Activities", in Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice*, T.M.C. Asser Press, The Hague, 2020, p. 361.

[17] Shebanee Devadasan, "Environmental Destruction and Armed Conflict: Protecting the Vulnerable Through Islamic Law", *Manchester Journal of Transnational Islamic Law & Practice*, Vol. 18, No. 1, 2022, p. 186. See also Ioana Cismas and Ezequiel Heffes, "Not the Usual Suspects: Religious Leaders as Influencers of International Humanitarian Law Compliance", *Yearbook of International Humanitarian Law*, Vol. 22, 2019.

[18] A. Al-Dawoody, above note 10, p. 72.

[19] Habib Ahmed and Abdulazeem Abozaid, "State Laws and Sharīʿah Compatibility: Methodological Overview and Application to Financial Laws", Manchester Journal of Transnational Islamic Law & Practice, Vol. 18, No. 1, 2022, p. 130.

laying claim to the applicability of the divine law to legal situations not directly expressed in the material sources of the law".[20] Indeed, as the quote introducing this article illustrates, Islamic law can be applied through time and space and one should take advantage of the flexibility that such a set of rules allows. As a matter of fact, reasoning by analogy is "prominent in legal reasoning",[21] and is also used to a certain extent in international humanitarian law.[22] Moreover, this article focuses on the four Sunni schools of Islamic law – *Hanafi*, *Maliki*, *Shafi'i*, and *Hanbali* – as reflected in contemporary legal scholarship. Still, a study conducted by Jaber Seyvanizad explored the comments of various Islamic scholars and highlighted that both Shi'i and Sunni scholars issued *fatwas* on the prohibition of the use of weapons of mass destruction,[23] the arguments of both types of scholars being thus relevant.

To tackle the topic adequately, this article first briefly recalls some of the main effects of nuclear weapons in view of assessing the lawfulness of their use more efficiently (Part 2). Once this preliminary part is established, the failure of international humanitarian law to prohibit the use of such weapons is explored (Part 3). This article then discusses to what extent Islamic law can be mobilized to fill this lacuna by examining various principles supporting the prohibition of the use of nuclear weapons (Part 4). Finally, the article examines the analogous principles of international humanitarian law, highlighting common features as well as differences with Islamic law (Part 5).

2. Effects of nuclear weapons and lessons from the past

That international humanitarian law does not directly prohibit the use of nuclear weapons is striking given the horrendous effects such weapons have. This preliminary part thus briefly recalls some of the main consequences

[20] Felicitas Opwis, "Syllogistic Logic in Islamic Legal Theory: al-Ghazali's Arguments for the Certainty of Legal Analogy (Qiyas)", in Peter Adamson (ed), *Philosophy and Jurisprudence in the Islamic World*, De Gruyter, Berlin, 2019, p. 97.
[21] Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument*, 2nd ed, Cambridge University Press, Cambridge, 2016, p. 4.
[22] M. Sassòli, above note 3, p. 226, para. 7.58.
[23] Jaber Seyvanizad, "WMD under Islamic International Law", *International Journal of Law*, Vol. 3, No. 1, 2017.

resulting from the use of nuclear weapons, thereby emphasizing the need to prohibit them. The impact such weapons have on property, persons, and the environment clearly indicates that their use contravenes the principles of Islamic law examined below.

Firstly, regarding property, thermal radiation emanating from the explosion could melt anything located in the nuclear fireball's path[24] and vaporize anything close to ground zero.[25] Every building near the explosion would likewise be destroyed by the air blast travelling at supersonic speed, which would also at least cause heavy damage at larger distances.[26] Moreover, an electromagnetic field would develop due to the interaction between the electromagnetic energy and the surrounding air.[27] This energy would be captured by metallic objects and then be transmitted to "computers and electronic equipment and circuitry essential to telecommunications, computer systems, transport networks, supplies of water and electricity, and much commerce and trade".[28]

Secondly, nuclear weapons would affect all individuals indiscriminately, from the most tenacious enemy fighter to the new-born child. Thermal radiation would kill and at best injure anyone exposed to it.[29] The resulting air blast would equally kill everyone near the explosion within a few seconds.[30] In addition, the explosion would release nuclear radiation, injuring and killing the exposed persons within days or up to a month depending on the distance from which the radiation is received.[31] At low doses, radiation can "damage cells and lead to cancer, genetic damage and

[24] Report of the Secretary-General, Comprehensive Study on Nuclear Weapons, UN Doc. A/45/373, 18 September 1990, p. 76, para. 294.
[25] International Campaign to Abolish Nuclear Weapons, *Catastrophic Humanitarian Harm*, 22 August 2015, p. 7, available at: https://www.icanw.org/catastrophic_humanitarian_harm.
[26] Comprehensive Study on Nuclear Weapons, above note 24, p. 76, para. 295.
[27] *Ibid.*, p. 77, para. 298.
[28] Reaching Critical Will, *Unspeakable Suffering: The Humanitarian Impact of Nuclear Weapons*, Geneva, 1 February 2013, p. 21, available at: https://www.icanw.org/unspeakable_suffering_the_humanitarian_impact_of_nuclear_weapons.
[29] Comprehensive Study on Nuclear Weapons, above note 24, p. 76, para. 294.
[30] *Ibid.* para. 295.
[31] *Ibid.*, pp. 76 and 77, para. 297.

mutations"[32] and put in danger the health of future generations.[33] The harm related to radiation is relative and infants are more at risk.[34] Finally, the radioactive nuclear fall-out will create delayed effects such as cancers or genetic injuries.[35] The fall-out is composed of debris and soil mixed with radionuclides that fall back to earth after being sent into the air due to the explosion. Those particles can move around the globe for years before being brought back to the ground.[36] Added to this are the impossibility to constrain the spread of the radiation and the difficulty of predicting the path of the fall-out, both depending on geographical, climatic, and meteorological factors, among others.[37]

Thirdly, the nuclear explosion would dramatically damage the environment. Thermal radiation would cause additional fires,[38] as the temperature released by the nuclear fireball can go from one to 100 million °C.[39] Furthermore, the abovementioned fall-out would cause serious damage to agriculture, livestock as well as crops, and groundwater could also be contaminated.[40] Nuclear weapons therefore pose important and unpredictable environmental issues, depending on a wide range of factors such as weather conditions, the location, and the height from which the weapon is dropped.[41] The Comprehensive Study on Nuclear Weapons provides compelling examples of fictional scenarios highlighting such consequences. By way of illustration, a regional nuclear war opposing India

[32] International Campaign to Abolish Nuclear Weapons, *Catastrophic Humanitarian Harm*, above note 25, p. 7.
[33] *Ibid*.
[34] Reaching Critical Will, above note 28, p. 21.
[35] Comprehensive Study on Nuclear Weapons, above note 24, pp. 77 and 79, paras 299 and 300.
[36] "Radioactive Fallout From Nuclear Weapons Testing", United States Environmental Protection Agency, last updated on 3 July 2023, available at: https://www.epa.gov/radtown/radioactive-fallout-nuclear-weapons-testing.
[37] Louis Maresca and Eleanor Mitchell, "The human costs and legal consequences of nuclear weapons under international humanitarian law", *International Review of the Red Cross*, Vol. 97, No. 899, 2015, pp. 631-632.
[38] Comprehensive Study on Nuclear Weapons, above note 24, p. 76, para. 294.
[39] International Campaign to Abolish Nuclear Weapons, *Catastrophic Humanitarian Harm*, above note 25, p. 7.
[40] Comprehensive Study on Nuclear Weapons, above note 24, p. 84, para. 317.
[41] Reaching Critical Will, above note 28, p. 33.

to Pakistan would lead to a huge climate disruption on a global scale, impacting agricultural production and exacerbating famine for several million people.[42] Studies have also highlighted that even a "limited nuclear exchange could result in reduced sunlight and rainfall, and cause depletion of the ozone layer".[43]

As a matter of fact, nuclear weapons have been used in two instances in times of war: in Hiroshima and Nagasaki in 1945 by the United States of America both times. These incidents were enough to grasp the "catastrophic humanitarian consequences"[44] such weapons have. By the end of 1945, 140,000 people were killed in Hiroshima, and 74,000 deaths were recorded in Nagasaki.[45] In both places, the fires caused by the nuclear weapons continued to burn even hours after the detonation, eventually killing or injuring the ones that survived the first blast.[46] In comparison, a bomb similar to the one dropped in Hiroshima would kill 866,000 people in the first weeks and injure up to 2,100,000 people in cities such as Mumbai in India – where the population density can go up to 100,000 people per square kilometre depending on the area.[47]

Survivors from the explosions of 1945 still continue to suffer from their effects, with an increase in rates of cancer and chronic diseases that followed the exposure to radiation.[48] The impact on survivors' children who were not

[42] Comprehensive Study on Nuclear Weapons, above note 24, pp. 37-45.
[43] Ira Helfand, *Nuclear Famine: A Billion People at Risk*, International Physicians for the Prevention of Nuclear War and Physicians for Social Responsibility, Somerville, MA, 2012, cited by L. Maresca and E. Mitchell, above note 37, p. 625.
[44] 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, Vol. 1, Part. 1, NPT/CONF.2010/50, 2010, p. 12.
[45] International Campaign to Abolish Nuclear Weapons, *Catastrophic Humanitarian Harm*, above note 25, p. 5.
[46] L. Maresca and E. Mitchell, above note 37, p. 634.
[47] M.V. Ramana, *Bombing Bombay? Effects of Nuclear Weapons and a Case Study of a Hypothetical Nuclear Explosion*, International Physicians for the Prevention of Nuclear War, Cambridge, MA, 1999, pp. 5 and 35.
[48] International Campaign to Abolish Nuclear Weapons, *Catastrophic Humanitarian Harm*, above note 25, p. 5.

even exposed to the explosions is also an ongoing concern.[49] Furthermore, the anxiety and trauma caused by those incidents have proven to be socio-culturally transmissible.[50] This highlights some of the long-term effects nuclear weapons can have on future generations. In comparison with biological or chemical weapons, there is an aggravated risk inherent to nuclear weapons due to the absence of temporal control over their consequences,[51] making the assessment of their effects even more unpredictable.

In light of the above, one would confidently assume that weapons resulting in such atrocious consequences are prohibited under international humanitarian law. However, as the next part will explore, the state of affairs fails to meet those expectations.

3. International Humanitarian Law and the (absence of a) prohibition on the use of nuclear weapons – A brief overview

The lawfulness of the use of nuclear weapons under international humanitarian law has been a contentious issue ever since their creation. Besides political considerations, the reason explaining this controversy relates to the absence of any rule directly addressing the matter. Absent such regulation, it was hoped that an international body would settle the discussion. In 1994, the General Assembly of the United Nations requested the International Court of Justice to render an advisory opinion on whether the threat or use of nuclear weapons is, in any circumstance, permitted under international law.[52] The Assembly was "[c]onscious that the continuing

[49] International Committee of the Red Cross in cooperation with the Japanese Red Cross Society, *Long-term Health Consequences of Nuclear Weapons: 70 Years on Red Cross Hospitals still treat Thousands of Atomic Bomb Survivors*, Information Note 5, July 2015, p. 2

[50] Matthew B. Bolton and Elizabeth Minor, "Addressing the Ongoing Humanitarian and Environmental Consequences of Nuclear Weapons: An Introductory Review", *Global Policy*, Vol. 12, No. 1, 2021, p. 89.

[51] Antônio Cançado Trindade, "The illegality under contemporary international law of all weapons of mass destruction", *Revista do Instituto Brasileiro de Direitos Humanos*, No. 5, 2005, p. 12.

[52] UNGA Res. 49/75K, 15 December 1994.

existence and development of nuclear weapons pose serious risks to humanity".[53]

Almost two years later, the International Court of Justice delivered its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*. The said opinion is the only example of *non liquet* in the jurisprudence of the International Court of Justice.[54] This is no coincidence as it touches upon an aspect of States' sovereignty that the latter are reluctant to see – overly – restricted by international (humanitarian) law. This "lack of enthusiasm" is also confirmed by the small number of States parties to the 2017 Treaty on the Prohibition of Nuclear Weapons,[55] none of the nuclear powers, nor their close allies, being on the list.[56] Thus, it would appear that the "state of international law" – in the words of the Court – has not evolved since 1996 in a way that would evidence a potential consensus among the international community on a prohibition on the use of nuclear weapons. Nonetheless, the said treaty binds the States that have ratified it and still represents a non-negligible step forward in achieving a complete ban.

In the said opinion, the Court first assessed whether treaty law prohibits the threat or use of nuclear weapons as such. In its analysis, the Court looked into the United Nations Charter as well as the law applicable in situations of armed conflict and found no "comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such".[57] Faced with the absence of a conventional rule prohibiting the use of nuclear weapons, the Court turned to the examination of customary international law. Likewise, the Court affirmed that there was no rule of customary nature proscribing the threat or use of nuclear weapons *per se* due to "the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other".[58]

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[53] *Ibid*.
[54] A. Cançado Trindade, above note 51, p. 18.
[55] Treaty on the Prohibition of Nuclear Weapons adopted in New York on 7 July 2017 and entered into force in 2021.
[56] M. Sassòli, above note 3, p. 394, para. 8.404.
[57] *Nuclear Weapons* advisory opinion, above note 2, para. 63.
[58] *Ibid*., para. 73.

Finally, the Court dealt with the legality of the use of nuclear weapons taking into consideration rules and principles of international humanitarian law and law of neutrality. The Court stated that the conclusions that must be drawn from the applicability of those bodies of law are controversial, highlighting differing views on the issue.[59]

In light of the above, by introducing *jus ad bellum* considerations of self-defence in a *jus in bello* analysis,[60] the Court provided a controversial conclusion on the question at hand:

> [T]he threat or use of nuclear weapons would *generally be contrary* to the rules of international law applicable in armed conflict, and *in particular the principles and rules of humanitarian law*;
> However, in view of the current state of international law, and the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in *an extreme circumstance of self-defence, in which the very survival of a State would be at stake*.[61]

This resolutory point of the advisory opinion was adopted on the casting vote of the President of the Court, reflecting the sensitivity of the subject as well as the schism within the international community regarding nuclear weapons. Regardless, it is noteworthy that the Court considered that the use of such weapons would *in general* be contrary to international humanitarian law with one – unclear – exception of extreme cases of self-defence. This was the conclusion of the International Court of Justice in light of the state of international law in 1996. Would the Court have reached a different conclusion today? This 'million-dollar question' goes beyond the scope of this article. Be that as it may, no one can deny that the state of affairs has evolved since then, if only because a treaty on the prohibition of nuclear weapons has been adopted – even if, as previously established, the instrument

[59] *Ibid.*, paras 90 ff.
[60] M. Sassòli, above note 3, p. 394, para. 8.404.
[61] *Nuclear Weapons* advisory opinion, above note 2, para. 105(E) (emphasis added).

has been subject to very limited ratifications. In addition, according to the views of various scholars, a customary rule prohibiting the use of nuclear weapons is emerging.[62] Plus, States recognize that they are bound by international humanitarian law when dealing with those weapons,[63] including the rules on the conduct of hostilities such as the principles of distinction and proportionality.

This brief overview highlights that contrary to what logic would dictate with regard to a *humanitarian* regime of law, there seems to be no consensus concerning a strict ban on the use of nuclear weapons in international humanitarian law, regardless of how horrendous their effects have proven to be. This legal gap present in international humanitarian law has been acknowledged by the former President of the International Committee of the Red Cross Peter Maurer, who called for a "reassessment of nuclear weapons by all States in both *legal* and policy terms".[64] Against this background, one could argue that the solution to this debate is to be found outside international humanitarian law. This is precisely where Islamic law comes into play for actors applying this regime of law.

4. Islamic Law as a tool to fill the gap

As previously highlighted, in 2006 and 2008 respectively, Ayatollah Ali Khamenei stated that possessing nuclear weapons was contrary to the edicts of Islam and that the production and use of such weapons cannot be authorized due to "fundamental religious grounds", such as the prohibition of killing non-combatants.[65] Regarding such *fatwas*, the Iranian jurist Ayatollah Mohsen Faghihi went as far as considering that the prohibition of the use of weapons of mass destruction – and thus nuclear weapons – "does not need any deep arguments, the *fatwa* of the Leader being in fact the

[62] A. Cançado Trindade, above note 51, p. 19.
[63] M. Sassòli, above note 3, p. 395, para. 8.405.
[64] Peter Maurer, "Nuclear weapons: Ending a threat to humanity", speech given to the diplomatic community in Geneva on 18 February 2015, *International Review of the Red Cross*, Vol. 97, No. 899, 2015, p. 889.
[65] Cited by T. Habibzadeh, above note 9, p. 151.

declaration of God's real edict stipulated in the Holy verses and the hadiths".[66] Ayatollah Ali Khamenei is a representative of the Twelver Shia School of Islam, which is dominant in Iran but not in other countries such as Pakistan for instance.[67] Nonetheless, this example illustrates the relevance of Islamic law and leads to the analysis of how the use of nuclear weapons can be considered as contrary to its principles. However, as such weapons did not exist during the life of the Prophet, no precise rule of Islamic law addresses the issue, leaving scholars with nothing but analogy to decide on their lawfulness.

Regarding weapons of mass destruction more broadly, three categories of Islamic law jurists have been identified by Sohail H. Hashmi. It is important to note that none of these positions is clearly settled in the current state of affairs.[68] Firstly, availing themselves of the principle of reciprocity and *Qur'ānic* pronouncements,[69] "weapons of mass destruction jihadists" argue that in certain circumstances and if the enemy uses nuclear weapons first, their use can be accommodated to the regime regulating the conduct of hostilities under Islamic law.[70] This category represents the majority position.[71] Referring to verse 8:60 of the *Qur'an*, contemporary Muslim jurists such as Mohammad Bin Nasar al-Ja'wan, Ahamad Nar, and Mohammed Khair Heikal argued that Muslim leaders could use weapons of mass destruction to confront enemy threats.[72] Relying on verse 2:195, scholars like Mohamed Mokbel Mahmud Elbakry even considered that abstaining from using a weapon used by the adversary could be considered as committing suicide – prohibited by the said verse.[73] The author is, however, not entirely convinced by this approach. As will be elaborated below, reciprocity is not an

[66] *Ibid.*, p. 156.
[67] Shameer Modongal and Seyed Hossein Mousavian, "Why Iran Has Not Developed the Nuclear Weapons: Understanding the Role of Religion in Nuclear Policies of Iran", *Bandung*, Vol. 6, 2019, p. 138).
[68] S. H. Hashmi, above note 12, p. 323.
[69] A. Al-Dawoody, above note 10, p. 126 (*Qur'an* 2:194; 8:60; 16:126).
[70] S. H. Hashmi, above note 12, p. 322.
[71] *Ibid.*, p. 323.
[72] Sulaiman Lebbe Rifai, 'Islam and the Proliferation of Nuclear Weapons', 16 May 2022, p. 8, available at: https://ssrn.com/abstract=4110776.
[73] A. Al-Dawoody, above note 10, p. 126.

absolute justification allowing the use of every means of warfare against the enemy.

Secondly, "weapons of mass destruction terrorists" go even further by stating that Muslims must acquire such weapons and that they can be used as a first resort against all non-Muslims.[74] The proponents of such a view interpret the Islamic legal texts as allowing the use of every means against the enemy to obtain a military advantage.[75] Such an approach would render useless all the principles of Islamic law restricting the use of force by Muslims that will be explored below, and must consequently be rejected.

This article thus supports the third approach of the "weapons of mass destruction pacifists", which calls for the prohibition of the acquisition and, *a fortiori*, the use of those weapons, considered to be contrary to Islamic ethics because of their very effects.[76] For instance, after enumerating various prohibitions in Islamic law such as killing non-combatants and destroying plantations, Ibrāhīm Yahyā al-Shihābī concludes that "killing, and vandalism just to appease anger or hatred, or revenge, is not allowed at all, and this leads us to ban nuclear weapons".[77] A related issue concerns the production, testing and stockpiling of such weapons as a deterrence strategy. The author agrees with Hashmi who argues against the proliferation of nuclear weapons. The scholar elaborates that nuclear deterrence "implies – with certainty – the killing of large numbers of innocents, the ravaging of the natural environment, and the injuring of generations yet unborn".[78] It is therefore fundamentally different from the deterrence mentioned in the *Qur'an*.[79] In addition, the deterrence argument is only relevant when the enemy is certain that the other

[74] S. H. Hashmi, above note 12, p. 322.
[75] Muḥammad Khayr Haykal, *Al-Jihād wa al-Qitāl fī al-Siyyāsah al-Shar'iyyah,* 2nd ed., Vol. 2, Beirut: Dār al-Bayāriq, 1996/1417, p. 1353.
[76] *Ibid*; S. L. Rifai, above note 72, p. 9.
[77] Ibrāhīm Yahyā al-Shihābī, *Mafhūm al-Harb wa al-Salām fī al-Islām: Sirā'āt wa Hurūb 'am Tafā'ul wa Salām?*, N.p.: Manshūrāt Mu'assasah Maī, 1990/1399, p. 76 (our translation).
[78] Sohail H. Hashmi, "Weapons of Mass Destruction and Islamic Law", in Ahmed Al-Dawoody (ed.), *IHL and Islamic Law in Contemporary Armed Conflicts*, Experts' workshop, Geneva, 29–30 October 2018, International Committee of the Red Cross, Geneva, 2018, p. 32.
[79] *Qur'an* 8:60.

side intends to use the weapon. However, those intentions can be hard to read and may consequently lead to mistakes, turning the nuclear catastrophe into a fatality.[80] Plus, as Hashmi further notes, developing and stockpiling nuclear weapons requires important resources, implying that the latter are diverted from other – more pressing – needs. This would amount to *isrāf* (waste) which is prohibited[81].

The following sections will thus demonstrate how Islamic law provides many grounds supporting the prohibition of the use of nuclear weapons. Indeed, in instances where Islamic law allows the use of force, this prerogative is restricted by various principles.[82] This part of the article explores the principle of distinction (section 1), the protection of property (section 2), the principle of proportionality (section 3) and the protection of the environment (section 4). Still, as emphasised below, the prohibitions established by Islamic law are considered by various jurists as having their own limits and some nuances will have to be drawn.

4.1 Principle of distinction between combatants and civilians

4.1.1 Immunity given to non-combatants

Frequently invoked by the detractors of nuclear weapons, the most obvious element indicating that such weapons contravene Islamic edicts is perhaps their indiscriminate character. Similar to international humanitarian law, Islamic law is characterized by the pre-eminence of the principle of distinction between combatants and non-combatants, provided by the *Qur'an*,[83] the *sunnah*, as well as the practice of Prophet Muhammed's companions who

[80] S. H. Hashmi, above note 78, p. 32.
[81] *Ibid.*, p. 33.
[82] *Qur'an* 2:190 cited by Karima Bennoune, "As-Salāmu ʿAlaykum? Humanitarian Law in Islamic jurisprudence", *Michigan Journal of International Law*, 1994, Vol. 15, No. 2, p. 623. Some of those limits have been explored regarding weapons of mass destruction more generally, see Sophie Timmermans, "The Use of Weapons of Mass Destruction: A Comparison of the Restrictions and Justifications in Islamic Law of Armed Conflict and International Humanitarian Law", *Manchester Journal of Transnational Islamic Law & Practice*, Vol. 18, No. 1, 2022.
[83] *Qur'an* 2:190.

succeeded him in ruling the Caliphate.[84] This principle is of utmost importance, as illustrated by the *Qur'an* verses establishing that the killing of an innocent amounts to the killing of mankind[85] and that "there is no glory to be obtained by killing non-combatants".[86] The value attached to innocent lives also explains the emphasis on permitting the possibility of surrender, which is deduced from the *Qur'an*[87] and multiple orders of the fourth caliph 'Ali ibn Abu-Talib.[88]

The consequence of this distinction is that non-combatants, considered as civilians,[89] are immune from any deliberate harm during the conduct of hostilities – as long as they do not engage in the latter.[90] Various *hadiths* of the Prophet and practice of caliph Abu Bakr forbid the killing of women, children, the aged, the clergy as well as any hired man (*al-'Asīf*).[91] According to the majority of jurists, this list is non-exhaustive. As a result, by reasoning by analogy, other categories – such as the blind, the sick, the incapacitated and the insane – who do not engage in combat and, consequently, do not threaten the Muslim army are equally protected.[92] Based on a conception of Islamic *casus belli* as the "unbelief of the Muslim's

[84] M. Vanhullebusch, *War and Law in the Islamic World*, Leiden/Boston, Brill Nijhoff, 2015, p. 33.
[85] Saleem Marsoof, "Islam and International Humanitarian Law", *Sri Lanka Journal of International Law*, Vol. 15, 2003, p. 27.
[86] John Kelsay, "Do Not Violate the Limit: Three Issues in Islamic Thinking on Weapons of Mass Destruction", in Sohail H. Hashmi and Steven P. Lee (eds), above note 12, p. 354.
[87] *Qur'an* 4:90.
[88] K. Bennoune, above note 82, p. 627.
[89] Mohd Hisham Mohd Kamal, "Principles of Distinction, Proportionality and Precautions under the Geneva Conventions: The Perspective of Islamic Law", in Mohd Jahid Hossain Bhuiyan and Borhan Uddin Khan (eds), *Revisiting the Geneva Conventions: 1949-2019*, Leiden, Brill Nijhoff, 2019, p. 246.
[90] Ahmed Al-Dawoody, "Islamic Law and International Humanitarian Law: an Introduction to the Main Principles", *International Review of the Red Cross*, Vol. 99, No. 3, 2017, pp. 1002 and 1003 ; Yadh ben Achour, « Islam et droit international humanitaire », *Revue Internationale De La Croix-Rouge*, Vol. 62, No. 722, 1980, p. 65 ; Said El-Dakkak, « Le droit international humanitaire entre la conception islamique et le droit international positif », *Revue Internationale De La Croix-Rouge*, Vol. 72, No. 782, 1990, p. 121.
[91] A. Al-Dawoody, above note 10, p. 111; Y. ben Achour, above note 90, p. 67 ; Ameur Zemmali, *Combattants et Prisonniers de guerre en Droit Islamique et en Droit International Humanitaire*, Pedone, Paris, 1996, p. 64.
[92] A. Al-Dawoody, above note 10, p. 114; A. Al-Dawoody, above note 90, p. 1003.

enemies", a minority position however believes that anyone who refuses to pay *jizyah* – defined as "tax levied to exempt eligible males from conscription"[93] – automatically becomes a legitimate target, except for women and children.[94]

As previously stated, nuclear weapons did not exist during Prophet Mohammed's life. Nevertheless, the reasoning behind the prohibition of other means and methods of warfare due to their indiscriminate character can be transposed to the present issue. For instance, some jurists argue that night attacks (*bayāt*), with mangonels, are prohibited precisely because of the impossibility of distinguishing combatants from women and children.[95] The same goes for flooding and fire at enemy fortifications, which are considered as forbidden by some scholars in part "because it will lead to casualties among the enemy's women and children".[96] Others also argue that the prohibition of poison by the Muslim jurists includes nowadays weapons of mass destruction, and therefore nuclear weapons, not necessarily because of their substance, but rather because of the resulting killing of innocent people.[97] In this regard, the Prophet Mohammed is said to have prohibited the spray of poison in the heathen regions, as reported in the "Sakuni's Hadith" – on which Shiite jurisprudence relies.[98] In the same vein, to deny the allegations according to which Iran was in the process of acquiring nuclear weapons, Ali Khamenei stated in 2004 that "[a]tomic bomb not only kills enemies, but also takes the life of those who are *not enemies*. "…" This *indiscriminate killing* is against our belief *in the Islamic System*".[99] This quote highlights the inherent incompatibility of weapons of indiscriminate effects and Islamic principles also according to the Twelver Shia School of Islam.

It is evident that nuclear weapons, due to their very nature and devastating humanitarian effects, could hardly respect this requirement of

[93] A. Al-Dawoody, above note 10, p. 48.
[94] *Ibid.*, p. 111.
[95] *Ibid.*, p. 119.
[96] *Ibid.*, p. 124.
[97] T. Habibzadeh, above note 9, p. 159.
[98] *Ibid.*, p. 159.
[99] *Ibid.*, p. 151 (emphasis added).

distinction. Applying the above to contemporary issues, some modern Muslim scholars have thus advocated for a complete prohibition of the use of nuclear weapons, considering it as "contrary to the laws of Islam"[100] and urging Muslim States to "do everything in [their] power to bring about the complete elimination of such weapons".[101]

4.1.2 Nuances to the distinction between combatants and non-combatants

The principle of distinction is not considered as absolute by all jurists. Some argue that the protection offered to civilians and their property can be superseded by military necessity (*darura*).[102] As said by the *Hanafi* jurist al-Shaybani when assessing the presence of non-combatants in a city during an attack, "[i]f the Muslims stopped attacking the inhabitants of the territory of war for any of the reasons that you have stated, they would be *unable to go to war* at all, for there is no city in the territory of war in which there is no one at all of these [women, children…]".[103] In the same vein, absolute military necessity was invoked by some scholars from the *Hanafī* and *Hanbalī* schools to justify the flooding of enemy fortifications.[104]

In addition, some jurists excused the killing of non-combatants when such a result was a foreseeable consequence of an attack but not an intended one, the blame then falling on "the enemy leadership that, in resisting Islam, placed them in harm's way".[105] To support this position, some referred to an instance of a night raid during which women and children were killed. When informed of their death, the Prophet is said to have answered "they are not from us".[106] Further, some stated that reciprocity (*muqabala bi al-mithl*) could

[100] Agha Shahi, "The Role of Islam in Contemporary International Relations", in *L'Islam dans les relations internationales : Actes du IV Colloque Franco-Pakistanais, Paris, 14-15 mai 1984*, Édisud, Aix-en-Provence, 1986, p. 27.
[101] *Ibid*.
[102] S. H. Hashmi, above note 12, p. 330; M. Vanhullebusch, above note 84, p. 33.
[103] Cited by J. Kelsay, above note 86, p. 356 (emphasis added).
[104] A. Al-Dawoody, above note 10, p. 124.
[105] J. Kelsay, above note 86, p. 355.
[106] *Ibid.*

prevail over the protection given to civilians and their property but only to the extent needed to avoid a Muslim defeat.[107]

The author however suggests that those nuances to the protection afforded to non-combatants cannot be transposed as such to nuclear weapons without factoring in their peculiarities and their large-scale devastating effects. Indeed, means and methods existing at the time of the life of the Prophet Mohammed were far less developed and destructive than nuclear weapons. Some of the reasonings justifying the said nuances uneasily fit the evaluation of the legality of the use of such weapons. For instance, referring to the statement made by al-Shaybani, preventing a party to an armed conflict from killing civilians by prohibiting the use of nuclear weapons will not amount to making this party unable to go to war. This is confirmed by the absence of any justification for civilian killing within Islamic texts.[108] In any case, the nuances set above are not unanimously accepted and consequently do not constitute absolute obstacles to the prohibition of the use of nuclear weapons.

4.2 Protection of property

4.2.1 Prohibition to destroy property

The principle of distinction does not only concern individuals, but also covers objects. Besides protecting civilians, Islamic law indeed provides a specific protection to their property during the conduct of hostilities.[109] Due to the variety of kinds of property, it is however difficult to provide a 'one-size-fits-all' rule regarding the protection of civilian property.[110] Civilian objects are comprised of "villages, towns, cities, private dwellings, places of worship, buildings, civilian transport, medical service, and dams".[111] One of the fundamental human values in Islamic law is precisely the protection of both

[107] *Qur'an* 2:194, 9:36 and 9:37; S. H. Hashmi, above note 12, p. 330.
[108] Zarak Asad Khan, "The Islamic Laws of War and Nuclear Weapons", *DLP Forum*, 29 January 2023, available at: https://www.dlpforum.org/2023/01/29/the-islamic-laws-of-war-and-nuclear-weapons/.
[109] A. Al-Dawoody, above note 90, p. 1007.
[110] A. Al-Dawoody, above note 10, p. 128.
[111] M. Hisham Mohd Kamal, above note 89, p. 248.

private and public property, which are therefore immune from attacks.[112] In that sense, property such as hospitals, schools, or water supply cannot be destroyed because of their impact on the life of the population, subject to the nuances set out below.[113] Scholars supporting the prohibition of the destruction of civilian property, including al-Awzāʿī, Abū Thawr, al-Layth ibn Saʿd, and al-Thawrī, refer to Abu Bakr's ten commands, which included *inter alia* not to destroy buildings.[114] There is no need to elaborate on how nuclear weapons would automatically undermine this protection, unless their effects could be directed to a specific target or concentrated in a vast empty area. Notwithstanding, the impact on the environment would still be a matter of concern, as explored below.

4.2.2 Nuances to the protection of property

Without denying the protection given to civilian property, some jurists concede that its destruction is accepted in case of reciprocity (*muʿamalaal-mitl*)[115] or if the conduct of hostilities renders such destruction unavoidable.[116] Military necessity could thus also justify the destruction of enemy property.[117] To reconcile such views allowing the destruction of property with Abu Bakr's commands prohibiting it, Abū Yūsuf, al-Shāfiʿī and *Mālikī* jurists claimed that the first caliph prohibited such destruction simply because he knew that a Muslim victory was already secured and, as a result, destroyed property would amount to spoils for the Muslims.[118] Not convinced by this interpretation, other scholars such as Al-Awzāʿī argued that Abu Bakr would not have made the aforementioned commands "had he not known that the

[112] Senad Ćeman and Amir Mahić, "Principles of Islamic Law of Armed Conflicts: Protection of Property, Treatment of Prisoners of War, Providing Refuge and Treatment of Bodies of the Deceased during Hostilities", in Ahmed Al-Dawoody *et al.*, *Islamic Law and International Humanitarian Law*, Proceedings, International Committee of the Red Cross and Faculty of Islamic Studies, Sarajevo, 2020, p. 72.
[113] *Ibid.*, p. 73.
[114] A. Al-Dawoody, above note 10, p. 127.
[115] S. Ćeman and A. Mahić, above note 112, p. 73.
[116] Matthias Vanhullebusch, "Reciprocity under International Humanitarian Law and the Islamic Law of War", *Journal of Islamic State Practice in International Law*, Vol. 11, No. 1, 2015, p. 68, p. 73.
[117] A. Al-Dawoody, above note 90, p. 1004.
[118] A. Al-Dawoody, above note 10, p. 127.

Prophet's earlier actions were either abrogated by the Prophet himself or the Qur'an or limited in their ethical and legal import to their particular occurrences".[119]

Furthermore, similarly to civilians, property used for military purposes becomes a legitimate target during the armed conflict.[120] For instance, in the battle opposing Muslims and the *Banū al-Nadīr* tribe, the fighters of the latter used their dwellings – considered as civilian objects – to shelter. The Prophet Mohammed ordered to attack those dwellings that lost their protection and became military objectives as they were used for military purposes.[121] Nonetheless, even if the target is military property, Islamic law states that the aim should only be to make the enemy surrender and not to destroy such property.[122] Reckless destruction of enemy property could fall under the notion of *fasad fi al-ard* given that everything is considered as belonging to God.[123]

4.3 Principle of proportionality

4.3.1 Prohibition of unnecessary suffering and excessive casualties

Another key principle that could be invoked to support that Islamic law prohibits the use of nuclear weapons is proportionality. Even when the use of force is authorized, the *Qur'an* commands not to "transgress limits"[124] and not to be "extravagant in killing".[125] Verse 16:126 of the *Qur'an*, which states that harm in retaliation has to be equivalent to the initial harm suffered, was precisely revealed to prevent excesses in the use of force by Muslim fighters who wanted to cut their enemies into pieces after the Prophet Mohammed's uncle was killed during the battle of Uhud.[126] This implies that means and

[119] *Ibid.*; S. H. Hashmi, above note 12, p. 330.
[120] S. Ćeman and A. Mahić, above note 112, p. 72.
[121] M. Hisham Mohd Kamal, above note 89, p. 248.
[122] A. Al-Dawoody, above note 90, p. 1007.
[123] *Ibid.*
[124] *Qur'an* 11:190, cited by S. Marsoof, above note 85, p. 24.
[125] *Qur'an* 17:33, cited by Ahmed Zaki Yamani, "Humanitarian International Law in Islam: A general outlook", *Michigan Journal of International Law*, Vol. 7, No. 1, 1985, p. 198.
[126] Niaz A. Shah, "The Use of Force under Islamic Law", *The European Journal of International Law*, Vol. 24, No. 1, p. 361.

methods of warfare that cause unnecessary suffering or bloodshed have to be limited.[127] It is thus accepted that the use of force cannot go further than what is needed by military necessity.[128] This highlights the importance given by Islamic law to human dignity (*al-karāma*), the preservation of which is "both a constant transgenerational struggle and a goal".[129] It all comes down to the idea of fighting humanely.[130] As the dignity of the man is inevitably threatened during wars, Islamic law of armed conflict incorporates human integrity within its rules as a factor limiting the use of force against an individual.[131] As the Prophet said, "fairness is mandatory" in the sense that if one kills, the killing must be done properly and therefore humanely.[132] Likewise, even when respecting the law of equality and reciprocity, verse 2:194 of the *Qur'an* prescribes, to "fear Allah, and know that Allah is with *those who restrain* themselves".[133]

It is fair to say that nuclear weapons would struggle to pass this proportionality test. One can hardly think of a situation where their effects would be considered as 'necessary suffering'. Here again, reasoning by analogy is appropriate. For instance, the fact that injury to the face is prohibited – or at least considered as disapproved – highlights that weapons causing unnecessary suffering are not permitted.[134] In the same vein, Ahmed Zaki Yamani recalled an incident in which the Prophet Mohammed changed his mind and ordered to kill rather than burn enemies, even if enemy combatants are by definition legitimate targets. The Prophet justified this prohibition to use fire by recalling that only God can punish by fire.[135] Referring to the views of the four schools in Sunni Islam, this led Hashmi to state that burning individuals voluntarily – which can be a consequence of the explosion of a nuclear weapon – "either to overcome them in the midst of

[127] M. Vanhullebusch, above note 84, p. 38.
[128] A. Al-Dawoody, above note 90, p. 1003; S. El-Dakkak, above note 90, p. 121.
[129] Mustafa Hasani, "Human Dignity in the Light of Islamic Law", in Ahmed Al-Dawoody *et al.*, *Islamic Law and International Humanitarian Law*, above note 112, p. 54.
[130] M. Vanhullebusch, above note 84, p. 38.
[131] S. El-Dakkak, above note 90, p. 114.
[132] A. Zaki Yamani, above note 125, p. 198.
[133] *Qur'an* 2:194, cited by Matthias Vanhullebusch, above note 116, p. 68 (emphasis added).
[134] A. Zaki Yamani, above note 125, p. 198.
[135] *Ibid.*; see also A. Al-Dawoody, above note 10, p. 123; N. A. Shah, above note 126, p. 361.

battle or to punish them after capture, is forbidden".[136] Mohaghegh Damad further stated that this incident demonstrates that weapons leading to unjustified pain are forbidden, including incendiary weapons.[137] Poison-tipped arrows provide another compelling illustration. While al-Shaybanī, a *Hanafī* jurist, authorized using poison-tipped arrows due to their effectiveness against the enemy,[138] Khalil ibn Ishaq, a *Maliki* jurist, believed that poisoned arrows are not authorized because of the resulting harm that would exceed "the possible benefit achieved by the combatant".[139] The Shiite jurist Hilli also supported the prohibition of the use of poisoned weapons regardless of the circumstances.[140]

4.3.2 Nuances to the requirement of proportionality

The principle of proportionality is subject to a few nuances according to some scholars. Under their approach, both military necessity and reciprocity could be mobilized to justify a disproportionate attack, which would otherwise be prohibited.[141] Military necessity could be invoked "to protect the public good of the *ummah*".[142]

However, as for the principle of distinction, the way one interprets such nuances must be adapted to the fact that nuclear weapons are weapons of *mass destruction*. Moreover, one should note that the *Qur'an* provides that those who restrain themselves from injuring in retaliation by showing patience or by forgiving and reconciling are rewarded by God.[143] Therefore, for the Muslim combatant, it is in the author's view that proportionality - and, to a certain extent, moderation and restraint - should be favored.

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[136] S. H. Hashmi, above note 12, p. 328.
[137] T. Habibzadeh, above note 9, pp. 158-159.
[138] A. Al-Dawoody, above note 90, p. 1005.
[139] *Ibid*.
[140] K. Bennoune, above note 82, p. 628.
[141] M. Vanhullebusch, above note 116, pp. 72 et 73; S. H. Hashmi, above note 12, p. 323; S. Timmermans, above note 82, p. 200.
[142] M. Vanhullebusch, above note 116, p. 72.
[143] Rolf Mowatt-Larssen, *Islam and the Bomb. Religious Justification For and Against Nuclear Weapons*, Belfer Center for Science and International Affairs, Cambridge, MA, January 2011, p. 25.

Proportionality can thus also limit necessity (*al-darurat tuqdaru bi qadariha*).[144] Likewise, while verse 16:126 implies a certain form of reciprocity, the second part of the said verse limits the possibility of using equivalent force in retaliation by insisting on the benefits of opting for patience instead (similarly to verse 2:194).

4.4 Protection of the environment

4.4.1 Prominent status of the environment

Lastly, another convincing reason justifying the prohibition of the use of nuclear weapons relates to the environment. The notion of environment in Islamic law is broad and encompasses "climate and its components, plants, animals, sand, human beings, and all things found on the ground or in the atmosphere".[145] The environment occupies a particular place in Islam due to its uniqueness.[146] Therefore, not only are Muslims not allowed to harm it,[147] they are also responsible on both individual and collective levels for its safekeeping.[148] It is also considered that damage caused to the "natural habitat of species unable to defend themselves against human attack"[149] is an act of corruption in the land (*fasad fi al-ard*).[150] In that sense, the protection given to the environment goes beyond the fact that it benefits humans,[151] as "humankind is not the only community to live in this world".[152]

This specific protection given to the environment is linked to the idea that as the environment is a creation of God, by protecting it, Muslims

[144] M. Vanhullebusch, above note 116, p. 38.
[145] Milad Abdelnabi Salem, Norlena Hasnan and Nor Hasni Osman, 'Some Islamic Views on Environmental Responsibility', *International Conference on Environment Science and Biotechnology*, 2012, Vol. 48, p. 109.
[146] *Qur'an* 6:38.
[147] S. Ćeman and A. Mahić, above note 112, p. 73.
[148] Sayed Sikandar Shah Haneef, 'Principles of Environmental Law in Islam', *Arab Law Quarterly*, Vol. 17, No. 3, 2002 p. 247.
[149] S. H. Hashmi, above note 12, p. 323.
[150] *Ibid*.
[151] Mawil Izzi Deen, "Islamic Environmental Ethics: Law and Society," in J. Ronald Engel and Joan Gibb Engel (eds), *Ethics of Environment and Development: Global Challenge, International Response*, University of Arizona Press, Tucson, AZ, 1990, p. 190.
[152] *Ibid*.; see also *Qur'an* 6:38.

"preserve its values as a sign of the Creator".[153] Therefore, there are moral precepts governing the relationship between an individual and the environment.[154] The conduct of the Prophet's companions reflects the importance given to the environment by Islamic law. During the war, they would cut dates from their trees without touching the latter.[155] As the first caliph Aby Bakr ordered: "[y]ou shall not fell palm trees or burn them; you shall not cut down [any] fruit-bearing tree; you shall not slaughter a sheep or a cow or a camel except for food".[156]

As the aforementioned effects of nuclear weapons demonstrate, their use entails irreversible and dramatic consequences for the environment that hardly seem compatible with the edicts of Islamic law explored in this section. Being part of the broader category of weapons of mass destruction, nuclear weapons destroy everything in their path and have a long-term environmental impact. Accordingly, one could argue that the use of nuclear weapons is also contrary to the protection Islamic law prescribes for the environment.

4.4.2 Nuances to the protection of the environment

Here again, some jurists argued that the protection given to the environment is not absolute and has to be weighed against military necessity. Thus, even if the general rule prohibits cutting fruit trees and slaughtering animals, scholars from the *Hanbalī*, *Maliki*, and *Shafi'I* schools still consider such conduct as authorized if it is necessary to overcome the enemy. Scholars from the *Hanafī* school went as far as justifying such destruction to undermine the enemy's economy.[157]

For example, it was accepted that Muslims could destroy a forest if the trees were so numerous and dense that it would allow the enemy to hide in it.[158] Moreover, the Prophet ordered the destruction of palm trees of the

[153] *Ibid*.
[154] *Ibid*., p. 192.
[155] S. El-Dakkak, above note 90, p. 124.
[156] S. H. Hashmi, above note 12, p. 329.
[157] *Ibid*., p. 330.
[158] S. El-Dakkak, above note 90, p. 124.

Banū al-Nadīr tribe in 4/625 to make them surrender more easily.[159] Nonetheless, there is no other instance of the Prophet using such a tactic.[160] Moreover, here again, one could counter-argue that the first caliph would not have commanded not to destroy property if he did not know at that time that the authorization to commit such destruction was abrogated by the Prophet or the *Qur'an*, or that the actions of the Prophet were "limited in their ethical and legal import to their particular occurrences".[161] Finally, given the large-scale effects that the use of such weapons could have on the environment over a long and undefined period – contrary to the destruction of a few palm trees –, it is in this article's view debatable that military necessity could be a plausible justification.

5 Comparison with analogous principles under International Humanitarian Law

As highlighted above, international humanitarian law fails to provide an explicit rule prohibiting the use of nuclear weapons for those States that have not ratified the Treaty on the Prohibition of Nuclear Weapons. Still, much like Islamic law, international humanitarian law contains equivalent principles that restrict parties to a conflict when it comes to the way the latter conduct hostilities, while recognizing a certain margin of appreciation to the belligerents at the same time. The resemblance of the two regimes is not coincidental as both derive from the same elementary human values and place human dignity at the center, evidencing that "there are values that are universal and an important part of most religious and other worldviews".[162] Still, while both regimes are very similar in essence, they are not identical. This part thus briefly assesses how international humanitarian law frames the principles explored above, highlighting potential similarities and differences with Islamic law.

[159] S. H. Hashmi, above note 12, p. 329. See also *Qur'an* 59:5.
[160] A. Al-Dawoody, above note 10, p. 127.
[161] S. H. Hashmi, above note 12, p. 330.
[162] Delegation of the International Committee of Red Cross in Bosnia and Herzegovina, in Ahmed Al-Dawoody *et al.*, *Islamic Law and International Humanitarian Law*, above note 112, p. 1.

5.1 Principle of distinction

As in Islamic law, the principle of distinction is one of the cardinal rules of international humanitarian law ensuring that innocent lives and civilian objects are spared. It is recognized by treaty law[163] and customary international law for both international and non-international armed conflicts.[164] In simple terms, neither civilians nor civilian objects can be targeted. For an attack to be lawful during the conduct of hostilities, it must be "directed at a legitimate target, namely, a military objective, a combatant, a civilian while directly participating in hostilities or, at least in [non-international armed conflicts], a member of an armed group with a continuous combat function".[165] Moreover, an attack that employs means and methods of combat that "cannot be directed at a specific military objective" will be considered as an indiscriminate attack,[166] and the same goes for "method or means of combat the effects of which cannot be limited" as required by the 1977 Additional Protocol I to the 1949 Geneva Conventions.[167]

As a consequence, civilians who do not directly take part in hostilities and combatants who surrendered, are sick, wounded or shipwrecked or are in any other way *hors de combat* cannot be the object of an attack. Likewise, civilian objects, defined negatively as those objects that are not military objectives, are protected as well. Article 52(2) of Additional Protocol I defines military objectives as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage". This definition is considered as

[163] 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), Art. 48 (hereinafter: Additional Protocol I).
[164] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Customary International Humanitarian Law, Vol. 1: Rules, Cambridge University Press, Cambridge, 2005, Rules 1 and 7 (hereinafter: ICRC Customary Law Study).
[165] M. Sassòli, above note 3, p. 348, para. 8.289.
[166] Additional Protocol I, Art. 51(4)(b); see also ICRC Customary Law Study, Rule 71.
[167] Additional Protocol I, Art. 51(4)(c).

customary law for both international armed conflicts and non-international armed conflicts.[168]

The similarity in substance with Islamic law, although the form may differ, is striking. The underlying idea is identical: those individuals or objects that do not pose a threat to the enemy are protected from attacks. This being said, not every killing of a civilian or damage to civilian property is absolutely prohibited under international humanitarian law. First, civilians that take part in hostilities[169] and civilian objects turned into military objectives in accordance with Article 52(2) abovementioned are legitimate targets[170] – as provided by Islamic law. Second, incidental civilian life loss, civilian injury, and damage to civilian property (or a combination thereof) will not make the attack unlawful if the consequences are not excessive in relation to the concrete and direct military advantage anticipated.[171]

Whereas under Islamic law, some scholars argue that necessity can supersede the protection given to civilians and civilian property – but as highlighted above, this nuance has to be counterbalanced by the principle of proportionality –, international humanitarian law does not recognize necessity as a circumstance precluding wrongfulness.[172] Incidental effects of an attack are nevertheless tolerated if not excessive compared to the military advantage anticipated.[173] When it comes to reciprocity, while some Muslim jurists affirm that it can justify targeting civilians in order to win the battle, under modern international humanitarian law, it is established that reciprocity cannot override the principle of distinction, such a "*tu quoque*" argument has indeed been firmly rejected.[174] However, reprisals are authorized under certain specific conditions in international armed conflicts,

[168] ICRC Customary Law Study, Rule 8.
[169] Additional Protocol I, Art. 51(3) and Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 13(3).
[170] ICRC Customary Law Study, Rule 10.
[171] Additional Protocol I, Art. 51(5)(b).
[172] Additional Protocol I, Arts 51(5)(b) and 57(2)(a)(iii); see also ICRC Customary Law Study, Rule 14.
[173] M. Sassòli, above note 3, p. 88, para. 5.55.
[174] *Ibid.*, p. 81, para. 5.37.

and customary international humanitarian law only prohibits reprisals if directed against *protected* civilians and *protected* objects.[175]

5.2 Principle of proportionality

As equally important as the principle of distinction, the principle of proportionality is a key rule of international humanitarian law recognized by both treaty law[176] and customary law applicable to both international and non-international armed conflicts.[177] An attack, even if directed against a legitimate target, would be unlawful if it "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".[178] As such, the principle of proportionality thus differs from what is meant by proportionality under Islamic law, since the latter foresees the rule as a restricting principle applying to every attack, whereas the former regime aims at determining the proportionality ratio between the military advantage and the civilian damage.

An equivalent to the proportionality principle as conceived in Islamic law can however still be found in international humanitarian law within rules governing means and methods of warfare. Indeed, the choice of the latter is not unlimited even if the target is a legitimate one,[179] as the attacker is prohibited from employing "weapons, projectiles, and material, and methods of warfare of a nature to cause *superfluous injury or unnecessary suffering*".[180] Such a principle was already enshrined in the 1868 Saint Petersburg Declaration and in the Hague Regulations,[181] and is now also considered as part of customary law, applying thus in both international and non-

[175] ICRC Customary Law Study, Rules 146 and 147; Additional Protocol I, Arts 51(6) and 52(1). Additional Protocol I does not require the civilian or the civilian objects to be considered as protected.
[176] Additional Protocol I, Arts 51(5)(b) and 57(2)(a)(iii).
[177] ICRC Customary Law Study, Rule 14.
[178] Additional Protocol I, Art. 51(5)(b).
[179] Additional Protocol I, Art. 35(1).
[180] Additional Protocol I, Art. 35(2) (emphasis added).
[181] M. Sassòli, above note 3, p. 381, para. 8.368.

international armed conflicts.[182] This test implies weighing the effects of weapons and methods with their military utility.[183] The unnecessariness of the suffering will have to be evaluated taking into consideration the "suffering which is beyond that essential for the achievement of the purpose for which it has been inflicted".[184] Nonetheless, the normative autonomy of this principle is debated. In the absence of a treaty or customary norm prohibiting a specific weapon, some scholars claim that the said principle cannot independently make the use of that particular weapon unlawful.[185]

Be that as it may, as highlighted by Judge Mohammed Bedjaoui, former member and President of the International Court of Justice, Islamic law here again foreshadowed international humanitarian law, the same way it did with the principle of distinction:

> This [Islamic] rule that combatants should be spared unnecessary suffering, together with the rules for the protection of civilian population and the fundamental distinction between combatants and non-combatants, already featured in seventh-century slam, constitute one of the foundations of humanitarian international law as codified in the 20th century.[186]

5.3 Protection of the environment

Similar to Islamic law, international humanitarian law is comprised of rules specifically protecting the environment during the conduct of hostilities. One of the basic rules of Additional Protocol I concerning means and methods of

[182] ICRC Customary Law Study, Rule 70.
[183] M. Sassòli, above note 3, p. 382, para. 8.369.
[184] Leslie Claude Green, *Essays on the Modern Law of War*, Transnational Publishers, New York, 1985, p. 89, cited by Timothy J. Heverin, "Legality of the Threat or Use of Nuclear Weapons: Environmental and Humanitarioan Limits on Self- Defense", *Notre Dame Law* Review, Vol. 72, No. 4, 2014, p. 1300.
[185] M. Sassòli, above note 3, p. 383, para. 8.372.
[186] Mohammed Bedjaoui, "The Gulf War of 1980–1988 and the Islamic Conception of International Law", in Ige F. Dekker and Harry H.G. Post (eds), *The Gulf War of 1980–1988: The Iran-Iraq War in International Legal Perspective*, Martinus Nijhoff, Dordrecht, 1992, p. 290, cited by A. Al-Dawoody, above note 10, p. 116, note 63.

warfare provides that their use is prohibited if they "are intended, or may be expected, to cause widespread, long-term and severe damage to the *natural environment*".[187] This prohibition is also customary international humanitarian law[188] and is considered as absolute.[189] In this regard, Additional Protocol I dedicates a specific provision to the protection of the natural environment:

> 1. *Care* shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a *prohibition* of the use of methods or means of warfare which are intended or may be expected to *cause such damage to the natural environment* and thereby to prejudice the health or survival of the population.
> 2. Attacks against the natural environment *by way of reprisals are prohibited*.[190]

Furthermore, unless it is turned into a military objective, the natural environment must be considered as composed of civilian objects, treated and protected accordingly.[191] Such a rule can also be found in customary international humanitarian law, which also applies in non-international armed conflicts.[192] Moreover, States have to "take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives".[193] In other terms, an attack cannot be launched against a legitimate target if the expected incidental damage to the environment would be excessive compared to the anticipated concrete and direct military advantage.[194]

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[187] Additional Protocol I, Art. 35(3) (emphasis added).
[188] ICRC Customary Law Study, Rule 45.
[189] L. Maresca and E. Mitchell, above note 37, p. 640.
[190] Additional Protocol I, Art. 55 (emphasis added).
[191] Additional Protocol I, Art. 52(1).
[192] ICRC Customary Law Study, Rule 43(A).
[193] T. J. Heverin, above note 184, p. 1298; L. Maresca and E. Mitchell, above note 37, p. 640.
[194] ICRC Customary Law Study, Rule 43(C).

When it comes to military operations, States have to take feasible precautionary measures to avoid, and at least minimize, the incidental damage inflicted on the environment.[195] While Article 55(2) of Additional Protocol I further prohibits reprisals against the environment, international humanitarian law contains an exception to the prohibition of the destruction of the natural environment in case of imperative military necessity.[196]

6. Conclusion

In conclusion, Islamic law provides several principles that can be invoked to support the prohibition of the use of nuclear weapons, the effects of which are "both qualitatively and quantitatively unique".[197] One could argue that while these principles already exist in international humanitarian law, they still failed to lead to any accepted prohibition of the use of nuclear weapons. While this observation must be acknowledged and even if the similarities between the two bodies of law are striking, one should not underestimate the weight an argument under Islamic law could have for actors bound by Islamic law of armed conflict compared with an argument under modern international humanitarian law. Indeed, whereas the latter can easily be influenced by political considerations among others, Islamic law is highly regarded, as it is considered that "divine law is beyond the grasp of the human endeavour".[198]

It is equally true that nuclear weapons could be designed to respect the principle of distinction, or at least to have a more precise and limited impact. However, not only does the scope of this article focus on nuclear weapons as weapons of mass destruction, but tactical nuclear weapons would in any case still be a concern for the environment. The current trend even seems to indicate the proliferation of more devastating nuclear weapons. For instance, the nuclear weapons Russia currently possesses have bigger explosive yields than the ones that destroyed Hiroshima.[199] In the same vein, emerging

[195] ICRC Customary Law Study, Rule 44.
[196] ICRC Customary Law Study, Rule 43(B).
[197] Reaching Critical Will, above note 28, p. 17
[198] A. Zaki Yamani, above note 125, p. 189.
[199] International Campaign to Abolish Nuclear Weapons, above note 4.

technologies and cyber operations exacerbate the risk and the consequences of the use of nuclear weapons.[200] Plus, even if one were to admit that, for example, civilians could be spared, what would be the concrete added value of such weapons compared to all the other means of warfare already available, if not an entry point for more suffering and abuse?

Finally, this article demonstrated that reciprocity and (military) necessity were – and are – often invoked to circumvent the prohibitions set by the principles discussed above. While recognizing the absence of any consensus on the issue, this article nonetheless provides that if it is understandable that a certain margin of action was accepted to ensure a Muslim victory, this tolerance can only be understood in light of the settings of the seventh century. Weapons such as nuclear ones, which possess such a wide impact on present and future civilizations, could not have been foreseen by the jurists at that time. Consequently, a strict analogy with what was considered justified centuries ago cannot be made without any form of critical thinking when assessing contemporary weapons.[201] To put it simply, allowing the use of poisoned arrows will not have the same consequences as allowing the use of nuclear weapons. The above-mentioned examples of prohibited means and methods that were allowed for military necessity and/or reciprocity reasons 'only' violated one (or two) of the discussed principles with very 'limited' effects, whereas current nuclear weapons confront almost inevitably all those principles on a large-scale basis. Supporting the contrary would go against Islam, which "has always favoured the protection of life and human beings above all sorts of divisions".[202]

[200] International Campaign to Abolish Nuclear Weapons, *Emerging technologies and nuclear weapon risks*, Briefing paper, 28 January 2020, available at: https://www.icanw.org/briefing_emerging_technologies_and_nuclear_weapon_risks.
[201] A similar reasoning was explored regarding chemical weapons, see S. H. Hashmi, above note 78, p. 31.
[202] M. Vanhullebusch, above note 116, p. 78.

Ethical Paradigm of Buddhism: A Buttress for Compliance with International Humanitarian Law

*Pimchanok Palasmith**

The core Buddhist morality revolves around the instruction "[t]o avoid all evil, to cultivate good, and to cleanse one's mind" (Dhammapada 183).[1] To achieve these aims, Buddhist lay followers were taught to uphold precepts and practice meditation. These are means to inhibit physical and mental immoral activities. Correspondences between Buddhist practices and IHL will be illustrated upon to argue that the moral alignment reinforces legitimacy of the law and compliance. Furthermore, this article argues that keeping the five precepts and practicing mindfulness of breathing (Ānāpānasati bhāvanā) are conducive for compliance with International Humanitarian Law (IHL) physically and psychologically. Lastly it proposes some practical means to integrate IHL through ethical doctrines into Buddhist community which should contribute to more efficient application of IHL.

***Keywords**:* International Humanitarian Law, the Five precepts, Mindfulness of Breathing

1. Introduction

Compliance with International Humanitarian Law (IHL) like other laws is dependent on various factors. It depends on the interplay between IHL and diverse practical, strategic, socio-political, normative and psychological

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[1] "Dhammapada 183." Translated by Acharya Buddharakkhita, Buddhavagga: The Buddha, 1996, https://www.accesstoinsight.org/tipitaka/kn/dhp/dhp.14.budd.html.

considerations that determines its effectiveness.[2] Generally people comply with the law because they believe it is the 'right thing to do'.[3] Personal morality is also a significant predictor of compliance and legitimacy of the law can significantly influence the degree to which people follow it.[4] While IHL regulates conduct in armed conflicts, Buddhism encourages its followers to be self-disciplined and lead ethical lives. This article thus argues that disseminating IHL through religious norms and moral reasoning reinforces its perceived legitimacy and fosters combatants' internalized control.

The second section thus elaborates on the elementary Buddhist concepts which spiritually support IHL compliance. The religious influence can be helpful especially when the formal settings of IHL dissemination and implementation are weak or rare. The major findings in the "Roots of Restraint in War" by the International Committee of the Red Cross (ICRC), also suggested that "integrating the law into doctrine and training, linking it to local norms and values gives it greater traction that increases restraint on the battlefield".[5] The third part draws on correspondences between the Buddhist precepts and IHL. It argues that the law accords with Buddhist fundamental virtues, therefore is morally legitimate. Legal legitimacy is the public belief that laws are binding and leads individuals to follow rules neither because they agree with each specific rule, nor because they expect

[2] Sassòli, Marco. "The Implementation of International Humanitarian Law: Current and Inherent Challenges." Yearbook of International Humanitarian Law, vol. 10, 2007, pp. 45–73., doi:10.1017/S1389135907000451.

[3] Jackson, Jonathan, et al. "Compliance with the Law and Policing by Consent: Notes on Police and Legal Legitimacy." Routledge, London, UK, 2012, pp. 22–49. LSE Research Online, https://eprints.lse.ac.uk/30157/1/Jackson_etal_Compliance_with_the_law_and_policing_by_consent_2012.pdf, Accessed 27 June 2023.; See also Tyler, Tom R. "Psychological Perspectives on Legitimacy and Legitimation." Annual Review of Psychology, 2006, pp. 375–400, https://doi.org/https://doi.org/10.1146/annurev.psych.57.102904.190038.; See also, Tyler, Tom R. Why People Obey the Law. Princeton University Press, 2006

[4] Jackson, Jonathan, et al. "Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions." British Journal of Criminology, vol. 52, No.6, 5 Feb. 2012, pp. 1051–1071, https://doi.org/https://dx.doi.org/10.2139/ssrn.1994490; see also Tyler, Tom R., and Yuen J. Huo. Trust in the Law: Encouraging Public Cooperation with the Police and Courts . Russell Sage Foundation, 2002.

[5] The Roots of Restraint in War. ICRC, 2018, https://www.icrc.org/en/publication/4352-roots-restraint-war, Accessed 29 Oct. 2022.

punishment, but because they accept that it is morally right to abide by the law.[6] The fourth part discusses corresponding psychological aspects between Buddhist mental culture and IHL as a supplement to IHL adherence. It argues that ingrained spiritual incentive affects an individual's behavior to a greater extent than that of law, especially in the fog of war. Lastly this article proposes practical means to integrate these moral and legal alignments into Buddhist community. Supposedly, assimilation of religious and psychological factors with the law offers value-based motivation for voluntary deference and establish a greater sense of inclusivity which could reduce the perception of IHL as far-fetched, western-imposed rules.

2. Ethical Paradigm of Buddhism

Elementally, Buddhism considers all living creatures as comprising of body and mind that interact interdependently. The trained or untrained mind affects one's whole behavior. The five precepts and mindfulness of breathing will be the primary focus of this article, and both will be reviewed together as a comprehensive self-restraint mechanism, physically and mentally. Upholding the five precepts requires abstention from taking life, stealing, sexual misconduct, false speech, and taking intoxicants. Mindfulness of breathing helps to cultivate mental restraint. These doctrines are considered to be the most fundamental and prevalent principles which are commonly observed by Buddhists. Both are the Buddhist law of conduct which both lay Buddhists and monastic are preached to undertake daily through their whole lives. Observing the precepts means to generate favorable karma whilst refraining from causing unfavorable karma. It is also a preparative process for cultivating higher mental state through meditation.

[6] Jackson, Jonathan, et al. "Compliance with the Law and Policing by Consent: Notes on Police and Legal Legitimacy." Routledge, London, UK, 2012, pp. 22–49. LSE Research Online, https://eprints.lse.ac.uk/30157/1/Jackson_etal_Compliance_with_the_law_and_policing_by_consent_2012.pdf, Accessed 27 June 2023.; see also Jackson, Jonathan, et al. "Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions." British Journal of Criminology, vol. 52, No.6, 5 Feb. 2012, pp. 1051–1071, https://doi.org/https://dx.doi.org/10.2139/ssrn.1994490

Additionally, other core Buddhist values which promote an ethic of empathy e.g., non-violence (Ahimsa), compassion (Karuṇā), forbearance (khanti), etc. are also vital for following the path of the Buddha. Buddhists are taught to be decent human beings while striving to achieve the ultimate goal of Buddhism, nibbana (nirvana). However, the Buddhist approach to spiritual life yields a great degree of flexibility. It ought to be noted that not all Buddhists crave for nibbana. Some might just want to accumulate favorable karmic results for rebirth in a finer condition, for instance, in heaven. In the same vein, Buddhists are instructed to avoid committing bad karma because its consequences will lead to a rougher condition e.g., to rebirth as an animal or in hell. However, Buddhist followers can exert themselves as much or as little as they wish, so long as principal moral rules are not violated.

Furthermore, the law of karma (kamma) is also a foundational doctrine in Buddhism. Everyone is inevitably subject to retributive consequences of moral responsibility of his/her actions. According to the Buddha,

> "…. A woman or a man, a householder or one gone forth into homelessness/monastic life should often reflect thus:
> 'I am the owner of my kamma, the heir of my kamma;
> I have kamma as my origin, kamma as my relative, kamma as my resort; I will be the heir of whatever kamma, good or bad, that I do".[7]

Indeed, good karma can be analogous to pure water which by its nature cannot nullify but dilute concentration of salt or competing effect of bad karma. However, the degree of volition (cetana) can affect the gravity of unwholesomeness of an action. For instance, it may be argued that killing enemy combatants to protect innocent civilians or inflicting unintentional harm incurs less bad karma than deliberately harming civilians. However, the

[7] "Abhiṇhapaccavekkhitabbaṭhāna Sutta." Translated by Bhikkhu Bodhi, SuttaCentral, https://suttacentral.net/an5.57/en/bodhi?reference=none&highlight=false. Accessed 16 Oct. 2022

matter of intention that affects karmic consequences need to be addressed cautiously. This narrative can adversely contradict IHL principles and can be used to justify oppression or demonization of others. For instance, the propaganda that killing the adversary is not sinful because the intention is to protect one's own race or religion or that others have less 'virtue'.

3. Convergences with IHL

The main purpose of IHL is to regulate means and methods of warfare and protect the victims of armed conflict. It acknowledges the possibility of lawful conduct of war, while balancing the competing principles of humanity and military necessity. The Pāli Canon also recognizes the existence of violence and war. Yet there is no resource for its justification nor the just war theory.[8] The Pāli Canon suggests that, as long as human beings have not eliminated all sensual desires, verbal and physical abuses or violent activities towards one another seems to be unavoidable.[9] Realistic recognition of war, violence and sensual desires, therefore, allows Buddhist combatants to simultaneously fulfill their military duties and to observe the religious doctrine while complying with IHL. It is true that, as Marco Sassóli argued, "IHL does not seek to promote 'love', 'mercy' or 'human empathy' … but respect based upon objective criteria."[10] Nevertheless, supposedly broader phycological aspects of religious teachings can reinforce cross-disciplinary effort that supplement effective implementation of IHL, as will be discussed below.

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[8] Deegalle, Mahinda. "Norms of War in Theravada Buddhism." World Religions and Norms of War, edited by Gregory M. Reichberg and Vesselin Popovski, United Nations University Press, Tokyo, Japan, 2009, pp. 60–86., See also Harvey, Peter. "War and peace." An Introduction to Buddhist Ethics: Foundations, Values and Issues, Cambridge University Press, 2000, p. 255.

[9] "Maha-Dukkhakkhandha Sutta: The Great Mass of Stress." Translated by Thanissaro Bhikkhu, 2005, https://www.accesstoinsight.org/tipitaka/mn/mn.013.than.html.; see also Deegalle, Mahinda. "Introduction: Buddhism, Conflict and Violence." Buddhism, Conflict and Violence in Modern Sri Lanka, Routledge, Taylor & Francis Group, London, 2006, p. 6.

[10] Sassóli, Marco. "Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to Be Clarified." International Law Studies, vol. 90, 2014, https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1017&context=ils, Accessed 5 Mar. 2023.

3.1 Protected persons under IHL

The Dhammika Sutta (Sn. v. 394) indicates that "a lay person should not kill a living being, nor cause it to be killed, nor should he incite another to kill. Do not injure any being, either strong or weak".[11] Additionally, in Buddhism murder is also regarded as one of the greatest sins (adhamma) a person can commit. Whereas IHL ensures protection to a person or objects based on their status or function, either civilian or military, the first precept prohibits intentional destruction of life of a sentient being, regardless of their status or justification. Indeed, Buddhists are instructed to refrain from causing harm to others. For 'The thing that is disliked by me is also disliked by others. Since I dislike this thing, how can I give that pain to someone else?'[12]

3.1.1 Respect and protection for those who do not or are no longer taking part in hostilities

Under IHL, civilians, detainees, prisoners of war, persons *hors de combat*, e.g., wounded, sick, and shipwrecked members of the armed forces, and religious and medical personnel, are entitled to protection of their physical and psychological integrity. In this respect, the first precept and IHL correspond on the prohibition of murder or violence to life to protected persons, including order or threat that there shall be no survivors, or to conduct hostilities on this basis.[13] Declaring that no quarter will be given is also a war crime,[14] and prohibited under the customary international law.

Furthermore, considering the underlying purpose of the first precept, which is to protect lives, along with core Buddhist values, torture, maiming or inflicting harm to others, etc. can be interpreted as contradictions to the precept. It is thus consistent with the protection afforded by IHL which

[11] Dhammika Sutta: Dhammika. Translated by John D. Ireland, https://www.accesstoinsight.org/tipitaka/kn/snp/snp.2.14.irel.html.
[12] Sotāpatti Saṁyutta SN 55.7 Veḷudvāreyya Sutta, https://suttacentral.net/sn55.7/en/sujato?layout=plain&reference=none&notes=asterisk&highlight=false&script=latin
[13] AP I Art 40
[14] ICC Statute: Article 8(2)(b)(xii)

prohibits corporal and collective punishment, mutilation and all cruel, degrading treatment against protected persons, as well as scientific or biological experiments that are not necessitated by the medical treatment.[15] If such experiments cause death or seriously endanger the person's health, it constitutes a war crime in both international and non-international armed conflicts.[16] The underpinning values of Buddhism of compassion and benevolence, also supplement IHL provisions on ensuring humane treatment. Thereby, civilians and persons *hors de combat*, must be protected in all circumstances, against violence, slavery,[17] forced labor,[18] taking of hostages, and outrages upon personal dignity.

Furthermore, the first precept which prohibits killing, both directly and by the agency of another person,[19] also prohibits use of human shields.[20] The use of human shields involves intentionally taking advantage of the proximity of protected persons or objects under IHL to prevent or avoid the attack on military objectives,[21] since the perpetrator knowingly subjects them to danger by foreseeable effect of the attack. In this regard, the International Criminal Tribunal for the Former Yugoslavia (ICTY) qualified physically securing or holding peacekeeping forces against their will at potential NATO air targets as using "human shields."[22] The use of human shields is a war crime in international armed conflict under the ICC Statute.[23]

Apart from enjoying general protection under the first precept -- and under IHL as civilian persons -- children are entitled to further special

[15] GC I-IV Art.3, GC I-II Art.12, GC III Art.13, 17, 87, 89, GC IV Art.32,34, AP I Art.75 and AP II Art.4,6
[16] Under ICC Statute, Art. 8(2)(b)(x) and (e)(xi)
[17] AP II, Art. 4(2)(f)
[18] GC III, Art. 49, GC IV, Art. 40, 51, 95
[19] Harvey, Peter. "War and peace." An Introduction to Buddhist Ethics: Foundations, Values and Issues, Cambridge University Press, 2000, p. 249.
[20] GC III, Art. 23, GC IV, Art. 28, AP I, Art. 51(7)
[21] "Rule 97. Human Shields." ICRC, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule97#Fn_C7C1EC06_00010.
[22] ICTY, Karad□ić and Mladić case, Review of the Indictments, https://www.icty.org/x/cases/mladic/ind/en/kar-ii950724e.pdf
[23] ICC Statute, Article 8(2)(b)(xxiii)

protection under IHL, for instance, evacuation to safer zones,[24] special provisions on assistance[25] and detention,[26] prohibition against compulsory labor, and exemption from death penalty.[27] IHL protections for children also include non-participation and prohibition on recruitment of a child under the age of fifteen years in armed conflict.[28] However, the Optional Protocol on the Involvement of Children in Armed Conflict requires that a child under the age of 18 years does not have a direct participation in hostilities[29] and will not be recruited into the State armed forces.[30] Nonetheless, children who take a direct part in hostilities are still entitled to special protection when captured or subject to the power of an adversary, according to Article 77(3) of the Additional Protocol I and Article 4(3) of the Additional Protocol II.

3.1.2 Treatment to combatants and civilians taking direct part in hostilities

Combatants who have the privileged status to fight only exist in international armed conflict. S/he has the right to attack the enemy and may become subject to attack by the virtue of his/her combatant status alone.[31] As discussed above, civilians must be protected from the effects of armed conflict and are immune from direct attack, unless and for 'such time' as they directly participate in hostilities. According to the ICRC, a member of an organized armed group of a party to the conflict, who exercises 'continuous combat

[24] GC IV Art. 14, 17, 24 (para. 2), 49 (para. 3) and 132 (para. 2), AP I Art. 78, AP II Art. 4 (para. 3(e))
[25] GC IV Art. 23, 24 (para. 1), 38 (para. 5), 50 and 89 (para. 5); AP I Art. 70 (para. 1) and 77 (para. 1); P II Art. 4 (para. 3)
[26] GC IV Art. 51 (para. 2), 76 (para. 5), 82, 85 (para. 2), 89, 94, 119 (para. 2) and 132; AP I Art. 77 (paras 3 and 4), AP II Art. 4 (para. 3(d))
[27] GC IV Art. 68 (para. 4), AP I Art. 77 (para. 5), AP II Art. 6 (para. 4).
[28] AP I Article 77, the AP II Article 4, 3(c), the Convention on the Rights of the child, Article 38
[29] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts Art. 1
[30] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts Art. 2
[31] Hampson, Françoise J. "Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law." https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1080&context=ils. Accessed 9 Mar. 2023.; see also ICTY, The Prosecutor v. Kordić and Čerkez, Appeal Judgment, Case No. IT-95-14/2-A, 17 Dec 2004, para. 51

function' loses his/her protection as civilian.[32] Consequently, it makes him/her a lawful target of attack, even when they are not participating in hostilities, analogous to members of the armed forces.[33]

It is submitted that Buddhism is against all forms of infliction harm as elaborated above. Supposedly, the conundrum for Buddhist combatants is the treatment of adversary combatants or those who take a direct part in hostilities. In this manner, a lesson learned from the Angulimala Sutta is that a person can always opt for non-violence, regardless of severe harm s/he has caused. Angulimala was a decent man who became a serial murderer out of unquestioning respect for his teacher. Angulimala was asked to honor him with a thousand human little fingers. He had collected 999 fingers from those he had killed. Once Angulimala encountered the Buddha, Angulimala also wanted to take his. However, he could not reach the Buddha, despite his formidable strength and speed. Angulimala then asked the Buddha to stop. The Buddha replied that, "I have stopped, Angulimala, you too stop".

The Buddha further stated:

> "I have stopped, Angulimala, once & for all,
> having cast off violence toward all living beings.
> You, though, are unrestrained toward beings.
> That's how I've stopped and you haven't.";
> So that is why I have stopped and you have not."[34]

By hearing the Buddha's teaching, Angulimala decided to renounce all evils and was ordained as a monastic. Through his own cultivation and intention to cease all forms of violence, he later attained the final

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[32] Melzer, Nils. "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law." International Committee of the Red Cross, May 2009, https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf.

[33] Schmitt, Michael N., and Eric W. Widmar. "'On Target': Precision and Balance in the Contemporary Law of Targeting." JOURNAL OF NATIONAL SECURITY LAW & POLICY, vol. 7:379, 2014, https://jnslp.com/wp-content/uploads/2015/03/Precision-and-Balance-in-the-Contemporary-Law-of-Targeting_2.pdf. Accessed 1 Apr. 2023.

[34] Angulimala Sutta: About Angulimala, translated by Thanissaro Bhikkhu, https://www.accesstoinsight.org/tipitaka/mn/mn.086.than.html.

enlightenment, nibbana.[35] However, one day during the alms-round, he was severely injured, due to resentful sentiments. Yet he was told by the Buddha "…Bear with it, brahman, Bear with it, the fruit of the kamma …."[36]

From the Sutta, the Buddha did not give a comment on or justify the violence and killings committed, rather he asserted the undeniable effects of our karmic results, whether good or bad. It was emphasized that Angulimala's attempt to cease unwholesome deeds through non-violence does not counteract his past karma. He unavoidably served competing karmic retribution albeit was alleviated by positive karma. Regretting misdeeds is wholesome, but Buddhism emphasizes a future-directed morality, in which one always seeks to do better in the future, in an increasingly complete way.[37]

It is also worth noting that Angulimala's unquestioning obedience to his teacher can be analogous to the military chain of command that superior orders must be strictly followed. At times, military manuals may not indicate explicitly that military personnel must obey only lawful orders and must not obey unlawful commands.[38] However, Buddhist combatants should be reminded that under the Buddhist doctrine and international law, s/he will not be exempted from karmic consequences and individual criminal liability of his/her own act. This includes illegal acts s/he was ordered to be committed, if s/he knew – or should have known, due to the nature of the act

[35] Hecker, Hellmuth. "Angulimala A Murderer's Road to Sainthood." Angulimala: A Murderer's Road to Sainthood, https://www.accesstoinsight.org/lib/authors/hecker/wheel312.html.; Angulimala Sutta. http://buddhasutra.com/files/Buddhist_Sutra_A2.pdf.

[36] "Angulimala Sutta." Translated by Thanissaro Bhikkhu, Angulimala Sutta: About Angulimala, https://www.accesstoinsight.org/tipitaka/mn/mn.086.than.html.

[37] Harvey, Peter. An Introduction to Buddhist Ethics: Foundations, Values, and Issues. Cambridge University Press, 2000. P 68.

[38] As it was written in the US and the UK military Manuals. See "United States of America: Customary IHL - 154. Obedience to Superior Orders." ICRC IHL Database Customary IHL, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_us_rule154. And United Kingdom of Great Britain and Northern Ireland: Customary IHL - 154. Obedience to Superior Orders. https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_gb_rule154., respectively. Accessed 29 Oct. 2022.

ordered – that the order was unlawful.[39] On this front, the ICTY and ICTR Statutes[40] provide that the fact that an accused person acted in pursuant to an order of a government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment.[41]

Intrinsically, infringement upon the first precept requires an element of death as a result of killing.[42] In this regard, it can be argued that the inherent material of the first precept is simply not taking life. In Theravada school of Buddhism, injuring other livings does not break the precept. Although it incurs unfavorable karmic consequences and violates the underlying value of the precept, it is to a lesser degree than that of homicide. The first precept and IHL then converge, for example, as when fighting Buddhist combatants should resort to the use of force merely to neutralize or incapacitate their enemies. It should be noted as well that the ICJ recognized that "the prohibition on causing combatants unnecessary suffering" is one of the cardinal principles of IHL. It further defined unnecessary suffering as "a harm greater than that unavoidable to achieve legitimate military objectives".[43] Presumably the soldiers' main duties are not to kill but to serve their nations. Furthermore, killing is not an easy thing to do psychologically. Indeed, humanization of military operations helps soldiers cope with post-conflict trauma and stress. It should also be emphasized that IHL requires parties to an armed conflict not to cease fighting, but to fight more humanely and avoid causing unnecessary suffering. Therefore, complying with it does not adversely affect the capacity of the armed forces. Neither does directing attacks against civilians or civilian objects serve a military purpose nor would it make the attacking party be more competent. However, as a Buddhist

[39] Hague Convention on the laws and custom of war of 1907 Art 3; GCI Art. 49; GCII Art. 50; GCIII Art. 129; GCIV Art. 146; API Art. 86, 87, CIHL Rules 154 and 155, ICC Statute, Article 25

[40] ICTY Statute, Art 7.4, and ICTR Statute, Art 6.4.

[41] The Prosecutor v. Drazen Erdemovic, Case No. IT-96-22-T, Sentencing Judgment, 12 November 1996, para. 19, and Judgment in the Appeals Chamber, 7 October 1997, para. 19.

[42] Bodhi, Bhikkhu. 2.1 THE FIVE PRECEPTS, "Going for Refuge; Taking the Precepts.https://www.themindingcentre.org/dharmafarer/wp-content/uploads/2010/02/BBD1-Five-Precepts.bodhi_.pdf.

[43] Nuclear Weapons Advisory Opinion [1996] ICJ Rep 226 paras 77, 78, 95

combatant engaging in armed conflict, his/her individual judgement will be weighed to the same extent as those of other religions-- against violence.

3.2 Prohibition of pillage

The second precept prohibits stealing and appropriation of what belongs to someone else without the consent of the owner. The purpose of this precept is to protect the property of individuals from illegitimate confiscation,[44] whether by deceitful or coercive ways. It correlates with the prohibition of pillage under IHL and customary international law.[45] Pillage is the unlawful appropriation of public and private property in armed conflicts,[46] not justified by military necessity. It is a war crime in both international armed conflict[47] and non-international armed conflict.[48]

In this regard, the ICC Element of the Crime of pillage requires that "[t]he perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use".[49] Nevertheless, the ICTY jurisprudence, stated that "according to international law, the regulations do not allow arbitrary and unjustified plunder for army purposes or for the individual use of army members, even if the property seized can be used collectively or individually".[50] Moreover, the Special Court for Sierra Leone

[44] Bhikkhu Bodhi. "Taking the Precepts." Going for Refuge & Taking the Precepts, Buddhist Publication Society, Kandy, Sri Lanka, 1981, https://www.bps.lk/olib/wh/wh282_Bodhi_Going-For-Refuge--Taking-The-Precepts.pdf. Accessed 27 Oct. 2022.
[45] GC IV Article 33, its AP II Article 4(2)(g); Henckaerts, Jean Marie, and Louise Doswald-Beck. Customary International Humanitarian Law. I, Cambridge University Press, 2005. P 182.
[46] Delalić et al., Judgment, IT-96-21-T, 16 November 1998, para. 591. See also ICTY, The Prosecutor v. Kordić and Čerkez, Appeal Judgment, Case No. IT-95-14/2-A, 17 Dec 2004, para. 79.
[47] ICC Statute Art.8(2)(b)(xvi)
[48] ICC Statute Art.8(2)(e)(v)
[49] ICC, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the confirmation of charges, Pre-Trial Chamber I, 30 September 2008, Case No. ICC-01/04-01/07, para. 332; The Prosecutor v. Jean-Pierre Bemba Gombo (Situation of the Central African Republic), Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 320.
[50] ICTY, The Prosecutor v. Hadžihasanović & Kubura, Judgement, IT-01-47-T, 15 March 2006, para 52.

(SCSL) noted that "the requirement of 'private or personal use' is an unwarranted restriction on the application of the offence of pillage.[51] Such requirement was also found unduly restrictive and ought not to be an element of the crime of pillage".[52] The ICC later observed that the requirement is not reflected in customary or conventional international humanitarian law.[53] The court jurisprudence, hence, grants wider protection and resonates with the underlying moral of the second precept, on prohibition of unlawful confiscation in all forms, irrespective of the perpetrators' special intent.

Additionally, the second precept covers the act of plundering of natural resources in contemporary resource-driven armed conflicts. For instance, illegal exploitation and trafficking of mineral, coffee, and wildlife products. According to the ICJ, the Uganda's People Defense Forces, involved in the looting, plundering, and exploitation of the DRC's natural resources were in violation of the international prohibition of pillage pursuant to Article 47 of the 1907 Hague Regulations and Article 33 of the 1949 Geneva Convention IV."[54]

Additionally, the precept corresponds with prohibition on the unlawfully and wantonly extensive destruction and appropriation of property, in international armed conflict, not justified by military necessity,[55] and the prohibition of destroying or seizing the enemy's property in international

[51] SCSL, The Prosecutor v. Fofana and Kondewa, Judgement, SCSL-04-14-T, 2 August 2007, para 160
[52] SCSL, The Prosecutor v. Brima et al., Judgment, SCSL-04-16-T, 22 February 2008, paras 753- 4
[53] ICC, The Prosecutor v. Bemba, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 120.; However, the Appeal Chamber finds that the elements of crimes is a useful indication of the *opinio juris* of States and the ICRC customary IHL study concluded that pillage is the "specific application of the general principle of law prohibiting theft" thereby involving the "appropriation" of property "for private or personal use." see SCSL, The Prosecutor v. Fofana and Kondewa (CDF Case), Appeal judgement, SCSL-04-14-A, 28 May 2008, para. 403-404.
[54] Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of the International Court of Justice of 19 December 2005, I.C.J. Reports 2005, para. 242, 245.
[55] ICC Statute Article 8(2)(a)(iv)

armed conflict[56] and non-international armed conflict,[57] unless it is imperatively demanded by the necessities of war.

3.3 Prohibition of sexual violence in armed conflicts

According to the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR), for the purposes of international criminal law, sexual violence was defined as any act of a sexual nature committed on a person under circumstances which are coercive.[58] It can be broadly defined as acts of a sexual nature imposed by physical force, threats, intimidation, coercion, or by taking advantage of a coercive environment or a person's incapacity to give genuine consent.[59] Examples of such acts are enforced prostitution, sexual slavery, forced public nudity, sexual harassment, forced stripping, and mutilation of sexual organs, recreational or opportunistic rape, etc.

The third Buddhist precept is abstention from sexual misconduct concerning wrong sensuous pleasure. Accordingly, rape or other forms of sexual violence whether by physical compulsion or psychological pressure, is a breach of the precept.[60] Originally the third precept focused primarily on transgression against women, who are under forms of protection. It correlates with early IHL instruments which initially indicate protection specifically to the honour of women, against indecent assault. Article 27(2) of the Geneva Convention IV states that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault". However, recent scholarship has criticized that articulating sexual violence as an attack against women's honour rather than their physical and psychological security is inadequate and exacerbates

[56] ICC Statute Art. 8(2)(b)(xiii)
[57] ICC Statute Art. 8(2)(e)(xii)
[58] ICTR, The Prosecutor v. Jean-Paul Akayesu, Judgment, ICTR-96-4, 2 September 1998, para. 688; ICTR, The Prosecutor v. Alfred Musema, Case No. ICTR-96-13, Judgment, 27 January 2000, para 965.
[59] "Prevention and Criminal Repression of Rape and Other Forms of Sexual Violence during Armed Conflicts." International Committee of the Red Cross, 29 Oct. 2021, https://www.icrc.org/en/document/prevention-and-criminal-repression-rape-and-other-forms-sexual-violence-during-armed.
[60] Bodhi, Bhikkhu. 2.1 THE FIVE PRECEPTS, "Going for Refuge; Taking the Precepts. https://www.themindingcentre.org/dharmafarer/wp-content/uploads/2010/02/BBD1-Five-Precepts.bodhi_.pdf.

stigmatization.[61] Article 75 (2)(b) of the Additional Protocol I of 1977 provides that "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault are prohibited…". While Article 76(1) protects women specifically "against rape, forced prostitution and any other form of indecent assault, and Article 77(1) affords special protection to children against any form of indecent assault.

Even though women and girls are of particular attention when addressing sexual violence in armed conflict, these crimes are not limited to female or gender-conforming victims. Thus, the modern interpretation of such IHL provisions is more inclusive and non-discriminatory. All persons regardless of their sex are entitled to protection against sexual violence in armed conflict under customary IHL.[62] Article 4(2)(e) of the Additional Protocol II is the first IHL provision that explicitly prohibits outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault without distinction of victims' sex. The ICC statute also indicates that rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization or any other forms of sexual violence of comparable gravity, are war crimes in international[63] and non-international armed conflict.[64] It should be noted that the Elements of Crimes for the International Criminal Court defines the war crime of rape by the concept of "invasion," which is intended to be gender-neutral.[65]

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[61] International Committee of the Red Cross (ICRC), Gendered Impacts of Armed Conflict and Implications for the Application of International Humanitarian Law, ICRC, Geneva, June 2022, https://shop.icrc.org/gendered-impact-of-armed-conflict-and-ihl-pdf-en.html; see also Gopalan, Priya, Rejecting Notions of "Honour" to Mitigate Stigma: Prosecution for Sexual Violence Before the Bangladeshi International Criminal Tribunals, 2021, www.lse.ac.uk/women-peace-security/assets/documents/2021/WPS27Gopalan.pdf

[62] "Rule 93. Rape and Other Forms of Sexual Violence." Customary IHL - Rule 93. Rape and Other Forms of Sexual Violence, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule93.

[63] ICC Statute Art. 8(2)(b)(xxii)

[64] ICC Statute Art. 8(2)(e)(vi)

[65] Footnote 50, Elements of Crimes for the ICC, asp.icc-cpi.int/sites/asp/files/asp_docs/Publications/Compendium/ElementsOfCrime-ENG.pdf. Accessed 24 June 2023.

Moreover, even if Article 3 common to the four Geneva Conventions of 1949, applicable in a situation of non-international armed conflict, contains no specific prohibition against sexual violence, it requires that in all circumstances, persons not or no longer taking active part in hostilities must be treated humanely, and prohibits torture and outrages upon personal dignity, including humiliating and degrading treatment. On this front, rape and other forms of sexual violence can constitute torture, inhuman treatment, or willfully causing great suffering or serious injury to body or health.[66] The ICTR in the Akayesu case also recognized that sexual violence could fall within the scope of inhumane acts, outrages upon personal dignity and serious bodily or mental harm, thereby violating Common Article 3. In the Ćelebići case, the ICTY ruled for the first time that rape can constitute torture. Moreover, the court noted that sexual violence could constitute torture and an outrage upon personal dignity (i.e., war crimes), as well as a crime against humanity.[67]

3.4 The prohibition of perfidy and improper use of a flag of truce and distinctive emblems

The fourth precept is abstention from communication of falsehood, with intent to misguide or deceive others, resulting in fraud or dishonesty. Any form of lying or deception through speech, writing, gestures, etc., is a breach of the precept.[68] Accordingly, the precept reinforces IHL and customary international law on the prohibition of perfidy. It is an act that invites the confidence of an adversary to believe that he is entitled to protection under international law, with intent to betray that confidence. Article 37(1) of the

[66] "Prevention and Criminal Repression of Rape and Other Forms of Sexual Violence during Armed Conflicts." International Committee of the Red Cross, 29 Oct. 2021, https://www.icrc.org/en/document/prevention-and-criminal-repression-rape-and-other-forms-sexual-violence-during-armed.

[67] "Review of the Sexual Violence Elements of the Judgements of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in The Light of Security Council Resolution 1820." United Nations Department of Peacekeeping Operationshttps://www.icty.org/x/file/Outreach/sv_files/DPKO_report_sexual_violence.pdf.; see ICTY Statute Art.5(g)

[68] Harvey, Peter. "Key Buddhist Values." An Introduction to Buddhist Ethics: Foundations, Values and Issues, Cambridge University Press, 2000, p. 75.

Additional Protocol I prohibits killing, injuring, or capturing an adversary by resort to perfidy. Moreover, pursuant to Article 8(2)(b)(xi) of the ICC Statute, 'killing or wounding treacherously individuals belonging to the hostile nation or army' is a war crime.

Even if it is considered treacherous when someone assumes a false character to deceive his/her enemy to affect hostile acts, not all deception is unlawful under IHL. For instance, ruses of war or routine military deception, although they infringe upon the moral of the fourth precept, are not prohibited by IHL. Those are acts that intended to confuse or mislead an adversary or to induce him to act recklessly, which are not perfidious.[69]

Additionally, the fourth precept which is against conveying false impression also covers the prohibition of improper use of insignia, a white flag of truce, and distinctive or protected emblems, as indicated in Article 38(1) of the Additional Protocol I. Article 8(2)(b)(vii) of the Rome Statute stipulates that "making improper use of a flag of truce, of the flag, or of the military insignia and uniform of the enemy or of the United Nations and the distinctive emblems of the Geneva Conventions" is a war crime if resulting in death or serious personal injury.

4. Mindfulness in the conduct of hostilities

This part focuses on Buddhist approaches that can promote IHL compliance cognitively. While IHL does not cover the psychological aspect of how to conduct warfare in accordance with its principle, its core principles of distinction, proportionality and precautionary measures appear to highly rely on the performance of the combatant's mental faculty in distress. This section hence argues that Buddhist practices of the fifth precept and mindfulness of breathing which are measures that promote a clear state of mind and

[69] The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation., see also The UK Military Manual mentions the following examples of lawful ruses: surprises; ambushes; feigning attacks, retreats or flights; simulating quiet and inactivity; giving large strongpoints to a small force; constructing works, bridges, etc. see "Rule 57. Ruses of War." Customary IHL - Rule 57. Ruses of War, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule57. Accessed 30 Oct. 2022.

strengthens self-control can be developed into autonomous moral agents that buttress IHL adherence in the conduct of hostilities.

4.1 The fifth precept and mindfulness of breathing

The fifth precept requires abstention from taking intoxicants or drugs that are the basis for heedlessness. Even if this precept is set for restraining physical action, it rather emphasizes maintaining one's consciousness to prevent uncontemplated deeds. Providing that one's mind is beclouded, s/he is more susceptible to other forms of wrongdoings, for instance killing, stealing, sexual misconduct and lying. According to Buddhaghosa, breach of the fifth precept is always 'greatly blamable' as it obstructs the practice of Dhamma,[70] including mindfulness meditation.

Mindfulness of Breathing (Ānāpānasati bhāvanā)

Mindfulness of breathing is one of the meditative methods in the ancient Theravāda meditation system.[71] The term means observation of natural breathing as a meditative object, to be mindful of the way it occurs in its own accord.[72] Mindfulness of breathing helps stimulate self-awareness, emotional regulation and stability. As a result, practitioners' minds will be temporarily freed from lust-greed, hatred, and delusion.[73] It is the process of cleansing one's mind in Buddhism. According to the Buddha, all wars are fought within

[70] Harvey, Peter. "An Introduction to Buddhist Ethics: Foundations, Values and Issues", Cambridge University Press, 2000

[71] Skilton, Andrew, et al. "Terms of Engagement: Text, Technique and Experience in Scholarship on Theravada Meditation." Contemporary Buddhism, vol. 20, no. 1-2, 2019, pp. 1–35., https://doi.org/10.1080/14639947.2019.1666342. Accessed 20 Oct. 2022.

[72] Bhutekar, Dr. Santosh Vishnu, and Dr. Rajesh Shirsath. "Effect of Anapanasati Technique on Learning and Stress among Adolescents." The International Journal of Indian Psychology, vol. 7, no. 31, March. 2019, https://doi.org/DOI: 10.25215/0701.121.
; see also Anālayo, Bhikkhu. "Somatics of Early Buddhist Mindfulness and How to Face Anxiety." Mindfulness, vol. 11, no. 6, 8 May 2020, pp. 1520–1526., https://doi.org/10.1007/s12671-020-01382-x. Accessed 4 Feb. 2023.

[73] Ubeysekara, Dr. Ari. "Walking Meditation in Theravada Buddhism." Drarisworld, 27 Feb. 2021, https://drarisworld.wordpress.com/2020/04/22/walking-meditation-in-theravada-buddhism/.

the mind of people.[74] In this manner, mindfulness meditation is believed to help diminish the psychological roots of conflicts, i.e., greed and hatred.

Salient in mindfulness training is the ability to remain aware of what happens on purpose, without spontaneously reacting to it. For it helps to decrease activity in the fight-or-flight parts of the brain (i.e., the amygdala) that can cause us to be impulsive. Meanwhile, the part of the brain that controls awareness, concentration, rational thinking, and decision-making (i.e., the pre-frontal cortex) measurably increases in activity.[75] These brain activity alterations enhance attentional processes and cognitive capacity that, in turn, help military members to perform better with fewer lapses.[76] The positive psychological effects of mindfulness exercise have been evident in empirical scientific research. Indeed, it is generally associated with higher emotional intelligence and lower stress.[77] Mindfulness meditation positively improves soldiers' overall cognitive resilience and better prepares them for high-stress combat situations.[78] It also helps soldiers to recover from post-deployment distress such as post-traumatic stress disorder (PTSD).

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[74] Dhammapada verse 103, Self-Conquest is the Highest Victory, https://www.buddhanet.net/dhammapada/d_thous.htm#:~:text=Verse%20103.&text=one%20is%20the%20greatest%20conqueror,self%2C%20is%20the%20greatest%20conqueror.

[75] Eisenbeck, Nikolett, et al. "Effects of a Focused Breathing Mindfulness Exercise on Attention, Memory, and Mood: The Importance of Task Characteristics." Behaviour Change, vol. 35, no. 1, 2018, pp. 54–70., https://doi.org/10.1017/bec.2018.9. Accessed 14 Oct. 2022.

[76] "Mindfulness for the Military." HPRC, 28 Apr. 2020, https://www.hprc-online.org/mental-fitness/sleep-stress/mindfulness-military. See also Nassif, CPT Thomas H., et al. "Optimizing Performance and Mental Skills with Mindfulness-Based Attention Training: Two Field Studies with Operational Units: Corrigendum." Military Medicine, vol. 187, no. 1-2, 2021, https://doi.org/10.1093/milmed/usab477. Accessed 11 Nov. 2022.

[77] Charoensukmongkol, Peerayuth. "Benefits of Mindfulness Meditation on Emotional Intelligence, General Self-Efficacy, and Perceived Stress: Evidence from Thailand" Taylor & Francis, Journal of Spirituality of Mental Health, https://www.tandfonline.com/doi/abs/10.1080/19349637.2014.925364., see also Mogg, Richard. "Mindfulness for Military: Improving Human Performance, Cognitive Mastery, Emotional Intelligence and Resilience." Grounded Curiosity, 8 Aug. 2020, https://groundedcuriosity.com/mindfulness-for-military-improving-human-performance-cognitive-mastery-emotional-intelligence-and-resilience/#.Y2yiHy8RqRt.

[78] Myers, Melissa. "Improving Military Resilience through Mindfulness Training." Www.army.mil, USAMRMC Public Affairs, 1 June 2015, https://www.army.mil/article/149615/improving_military_resilience_through_mindfulness_training.

The fifth precept and mindfulness of breathing are means that nurture self-awareness and psychological restraint. Thereby the practices pave the way for compliance with the aforementioned four precepts and IHL. Furthermore, mindfulness mediation was also found to increase introspection and compassionate responses to suffering.[79] In this regard, it can also help deter conflict-related sexual violence, which often has no relation to sexual desire, but is instead linked to power, violence, and abuse of authority.[80]

Nevertheless, to ensure implementation of IHL during one of the most anarchic situations (i.e., the time of armed conflict) the instruction of the law itself seems to be insufficient. Therefore, adequate trainings for fostering mental restraint are necessary to ensure that while carrying arms in the conduct of hostilities, combatants are bearing humanity at the forefront of their minds. People who are taking on the obligations associated with cultural or religious norms and values as aspects of their own motivation, become self-regulating.[81] Indeed, mindfulness exercise has been integrated into various military trainings. For instance, the Royal Australian Air Force have trialed Corporate Based Mindfulness Training as part of Resilience Training.[82] Additionally, research in the US armed forces has shown that Buddhist-inspired mindfulness exercises can enhance soldiers' resilience and situational awareness which enables them to perform calmly and effectively under

[79] Condon, Paul, et al. "Meditation Increases Compassionate Responses to Suffering." Psychological Science, vol. 24, no. 10, 2013, pp. 2125–2127., https://doi.org/10.1177/0956797613485603. See also McGreevey, Sue. "Eight Weeks to a Better Brain." Harvard Gazette, Harvard Gazette, 12 Sept. 2019, https://news.harvard.edu/gazette/story/2011/01/eight-weeks-to-a-better-brain/.

[80] Dara Kay Cohen, Amelia Hoover Green and Elisabeth Jean Wood, "Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward", Special Report of the United States Institute of Peace, No. 323, February 2013, p. 6, available at: www.usip.org/sites/default/files/wartime% 20sexual%20violence.pdf; Patrick Chiroro, Gerd Bohner, G. Tendayi Viki and Christopher Jarvis, "Rape Myth Acceptance and Rape Proclivity: Expected Dominance Versus Expected Arousal in Acquaintance-Rape Situations", Journal of Interpersonal Violence, Vol. 19, No. 4, 2004, pp. 427–442.

[81] Tyler, Tom R. "Psychological Perspectives on Legitimacy and Legitimation." Annual Review of Psychology, 2006, pp. 375–400, https://doi.org/https://doi.org/10.1146/annurev.psych.57.102904.190038.

[82] Mogg, Richard. "Mindfulness for Military: Improving Human Performance, Cognitive Mastery, Emotional Intelligence and Resilience." Grounded Curiosity, 8 Aug. 2020, https://groundedcuriosity.com/mindfulness-for-military-improving-human-performance-cognitive-mastery-emotional-intelligence-and-resilience/#.Y23mpi8RqRs.

pressure and to adhere to norms of restraint.[83] Furthermore, it is suggested that mindfulness training be used as a tool for improved operational readiness and effectiveness, as well as well-being in military cohorts.[84] Hence, Buddhist practices should also strengthen psychological elements for IHL implementation, since better concentration and cognitive performance assist combatants in planning, deciding and executing military operations, in accordance with the principle of distinction, proportionality, and precautionary measures.

4.2 Distinction, Proportionality and Precautionary measures

Combatants with enhanced awareness should better distinguish between civilians and combatants, civilian objects, and military objectives. Arguably, fighting only with the adversary while engaged in combat and protecting innocent people helps alleviate Buddhist combatants' unpleasant spiritual and legal consequences. Attacking persons other than combatants and civilians who take a direct part in hostilities would violate the principle of distinction. Of course, the civilian population itself must be distinguished at all times and cannot be the object of attack according to Article 48 of the Additional Protocol I and Article 13(2) of Additional Protocol II to the Geneva Conventions of 1949 in international and non-international armed conflicts respectively. Under IHL, it is crucial to define who and what may be attacked so that the attacks may be directed only at combatants and military objectives.[85] An object is a military objective if it makes effective contribution to the adversary's military action, and if its total or partial destruction, capture or neutralization offers a definite military advantage -- both of which must be present in the circumstances at the time. Civilian objects are those which are

[83] Carlstedt, Roland A. Handbook of Integrative Clinical Psychology, Psychiatry, and Behavioral Medicine: Perspectives, Practices, and Research. Springer Pub. Co., 2010.;
Jha et al, Amishi P. "Minds 'at Attention': Mindfulness Training Curbs Attentional Lapses in Military Cohorts." PLOS ONE, vol. 10, no. 2, 2015, https://doi.org/10.1371/journal.pone.0116889.

[84] Jha, Amishi P., et al. Deploying Mindfulness to Gain Cognitive Advantage: Considerations for Military Effectiveness and Well-Being. https://lab.amishi.com/wp-content/uploads/Jhaetal_2019_HFM_302_DeployingMindfulness.pdf.

[85] AP I Art. 48, Art. 52 (2)

not military objectives.[86] In case of doubt, it must be presumed to be a civilian object.[87] The object nevertheless becomes a military objective once it is converted to military use, however slight.[88] Moreover, the principle of distinction is further encapsulated in IHL customary rules,[89] which prohibit the use of weapons that are by nature indiscriminate.[90]

After legitimate targets are identified, under IHL it is important to verify such military objectives as a precaution. Enhanced situational awareness helps combatants be alert and present in volatile combat environments. Mindfulness helps ensure that combatants take constant care to minimize incidental loss of civilian lives and objects.[91] They can have better context-dependent judgement to select the means of warfare that will cause the least harm to civilians and civilian objects.[92] They can promptly cancel or suspend the attack if the target is not a military objective or the attack is expected to be disproportionate. Advanced warning can also be effectively given if an attack may affect the civilian population.[93]

Moreover, even though a lawful target was identified and precautionary measures have been implemented, before launching an attack, a proportionality assessment must be taken to ensure that damage to civilian lives and objects are not excessive compared to the direct military advantage

[86] ICRC CIHL Study Rule 9
[87] AP I Art.52(3) In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.
[88] Schmitt, Michael N., and Eric W. Widmar. "'On Target': Precision and Balance in the Contemporary Law of Targeting." JOURNAL OF NATIONAL SECURITY LAW & POLICY, vol. 7:379, 2014, https://jnslp.com/wp-content/uploads/2015/03/Precision-and-Balance-in-the-Contemporary-Law-of-Targeting_2.pdf. Accessed 1 Apr. 2023.
[89] Rules 11, 12 supported by Rule 71
[90] Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, ICRC and Cambridge University Press, Cambridge, 2005,pp. 244–250.
[91] AP I Art. 57 "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.", AP II Art. 13(1) "The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations."; See also "Rule 15. Principle of Precautions in Attack." ICRC, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule15.
[92] AP I Art.57(3)
[93] AP I Art.57(2)(c)

anticipated.[94] In this regard, mindfulness can strengthen combatants' reasoning in order to carry out only a proportionate attack. The principle of proportionality is deemed as customary IHL. It is interesting to note that the Final Report to the Prosecutor Reviewing the NATO Bombing Campaign in the Federal Republic of Yugoslavia noted, that "[e]ven when targeting admittedly legitimate military objectives, there is a need to avoid excessive long-term damage to the economic infrastructure (...) with a consequential adverse effect on the civilian population"[95]

Furthermore, the ICC refers to civilian injuries, loss of life or damage that are clearly excessive 'in relation to the concrete and direct overall military advantage anticipated' constitutes a war crime.[96] The Elements of Crimes specify that 'concrete and direct overall military advantage' refers to a "military advantage that is foreseeable by the perpetrator at the relevant time."[97] In this respect, the ICTY adopted a "reasonable military commander" standard: "In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack."[98]

Indeed, proper application of the IHL principles of distinction, proportionality, and precautions assists Buddhist combatants to reconcile with their spiritual beliefs when conducting hostilities. They can be reassured

[94] AP I Art. 51(5)(b), Art. 57, Art. 85(3)(b)
[95] ICTY, Final Report to the Prosecutor Reviewing the NATO Bombing Campaign in the FRY, para. 18.
[96] ICC Statute, Art 8(2)(b)(iv): "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated".
[97] Such advantage may or may not be temporally or geographically related to the object of the attack.; the ICC, Elements of Crimes, Art. 8(2)(b)(iv), https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf
[98] ICTY, The Prosecutor v. Galic, Judgment, IT-98-29-T, 5 December 2003, para 58., see also Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, www.icty.org/x/file/Press/nato061300.pdf. Accessed 23 June 2023.

that the least harm is expected to be caused only to the extent that is proportionate and necessitated, resulting in lighter unfavorable karmic consequences.

5. Conclusion

Psychologists have traditionally recognized that internalization, which is the process by which people take on values as their own, provides an important basis for compliance with rules.[99] Perceiving IHL through the fundamental Buddhist doctrines of the five precepts and mindfulness of breathing enhances Buddhist combatants' sense of inclusiveness while securing IHL more legitimacy. For it helps to internalize moral values underpinning the law which increases motivation for willing cooperation and acts as an associated compliance mechanism. Ability to gain voluntary acceptance from people, due to their sense of obligation increases effectiveness during periods of scarcity, crisis, and conflict.[100]

While IHL applies only during times of armed conflict to regulate warfare and protect its victims, theoretically, a Buddhist combatant should not inflict harm, be deceitful or heedless against anyone at any time. Although the ultimate goal of Buddhism is to achieve nibbana and the utmost aspiration of humanity is absence of war where IHL would not have to be implemented. The two disciplines yet accommodate pragmatic approaches to strive towards mitigating suffering and regulating violence if not yet eradicated. The Buddhist doctrine and IHL therefore allow Buddhist combatants to seek balance between their spiritual commitment and maintaining their duties as combatants, between humanity and military necessity.

It is worth accentuating that by complying with IHL and conducting hostilities as humanely as possible, Buddhist combatants can simultaneously

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[99] Jackson, Jonathan, et al. "Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions." British Journal of Criminology, vol. 52, No.6, 5 Feb. 2012, pp. 1051–1071, https://doi.org/https://dx.doi.org/10.2139/ssrn.1994490.

[100] Tyler, Tom R. "Psychological Perspectives on Legitimacy and Legitimation." Annual Review of Psychology, 2006, pp. 375–400, https://doi.org/https://doi.org/10.1146/annurev.psych.57.102904.190038.

cultivate positive karma while attenuating the gravity of negative karma. The cross-disciplinary normative frameworks discussed above can be pragmatically implemented to buttress compliance of IHL. The interdisciplinary military manual or module for combatants and laypersons can be further developed and disseminated through the Buddhist military chaplain and the network of National Red Cross Societies, etc. In fact, the Thai Army Chaplain Division has carried out Buddhist teachings sessions regularly.[101] Additionally, the Essential Buddhist Teachings for the Armed Forces has been distributed in the Republic of Korea.[102] Through these methods, the Buddhist communities can find the rules more practically accessible thereby contributing to more effective implementation of IHL.

[101] "คู่มือการอนุศาสนาจารย์กองทัพบก พ.ศ.2538." Google Drive, Google, https://drive.google.com/file/d/1AetzqRKxSfDqhVTTcO7gJYUiw4X2VZMR/view.

[102] Lee, Hyein. "Between Common Humanity and Partiality: The Chogye Buddhist Chaplaincy Manual of the South Korean Military and Its Relevance to International Humanitarian Law." Taylor & Francis, ICRC, 22 Aug. 2022, https://www.tandfonline.com/doi/full/10.1080/14639947.2021.2089426.

Protecting the child who bears arms: How the status of Zones of Peace for Children under Philippine Act No. 11188 distorts International Humanitarian Law

Lance Ryan Villarosa

Philippine Republic Act No. 11188 was passed recognizing the vulnerable status of children in situations of armed conflict. As a measure of providing special protection, R.A. 11188 commendably declares children, among others, as "Zones of Peace"—shielding children from all forms of abuse and violence and particularly declaring, in terms certain and succinct, that children can never be the object of an attack. However, this concept touches on and fundamentally challenges one of the foundational pillars of International Humanitarian Law: Distinction. It is submitted that R.A. 11188, in sweeping terms, ignores the continued reality of child soldiers and creates a civilian-soldier hybrid who can kill but cannot be killed in the eyes of the law, because as a "Zone of Peace", children can never be lawfully targeted. In the day-to-day warfare situation where a soldier carries the responsibilities of eliminating combatants, saving civilians, and preserving his own life, making him second guess every interaction with a child, who no longer needs to feign innocence, imposes too heavy a burden on him to carry.

***Keywords*:** Child soldier, Republic Act No. 11188, Zone of Peace

"The road to hell is paved with good intentions." - *Abbot Bernard of Clairvaux*

1. Blurring the responsibilities of a soldier on the ground

Responsibility, and the consequences that accompany the same, is often measured and given based on the assumed capacity of the individual to make personal and conscientious decisions. This is why age, despite exceptions on discernment and in special cases, remains to be the most sensible indicator of

accountability because it proves that, all things considered equal, the individual most likely sought such a result after the development of his mental and emotional faculties.

Children are afforded special protection because they are not expected to think, anticipate, and perform in the same way as their older counterparts. They are never to be treated on the same level as adults and enjoy accountability appropriate for their age—that is and always has been society's worldview on children.

There is one extreme instance, however, where the veil of protection afforded to children is removed in favor of the direness of the situation: Armed conflict. It is only in war, where lines as drawn along human judgment, are children acting as an adult consequently treated as such.

The concept of child soldiers offers a unique perspective to the often-avoided topic of child protection in times of armed conflict. Under International Humanitarian Law (IHL), there are both general and special protections afforded to children caught up in armed conflict. Nevertheless, it recognizes that children who take a direct part in international (IAC) or non-international armed conflicts (NIAC) consequently become (i) combatants and in the event of their capture are entitled to prisoner-of-war status[1] or (ii) those who lose their protected status as civilians. In either case, the moment a child directly participates in the conflict, his presence on the battlefield signals fair game within the bounds of IHL.

The Philippines is no stranger to the phenomenon of child soldiers. In 2021 alone, the UN General Assembly Security Council verified 55 grave violations against 46 children (27 boys and 19 girls) which included the recruitment and use of 27 children with several armed groups such as the New People's Army, the Armed Forces of the Philippines, the *Abu Sayyaf* Group,

[1] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, art. 77(1) (entered into force 7 December 1978).

and the *Dawlah Islamiyah-Maute* Group.[2] This prevalence was exactly what led Philippine lawmakers to pass legislation definitively prohibiting the use of children in armed conflict.

However, with the passage of Republic Act or R.A. No. 11188 or the Special Protection of Children in Situations of Armed Conflict Act in the Philippines, soldiers become unreasonably burdened to consider significantly more lives than what they are required of under customary IHL. By bestowing upon children the status of a "Zone of Peace", R.A. 11188 places incredible pressure on soldiers to always consider the lives of children even in the likely event that they directly participate in hostilities. That is to say that even when a soldier is confronted with a child who bears arms and shoots at his allies, the former may not retaliate in fear of transgressing such Zone of Peace. In its worst form, it may lead armed groups to break their vows against the recruitment of children in favor of ending the conflict as quickly as possible.

This paper will discuss how the creation of zones of peace for children under R.A. 11188, as presently constructed, appears to be inconsistent with current principles of IHL. This will be examined in the following manner: First, a background on protected and unprotected persons including children under IHL; second, the standard of directly participating in the hostilities; third, the paradigm of treatment proposed under R.A. 11188; fourth, the inherent conflict in reconciling both bodies of law; and lastly, the unintended consequences of such admirable effort towards protecting children in times of armed conflict.

2. Laying down the IHL

Indispensable in the conduct of engagement is the application of IHL or the body of law applicable in times of armed conflict. Under IHL and relevant to this study is the conventional and customary principle of distinction, such that parties to the conflict must target only lawful military objectives and never

[2] Report of the Secretary-General on children and armed conflict (A/76/871-S/2022/493) issued on 11 July 2022.

civilians or civilian objects.[3] An attack that does not target one or more lawful military objectives is an indiscriminate attack.[4] In other words, attacks shall be limited strictly to military objectives.[5]

Generally, civilians are not considered military objectives.[6] Depending, however, on the characterization of the conflict and his/her participation in the same, it is possible that one loses his/her protective status. In times of an IAC, for instance, civilians who (i) become combatants[7] or (ii) take a direct part in hostilities[8] are considered to be legitimate military targets. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third [Geneva] Convention) are combatants.[9] Combatant status implies not only being considered a legitimate military objective, but also being able to kill or wound other combatants or individuals participating in hostilities, and being entitled to special treatment when *hors-de-combat*, i.e. when surrendered, captured or wounded.[10]

On the other hand, should there be a NIAC, civilians are immune from direct attack "unless and for such time as they take a direct part in hostilities".[11] This means that while civilians benefit from a general protection from attack,[12] this protection is lifted "for such time as they take a direct part in hostilities"[13]. During this time, a civilian who directly participates in the hostilities may be the proper subject of attack and may be attacked lawfully.

[3] Articles 48, 51(2), 52(2), Additional Protocol I.
[4] *Id.*
[5] *Id.*
[6] Art. 51 (2), Additional Protocol I.
[7] Article 43(2), Additional Protocol I.
[8] Art. 51 (3), Additional Protocol I.
[9] Article 43(2), Additional Protocol I.
[10] *Id.*
[11] Article 13(3), Additional Protocol II.
[12] Art. 51 (2), Additional Protocol I.
[13] Art. 51 (3) Additional Protocol I.

In the context of the Philippines where it has engaged and continues to engage in decades long conflict with non-State armed groups,[14] it is fair to assess such situation as a NIAC, whereby civilians who take a "direct part in hostilities" cannot be afforded protection under IHL.

3. What it means to "directly participate" in the hostilities

While there is no customary or treaty law definition of what constitutes direct participation in hostilities, it is often the view that participation should be understood to mean "acts which by their nature or purpose, are intended to cause actual harm to the enemy personnel and material."[15] According to the International Committee of the Red Cross (ICRC), an impartial humanitarian body recognized by the Geneva Conventions,[16] a specific act must meet the following criteria to qualify as direct participation in hostilities:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[17]

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[14] *See* International Crisis Group (ICG), The Communist Insurgency in the Philippines: Tactics and Talks, 14 February 2011, Asia Report N°202, available at: https://www.refworld.org/docid/4d5a310e2.html [accessed 6 July 2023].

[15] SCSL, *Prosecutor v. Sesay et al.* ("RUF-case"), "Judgment", SCSL-04-15-T, 2 March 2009, para. 104. *See ICTY, Prosecutor v. Perišić, "Judgement", IT-04-81-T, 6 September 2011, para. 93.*

[16] Article 3(2), Geneva Convention I.

[17] International Committee of the Red Cross (ICRC), Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law, May 2009, available at: https://www.refworld.org/docid/4a670dec2.html.

First, regarding the threshold of harm, the threshold is reached whenever the military operations or capacity of a party to an armed conflict are adversely affected, for example through the use of weapons against the armed forces, or by impeding their military operations, deployments, or supplies.[18] Where no military harm is caused, the threshold can also be reached by inflicting death, injury, or destruction on protected persons or objects such as the shelling or bombardment of civilian residential areas, sniping against civilians, or armed raids against refugee camps even though, in these scenarios, they would not necessarily cause a direct military harm to the enemy.[19]

Second, insofar as direct causation is concerned, acts that merely build or maintain the capacity of a party to harm its adversary in unspecified future operations do not amount to "direct" participation in hostilities, even if they are connected to the resulting harm through an uninterrupted chain of events and may even be indispensable to its causation e.g. the production of weapons and ammunition or general recruiting and training of personnel.[20]

Lastly, in order to amount to direct participation in hostilities, the conduct of a civilian must not only be objectively likely to inflict harm meeting the first two criteria, but it must also be specifically designed to do so in support of a party to an armed conflict and to the detriment of another (belligerent nexus).[21] That is to say that armed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party, cannot amount to "participation" in hostilities.[22]

Thus, while members of organized armed groups belonging to a party to the conflict lose protection against direct attack for the duration of their membership (i.e., for as long as they assume a continuous combat function), civilians lose protection against direct attack for the duration of each specific

[18] Nils Melzer, The ICRC's Clarification Process on the Notion of Direct Participation in Hostilities under International Humanitarian Law.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*

act amounting to direct participation in hostilities.[23] This includes any preparations and geographical deployments or withdrawals constituting an integral part of a specific hostile act.[24]

In order to avoid the erroneous or arbitrary targeting of civilians, parties to a conflict must take all feasible precautions in determining whether a person is a civilian and, if that is the case, whether he or she is directly participating in hostilities.[25] In case of doubt, the person in question must be presumed to be protected against direct attack.[26]

4. Children, as a special protected class, under IHL

In reference to children in armed conflict and on top of the general principles of IHL,[27] there are specific rules related to the protection of Children.

Under IHL, children affected by armed conflict are entitled to special respect and protection.[28] The International Criminal Court (ICC) Appeals Chamber in the 2017 case of *The Prosecutor vs. Bosco Ntaganda* had the occasion to cite Additional Protocol I, to wit: "Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason."[29] The Appeals Chamber went on to add that this, "...provision reflects the general principle that children continue to benefit from specific protective measures, even when associated with armed groups, as a result of their age."[30]

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[23] International Committee of the Red Cross (ICRC), Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law, May 2009, available at: https://www.refworld.org/docid/4a670dec2.html.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *See* the principle that a distinction must be made between civilians and combatants and the prohibition on attacks against civilians under Articles 48 and 51 in API.
[28] Customary IHL, Rule 135.
[29] Case no ICC-01/04-02/06-1962 (Official Case No) ICL 1786 (ICC 2017).
[30] *Id.*

This emphasis on the special protection afforded to children are seen in a bevy of international instruments such as the Geneva Conventions, the Additional Protocols, the Convention on the Rights of the Child, and even the Statute of the International Criminal Court. While not remiss in their conveyance of general protection afforded to civilians, it was well within the intent of the framers to categorize children as a special protected class.

Under GCIV and the first Additional Protocol, for instance, in the event of an international armed conflict, children not taking part in the hostilities are protected by GCIV relative to the protection of civilians. By stating that "Children shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason",[31] Protocol I explicitly lays down the special protection afforded to children.

Particularly, they are fundamentally guaranteed the principles of the right to life, the prohibitions on coercion, corporal punishment, torture, collective punishment, and reprisals.[32] Moreover, protections covering evacuation and special zones,[33] assistance and care,[34] identification, family reunification and unaccompanied children,[35] education and cultural environment,[36] arrested, detained or interned children,[37] and exemption from death penalty[38] are also included.

API, and later the 1989 Convention on the Rights of the Child and its optional protocol, in recognizing the frequent participation of children in

[31] Art. 77, Additional Protocol I.
[32] *See* Art. 27-34, Geneva Convention IV.
[33] Art. 14, 17, 24 (para. 2), 49 (para. 3) and 132 (para. 2) GCIV; Art. 78 API; Art. 4 (para. 3e) APII.
[34] Art. 23, 24 (para. 1), 38 (para. 5), 50 and 89 (para. 5) GCIV; Art. 70 (para. 1) and 77 (para. 1) API; Art. 4 (para. 3) APII.
[35] Art. 24-26, 49 (para. 3), 50 and 82 GCIV; Art. 74, 75 (para. 5), 76 (para. 3) and 78 API; Art. 4 (para. 3b) and 6 (para. 4) APII
[36] Art. 24 (para. 1), 50 and 94 GCIV; Art. 78 (para. 2) API; Art. 4 (para. 3a) APII
[37] Art. 51 (para. 2), 76 (para. 5), 82, 85 (para. 2), 89, 94 and 119 (para. 2) and 132 GCIV; Art. 77 (para. 3 and 4) API; Art. 4 (para. 3d) APII
[38] Art. 68 (para. 4) GCIV; Art. 77 (para. 5) API; Art. 6 (para. 4) APII

armed conflict, both by choice or by circumstance, adopted specific provisions banning their recruitment. API obliges States to take all feasible measures to prevent children under 15 from taking direct part in hostilities. It expressly prohibits their recruitment into the armed forces and encourages parties to give priority in recruiting among those aged from 15 to 18 to the oldest.[39]

Where the Philippines finds its relevance is in APII, which actually goes further, prohibiting both the recruitment and the participation – direct or indirect – in hostilities by children under 15 years of age.[40]

This is why it does not come as a surprise that even under the Statute of the International Criminal Court, conscripting or enlisting children into armed forces or groups constitutes a war crime in both international and non-international armed conflicts.[41]

Similarly, bearing in mind the obligations under IHL to protect the civilian population in armed conflicts, the 1989 Convention on the Rights of the Child obliges States Parties to take all feasible measures to ensure protection and care of children who are affected by an armed conflict.[42] This includes the obligation of States Parties to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.[43] In fact, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, to which the Philippines is a signatory to, raises the bar of protection even further by obligating State parties to take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.[44]

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[39] Art. 77, API.
[40] Art. 4, para. 3(c), APII.
[41] ICC Statute, Article 8(2)(b)(xxvi) and (e)(vii).
[42] Art. 38, *Convention on the rights of the child* (1989) Treaty no. 27531. *United Nations Treaty Series*, 1577.
[43] *Id*.
[44] UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000, available at: https://www.refworld.org/docid/47fdfb180.html.

The world has taken great strides in affording special protection to children in times of armed conflict. Several military manuals all over the world incorporate the rule that civilians are not protected against attack when they take a direct part in hostilities.[45] However, such protection must not be construed as clearance to extend such treatment broadly. It must be noted that nowhere is it stated in any of the international instruments mentioned that children are primordially afforded civilian status even when they take-up arms. In fact, the phrase "children not taking part in hostilities" in reference to the protection of children as civilians under GCIV and the general prohibition of recruitment and participation of children required amongst all member States suggests that children can directly participate in hostilities and therefore become lawful participants in war.

Of course, as René Provost puts it, "The conclusion that it is lawful to directly target child soldiers does not necessarily entail that it is lawful to target them as if they were adult soldiers"[46]—owing to Article 35 and 52 of Protocol I in mandating that Parties should not employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and limiting military objectives to those the destruction of which brings a definite military advantage. That is to say that if available means and methods of warfare can achieve the same military advantage while causing a lesser degree of injury or suffering, then international humanitarian law requires that they be used.[47]

Nevertheless, these restrictions speak only as to the means and ends of targeting a child soldier and not as to the predicate recognition that a child may still be a combatant or one who directly participates in hostilities after having fulfilled certain conditions.[48]

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[45] *See*, e.g., The Manual of the Law of Armed Conflict, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006. (Chapter 7, § 7.8), Law of Armed Conflict Manual DSK AV230100262 in Germany, Federal Ministry of Defense, 11 May 2013. (Chapter 3, § 303).

[46] Provost, R. (2016, January 9). Targeting child soldiers. EJIL: Talk! https://www.ejiltalk.org/targeting-child-soldiers/

[47] *Id*.

[48] *See* the ICRC's Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law wherein it states, "Accordingly, even civilians forced to

5. What R.A. 11188 did right

In 2019, the Philippines was lauded by the United Nations International Children's Emergency Fund (UNICEF) for passing Republic Act No. 11188 or the Special Protection of Children in Situations of Armed Conflict Act.[49] This law follows the 2017 UN-MILF Action Plan wherein 1,869 children disengaged from the Moro Islamic Liberation Front's (MILF) armed forces.[50]

Of particular importance in R.A. 11188 is the declaration of children as Zones of Peace.[51] Under the law, Zones of Peace are defined as,

> "[a] site with sacred, religious, historic, educational, cultural, geographical or environmental importance, which is protected and preserved by its own community. It is not merely a "Demilitarized Zone", but **a sanctuary that operates within ethical principles of nonviolence, free from weapons, acts of violence, injustice and environmental degradation**. The recognition of the Zone of Peace expresses commitments on the part of its community, governmental authority and, if appropriate, religious leadership to preserve the peaceful integrity of the designated site. Its custodians, members, participants and visitors exemplify mutual respect and nonviolent behavior while on the site, and share their resources for furthering peace and cooperation."[52]

By virtue of being a Zone of Peace, R.A. 11188 designates that children are to be treated in accordance with the policies stipulated under

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directly participate in hostilities or children below the lawful recruitment age may lose protection against direct attack.", p.60.

[49] UNICEF. (2019, February 20). *Law protecting child soldiers a victory for the Philippines*. UNICEF. Retrieved December 4, 2022, from https://www.unicef.org/philippines/press-releases/law-protecting-child-soldiers-victory-philippines-unicef

[50] *Id*.

[51] Rep. Act No. 11188 (2018), § 6. Special Protection of Children in Situations of Armed Conflict Act.

[52] § 5.

Article X, Section 22 of Republic Act No. 7610, otherwise known as the "Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act".[53] Passed in 1992, R.A. 7610 mandates the policy that children shall not be the object of attack and shall be entitled to special respect.[54] They shall be protected from any form of threat, assault, torture or other cruel, inhumane or degrading treatment.[55]

It also provides for the following:

(a) Children shall not be recruited to become members of the Armed Forces of the Philippines of its civilian units or other armed groups, nor be allowed to take part in the fighting, or used as guides, couriers, or spies;
(b) Delivery of basic social services such as education, primary health and emergency relief services shall be kept unhampered;
(c) The safety and protection of those who provide services including those involved in fact-finding missions from both government and non-government institutions shall be ensured. They shall not be subjected to undue harassment in the performance of their work;
(d) Public infrastructure such as schools, hospitals and rural health units shall not be utilized for military purposes such as command posts, barracks, detachments, and supply depots; and
(e) All appropriate steps shall be taken to facilitate the reunion of families temporarily separated due to armed conflict.[56]

The closest approximations of a "safe zone" in IHL is the concept of Neutralized Zones under the GCIV and a demilitarized zone under API. Establishing a neutralized zone permits the sheltering from the effects of war the wounded and sick combatants or non-combatants and civilian persons who take no part in hostilities, and who, while they reside in the zones,

[53] § 6.
[54] Rep. Act No. 7610 (1992). Art. X, § 22.
[55] *Id*.
[56] *Id*.

perform no work of a military character.[57] In the same vein, making a demilitarized zone the object of attack is a grave breach of Additional Protocol I.[58] A demilitarized zone is generally understood to be an area, agreed upon between the parties to the conflict, which cannot be occupied or used for military purposes by any party to the conflict.[59]

On a more novel note, R.A. 11188 defines four (4) different types of children:

(a) Children or a person below eighteen (18) years of age or a person eighteen (18) years of age or older hut who is unable to fully take care of one's self; or protect one's self from abuse, neglect, cruelty, exploitation or discrimination; and unable to act with discernment because of physical or mental disability or condition.[60]
(b) "Children affected by armed conflict (CAAC)" or all children population experiencing or who have experienced armed conflict;[61]
(c) Children involved in armed conflict (CIAC) or children who are either forcibly, compulsorily recruited, or who voluntarily joined a government force or any armed group in any capacity.[62] They may participate directly in armed hostilities as combatants or fighters; or indirectly through support roles such as scouts, spies, saboteurs, decoys, checkpoint assistants, couriers, messengers, porters, cooks or as sexual objects;[63] and
(d) Children in situations of armed conflict (CSAC) or children involved in armed conflict, including children affected by armed conflict and internally displaced children.[64]

[57] Art. 15, Geneva Convention IV.
[58] Article 85(3)(d), Additional Protocol I.
[59] Weller, M., Solomou, A., & Rylatt, J. W. (2015). *The Oxford handbook of the use of force in international law* (M. (Marc) Weller, A. Solomou, & J. W. Rylatt, Eds.; First edition.). Oxford University Press.
[60] Rep. Act No. 11188 (2018), § 5(g).
[61] § 5(i).
[62] § 5(j).
[63] *Id.*
[64] Rep. Act No. 11188 (2018), § 5(k).

These classifications are important in determining the specific actions to be undertaken by the State when dealing with these children such as the release of CIACs[65] and the enforcement of rights such as the right to be treated as victims and the right to be with their families for CSACs.[66]

6. What R.A. 11188 got wrong

It is particularly interesting that R.A. 7610 gives a policy that children "shall not be the object of attack" and that they shall be entitled to special respect.[67] However, it is equally concerning that such blanket declaration falls under Article X entitled, "Children in Situations of Armed Conflict"—a title that mirrors the nomenclature of CSACs. Under R.A. 11188, Children in Situations of Armed Conflict or CSAC refers to "*all children involved in armed conflict*, children affected by armed conflict and internally displaced children."[68]

What this suggests is that even in the likely instance where a child directly participates in the hostilities, he cannot be the object of an attack precisely because he is a Zone of Peace. In fact, it is only in the definition of *Children involved in armed conflict* or CIAC in R.A. 11188 where it is recognized that children may become combatants. However, in every instance CIACs are mentioned in the law, they are cited only in relation to their treatment in custody, release, and reintegration back into their communities[69] with no mention of the procedure to be undertaken the moment they become lawful military targets.

Still, interpreting Article 35 and 52 of Protocol I prohibiting the employment of means that cause superfluous injury or unnecessary suffering and the targeting of military objectives only to those limiting which brings a definite military advantage on one hand and the heightened protection to

[65] § 23.
[66] § 7.
[67] Rep. Act No. 7610 (1992), Art. X, § 22.
[68] Rep. Act No. 11188 (2018), § 5(k). (Emphasis supplied.)
[69] § 22, 23, 24.

children given in R.A. 11188 on another could suggest that soldiers are not given carte blanche authority to retaliate in the same offensive manner to child soldiers. That is to say that perhaps a more protracted approach is expected of soldiers when dealing with their child counterparts such as disarming and engaging with no intention to harm.

However, it is still unclear what the definitive approach should be when the child soldier in question is on the offensive and the life of the soldier is in imminent peril. Should efforts still be taken to prevent superfluous injury? Are children still considered Zones of Peace then?

R.A. 11188 offers no guidance as to resolving the same.

While it may be argued that it was well within the intentions of the lawmakers to exclude the specific mention of combatants in reference to zones of peace, the very definition of CSACs necessarily include children involved in armed conflict or CIAC.[70] That is to say that because of the sweeping definitions by which CSACs and CIACs are defined in relation to children as a whole, it would appear that the general policy of a zone of peace governs even if the child becomes a combatant by directly participating in the conflict.

This inherent conflict with IHL is problematic because any violation of R.A. 11188 including the broad prohibition of "killing children" merits the ultimate penalty of life imprisonment and a fine of not less than Two million pesos (₱2,000,000.00) but not more than Five million pesos (₱5,000,000.00)[71] or close to $36,000.

Granted, such omission of the concept of direct participation as an exception to the protective status of civilians and children could be attributed to mere oversight. However, absent any amendments to the law, the same wording could lead to the encouraged recruitment of child soldiers by both

[70] Remember, CSACs are defined as children involved in armed conflict, including children affected by armed conflict and internally displaced children.
[71] Rep. Act No. 11188 (2018), § 9.

state and non-state belligerents to ensure heightened success and impunity on the battlefield. Taken to its literal and maximum extent, it may very well lead to deliberate violations of IHL. This is because R.A. 11188 effectively creates super child soldiers—one that may bear arms and shoot but cannot be targeted by virtue of the overwhelming veil of protection known as "Zones of Peace".

The author submits that should there be an opportunity for lawmakers to amend R.A. 11188, an explicit mention that the declaration of "Zones of Peace" for Children shall not extend to those who take an active part in hostilities with a specific reference to interpretations under contemporary IHL such as the ICRC's "Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law".

7. Nobility only on paper

R.A. 11188 institutionalizes numerous safeguards for the protection of children, many of which are obvious manifestations of contemporary treatment of the youth: The right to be treated as victims,[72] the State burdened responsibility to prevent the recruitment, re-recruitment, use, displacement of, or grave child rights violations,[73] the dismissal of criminal cases against children involved in armed conflict, and their immediate referral to the social welfare authorities for rehabilitation and reintegration programs.[74]

Such noble intention, however, is tainted by its failure to address the impact of child soldiers in modern warfare. If anything, R.A. 11188 dangerously misdirects the focus of child support and protection through its blanket declaration of a zone of peace, carelessly leaving out the application of a child's potential combatant status when engaging in armed conflict as child soldiers.

Instead, what is laudable has quickly become one burdened with complications: How an otherwise innocent looking civilian in the eyes of a

[72] § 7.
[73] § 8.
[74] § 28.

soldier is actually a civilian-soldier hybrid who can kill but cannot be killed in the eyes of the law. It even sends backwards decades upon decades of efforts to conjure a collective voice against child soldier recruitment by incentivizing use of the same to ensure victory.

Such fusion of distinction, or the lack thereof, is what makes R.A. 11188 a missed opportunity in the development of IHL—a disservice to the countless who had worked to make normative the special protection we give to children in times of armed conflict.

Truly, and as has been proven, the road to hell is paved with good intentions.

Environmental destruction during armed conflict, anthropocentrism-ecocentrism divide and defining ecocide

Ramindu Perera

The anti-ecocide movement emerged as an initiative to use international criminal law to prohibit large scale destruction of the natural environment. The legal definition of ecocide published by the Independent Expert Panel appointed by Stop Ecocide Foundation (SEF) (2021) is a landmark moment in the ongoing campaign of criminalizing ecocide. This article analyzes the strengths and limitations of the SEF ecocide definition from an eco-centrist ecological perspective, on the ground that anthropocentric approaches to environmental protection in armed conflict situations are inadequate. The article identifies the definition as a progressive step forward from an eco-centric viewpoint as it represents several advances compared to article 8 (2) b iv which is the only provision that currently refers to the environment during armed conflict in the Rome Statute framework. Initiating a normative shift through bringing crimes against environment to the center of the Rome Statute regime, introducing a moderate and innovative actus reus criteria that relaxes the cumulative 'widespread, long-term and severe damage' requirement of article 8 (2) b iv, offering a dynamic interpretation to the constitutive elements of the actus reus criteria, advancing a flexible mens rea requirement through introducing the dolus eventualis standard and extending environmental protection to non-international conflicts represent progressive advances. However, linking the crime with a proportionality assessment as a second threshold impedes the effectiveness of the provision since it introduces an anthropocentric dimension that has resulted in diluting the eco-centric foundations of the ecocide conception. Refusing to treat the anthropocentric / eco-centric divide as binary oppositions, the article suggests considering them as two ends of a spectrum. Thus, it is argued that the proposed definition should be understood as a soft eco-centric scheme — a formula that remains within the ambit of eco-centrism but with an anthropocentric leaning.

Keywords – ecocide, Rome Statute, eco-centrism, international criminal law

1. Introduction

The impending climate crisis signified by long-term shifts in temperatures and weather patterns resulting in global warming, and associated repercussions of global warming such as environmental degradation, natural disasters, extremities in weather conditions, rising sea levels, acidifying of oceans etc. has posed an existentialist threat not only to humanity, but to the entire planet. As United Nations General Secretary Antonio Guterres remarked at the Climate Summit held in 2019, overcoming the climate crisis requires fundamental transformations in all aspects of society — in agriculture, land use, use of energy and models of development[1]. The threat of climate emergency has compelled academic disciplines — including international law — to rethink about their focus, and to consider the seriousness of the climate crisis in their respective fields[2]. The law of armed conflict cannot be exempted from this shift because environmental degradation that can contribute to the climate crisis has been integral to conflict situations[3]. As evident from the recently adopted Guidelines on the Protection of the Natural Environment in Armed Conflict (2020), it appears that the international humanitarian

[1] Antonio Guterres, 'Remarks at 2019 Climate Action Summit' (UN.org, 23 September 2019) <https://www.un.org/sg/en/content/sg/speeches/2019-09-23/remarks-2019-climate-action-summit>

[2] Jason Hickel, *Less Is More: How Degrowth Will Save the World* (Penguin Random House, 2020); Ian Gough, *Heat, Greed and Human Need: Climate Change, Capitalism and Sustainable Wellbeing* (Edward Elgar Publishing, 2017); Eduardo Kohn, *How Forests Think: Toward an Anthropology Beyond the Human* (University of California Press, 2013); Manuel Arias-Maldonado and Zev Trachtenberg (eds.), *Rethinking the Environment for the Anthropocene: Political Theory and Socionatural Relations in the New Geological Epoch* (Routledge, 2018); Zygmunt Bauman, *Wasted Lives: Modernity and Its Outcasts* (Polity,2003); Fritjof Capra and Ugo Mattei, *The Ecology of Law: Towards a Legal System in Tune with Nature and Community* (Berrett-Koehler Publishers, 2015); Richard O. Brooks and Ross Jones, *Law and Ecology: The Rise of the Ecosystem Regime* (Routledge, 2002); Prue Taylor, *An Ecological Approach to International Law: Responding to the Challenges of Climate Change* (Routledge, 1998)

[3] James R. Lee, *Climate Change and Armed Conflict: Hot and Cold Wars* (Routledge,2009); Halvard Buhauga, Nils Petter Gleditscha and Ole Magnus Theisena, 'Implications of Climate Change for Armed Conflict'('Social Dimensions of Climate Change' workshop, The World Bank Group,25 February, 2008); Asmeret Asefaw Berhe, 'On the relationship of armed conflicts with climate change' PLOS Clim 1(6):e0000038.<https://doi.org/10.1371/journal.pclm.0000038>

community has also taken the matter of environmental impact of armed conflict as a serious concern[4].

The scheme to recognize 'ecocide' as the fifth international crime under the Rome Statute regime is another proposition that has been advanced in this context of growing ecological awareness. The term ecocide indicates serious destruction caused to the natural environment. Though the idea of criminalizing ecocide was mooted decades before[5], the recent interest on the subject stems largely due to the campaigning of environmental activists to amend the Rome Statute to identify ecocide as a core international crime. The most recent development of this campaign is represented in the definition of ecocide by an independent expert panel appointed by the campaign organization Stop Ecocide Foundation (SEF) in 2021. Since its publication, the SEF definition has resulted in a rigorous academic debate. While some commentators are skeptical about the proposition, others have endorsed the definition albeit with criticism[6]. The present article chooses the SEF definition

[4] Also see ICRC, 'When Rain Turns to Dust: Understanding and Responding to the Combined Impact of Armed Conflicts and The Climate and Environmental Crisis on People's Lives' (International Committee of The Red Cross, 2022)

[5] Anja Gauger, Mai Pouye Rabatel-Fernel, Louise Kulbicki, Damien Short and Polly Higgins, 'The Ecocide Project: Ecocide is the missing 5th Crime Against Peace' (Human Rights Consortium, School of Advanced Study, University of London, 2012)

[6] see : Emma O'Biren, 'An international crime of "ecocide": what's the story?' (EJIL:Talk, 11-06-2021) <https://www.ejiltalk.org/an-international-crime-of-ecocide-whats-the-story/>; Donna Minha, 'The Proposed Definition of the Crime of Ecocide: An Important Step Forward, but Can Our Planet Wait?' (EJIL: Talk, 01-07-2021); Natascha Kersting, 'On Symbolism and Beyond: Defining Ecocide' (Volkerrechtsblog, 08.07.2021) <https://voelkerrechtsblog.org/on-symbolism-and-beyond/> [general supporting views]; Kai Ambos, 'Protecting the Environment through International Criminal Law?' (Ejil:Talk, 29-06-2021) <https://www.ejiltalk.org/protecting-the-environment-through-international-criminal-law/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2> [questioning the need for a new provision];Anastacia Greene, 'Mens Rea and the Proposed Legal Definition of Ecocide' (Volkerrechtsblog, 07-07-2021) <https://voelkerrechtsblog.org/mens-rea-and-the-proposed-legal-definition-of-ecocide/>; [analyzing the difference between mens-rea elements of the definition and the Rome Statute regime]; Jelena Aparac, 'A Missed Opportunity for Accountability?'(Volkerrechtsblog,09-07-2021) <https://voelkerrechtsblog.org/a-missed-opportunity-for-accountability/> [criticizing for not addressing corporate responsibility]; Fin-Jasper Langmack, 'Repairing Ecocide: A Worthwhile Challenge to the ICC Reparation System'(Volkerrechtsblog, 08-07-2021) <https://voelkerrechtsblog.org/repairing-ecocide/> [discussing reparations as a remedy]; Kevin Jon Heller, 'Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)' (OpinioJuris, 23-06-2021); <https://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/>; Kevin Jon Heller, 'Ecocide and Anthropocentric

as the point of analysis because this has been the most authoritative definition so far advanced by the anti-ecocide movement campaigning to amend the Rome Statute. The definition is well publicized — and has been subjected to widespread discussion as mentioned above.

This article aims to contribute to this discussion by critically analyzing the SEF definition of ecocide from an eco-centric ecological perspective. Eco-centric ecologism refers to the critical intellectual tradition that considers the traditional anthropocentric — or 'narrow' environmentalism as inadequate to formulate a sustainable response to the climate crisis and environmental destruction caused due to human activities. Anthropological ecologism regarding the environment from a human centric angle [because humans are benefitted through sustainable environmental practices] is definitely a step in the right direction compared to having no concern about the environment at all. But this paradigm, which approaches the matter of ecology through a human lens, is constrained because of its tendency to tolerate certain harmful environmental practices which might be seen as beneficial for humans.

To ensure long-term environmental coherence, it is necessary to move beyond the human centric point of view, and to consider environmental harm as destructive because of the damage done to the environment alone. The effect on human welfare should be a secondary matter in assessing environmental damage. The prohibition of serious destruction of the ecosystem should be absolute, and no human-benefit analysis could be invoked to justify such serious destruction. Informed by this theoretical approach, the present paper analyses the SEF definition on ecocide with the view that law of armed conflict requires a shift towards a more eco-centric arrangement from its current anthropocentric orientation to provide effective protection to the non-human environment in conflict situations. The analysis

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Cost-Benefit Analysis' (OpinioJuris, 26-06-21) <http://opiniojuris.org/2021/06/26/ecocide-and-anthropocentric-cost-benefit-analysis/>; Jérôme de Hemptinne, 'Ecocide: an Ambiguous Crime?, https://www.ejiltalk.org/ecocide-an-ambiguous-crime/' (Ejil:Talk:29-08-2021) <https://www.ejiltalk.org/ecocide-an-ambiguous-crime/>; Danuta Palarczyk, 'Ecocide Before the International Criminal Court: Simplicity is Better Than an Elaborate Embellishment' (2023) Criminal Law Forum' https://doi.org/10.1007/s10609-023-09453-z> [critical remarks on conceptual ambiguities]

attempts to identify the strengths and limitations of the SEF definition and suggest alternatives for further improvement.

To avoid confusion, it should be mentioned at the onset that the article does not wish to discuss policy implications of recognizing ecocide as the fifth international crime. Issues such as whether ICC resources are sufficient to accommodate the inclusion of the crime, how to prioritize crimes in prosecution or whether state parties would consent to an amendment are not addressed in the article. These are indeed important questions, but the scope of the article does not allow space to discuss them in detail. Further, the SEF definition covers environmental destruction during both conflict and non-conflict scenarios. However, the present article does not intend to address issues concerning environmental destruction during peace times. This again is a matter of crucial importance, but the article focuses on the strengths and limitations of the SEF definition with reference to environmental harm during armed conflict contexts.

The article is structured as follows: the second section explains why an eco-centric shift is needed in the areas of international humanitarian law and international criminal law which regulates warfare. Drawing from the theoretical literature on eco-centric ecologism, the section demonstrates that the traditional anthropocentric orientation of these legal regimes is insufficient in affording protection to the environment in conflict contexts. The third section provides an overview of the notion of ecocide with the aim of placing the SEF definition on ecocide in its historical context. The fourth section offers an analysis of the SEF definition identifying both its strengths and limitations. The concluding section summarizes the argument of the article.

2. The case for an eco-centric shift in the law of armed conflict

Limits of anthropocentrism

The increased attention on the relationship between mankind and the natural environment led to the emergence of the academic discipline 'environmental ethics' in the 1970s. In the context of growing awareness of environmental degradation and its impact on human lives, scholars belonging to different

disciplines attempted to theorize the preferred relationship between humans and the natural environment and envisage strategies to combat the ecological question. The earliest manifestation of this tendency was work concerning the importance of preserving natural systems like rivers and forests[7], and issues like the impact the use of pesticides having on the ecological balance[8]. At the same time, especially with reports coming from Vietnam about largescale environmental destruction during military operations, concerns were raised about the impact warfare has on the natural environment[9]. This awareness about how human conduct could destroy entire ecosystems encouraged scholars, thinkers and academics to focus seriously about the matter of human-nature interaction[10].

There has been a complex debate since 1970s in the field of environmental ethics about the optimum paradigm that can ensure an ecologically sustainable future. These positions range from the focus on encouraging participation of under-privileged groups in environmental decision making (participation), seeing the environmental problem as something serious than participation and viewing it as an issue of survival (survivalism), to the approach of understanding the ecological crisis as a crisis of culture and character — and thus, treating engaging with the crisis as an opportunity for emancipation[11]. Regardless of these differences, the intellectual inquiry about the ecological crisis broadly comprises of two distinct traditions; one approaching ecological sustainability from a human angle *i.e.,* concerning about the natural environment because of the benefit sustainability brings to the mankind [and its future generations] —and the other tradition tending to defend the integrity of the environment for the sake of the environment's own value. Different categories of ecologism introduced by various scholars — Arne Naess (shallow and 'deep' ecology)[12], Timothy

[7] Aldo Liopold, *A Sand County Almanac* (Ballentine Books, 1986)
[8] Rachel Carson, *Silent Spring* (Penguin Classics, 2000)
[9] David Zierler, *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think About the Environment* (University of Georgia Press, 2011)
[10] Robin Attfield, *Environmental Ethics: A Very Short Introduction* (Oxford University Press, 2018)
[11] Robyn Eckersley, *Environmentalism and Political Theory* (UCL press, 1993) 8-17
[12] George Sessions (ed), *Deep Ecology for the Twenty-First Century: Readings on the Philosophy and Practice of the New Environmentalism* (Shambala Press, 1995)

O'Riordan (techno centrism and ecocentrism)[13], Murray Bookchin (environmentalism and social ecology)[14], Donald Worster (imperialist and arcadian traditions of ecological thought)[15] among others in a more or less sense reflect the distinction between anthropocentric and eco-centric approaches to ecologism[16].

Eco-centric ecologism stems from the critique of anthropocentric approaches. Anthropocentric thought is interested in protecting the natural environment from the standpoint of human interest[17]. The dominant tradition of modern international environmental law, characterized by instruments such as the Stockholm Declaration (1972), Rio Declaration (1992) and United Nations sustainable development goals largely reflects an anthropocentric logic[18]. Further, environmentalist streams such as resource conservatism (conserve resources for human survival) and human welfare ecology (protect the environment to ensure the right to a healthy environment) are manifestations of this strand of thought[19]. The mainstream idea of environmentalism is built on the acknowledgement of the environmental rights of humans rather than concern towards any intrinsic value of nature[20].

Anthropocentrism in its different forms tends to separate the human from the ecological totality, assuming superiority of humans over the non-human environment[21]. From this sense of superiority stems the belief that the man has the right to control the earth[22] . This belief underlies the modern industrial society defined by endless drive towards consumerism and

[13] Timothy O'Riordan, *Environmentalism* (Pion, 1976)
[14] Murray Bookchin, *Toward and Ecological Society* (Black Rose Books, 1980)
[15] Donald Worster, *Nature's Economy: A History of Ecological Ideas* (2nd.ed., Cambridge University Press, 1994)
[16] Eckersley (§12)
[17] Roderick Frazier Nash, *The Rights of Nature: A History of Environmental Ethics* (The Universoty of Wisconsin Press, 1980)
[18] Luis J. Kotzé and Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' (2018) vol.7 Global Journal of Comparative Law 18
[19] Eckersley (§12)
[20] Rob White, *Climate Change Criminology* (Bristol University Press, 2020)
[21] Eckersley (§12)
[22] Carson (§9)

accumulation[23]. Instead of seeing humans as a part of a greater ecological community, and therefore the need for a harmonious relationship between humans and the non-human environment, anthropocentrism tends to subordinate ecological considerations to human interests.

Anthropological ecologism — even in its most sophisticated form like in human welfare ecology — functions within the parameters of human centrism. If humans fail to recognize that nature has its own intrinsic value regardless of its use for human welfare, destruction of ecosystems, species and life forms would be 'tolerated' if they are not conceived as of having direct relevance for human welfare. For example, destruction of African wildlife caused by periodic slaughters by poachers and military troops; or tigers, rhinos, bears facing extinction due to human activities are persistent environmental concerns[24]. These matters will bother us only if we adopt a non-anthropocentric view considering the inherent value of all types of species and environmental systems.

Furthermore, when human wellbeing is the standpoint, human necessity invariably becomes a justification for environmentally harmful activities committed on behalf of human interests. The notion of cost-benefit analysis of contemporary international environmental law that assess environmental harm in relation to human benefit reflects the overriding influence of the human necessity imperative. This privileged status accorded to human interests obstructs any meaningful answer to the ecological crisis. The talk about sustainable development has been criticized in this context as a human-centered developmental discourse co-opting the ecological discourse, and ensuring business is done as usual without substantive change[25].

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[23] David Pepper, *Eco-socialism: From deep ecology to social justice* (Routledge, 1993)

[24] Sessions (§ 13) *xix*

[25] For a critique of international environmental law and sustainable development see Julie Davidson, 'Sustainable Development: Business as Usual or New Way of Living?' (2000) 22(1) Environmental Ethics 25; Beatriz Santamarina, Ismael Vaccaro and Oriol Betran, 'The Sterilization of Eco-Criticism: From Sustainable Development to Green Capitalism' (2015) 14 Articulos 13; Thomas Wanner, 'The New "Passive Revolution" of the Green Economy and Growth Discourse: Maintaining the "Sustainable Development" of Neoliberal Capitalism' (2015) 20 New Political Economy 21; Lynley Tulloch, 'The neo liberalisation of sustainability' (2014) 13 Citizenship, social and economics, education 26; M.Shamsul Haque,

Thus, the need for a shift towards a non-anthropocentric understanding of the relationship between humans and non-human environment premised on the intrinsic value of the natural ecosystems has been raised by many scholars.

Eco-centrism and international law

Eco-centrist approach to ecology refutes the dualistic thinking in the anthropocentric tradition. Thus, eco-centrism is a '[…] worldview that recognizes intrinsic value in ecosystems and the biological and physical elements that they comprise, as well as in the ecological processes that spatially and temporally connect them[26]'. While the protection of the environment is conditional on utility for humans in the anthropocentric paradigm, the eco-centric approach tends to treat ecological sustainability as an *end in itself* rather than an instrument for human wellbeing. They ought to be protected for the sake of this inherent value. The eco-centric view has led to the emergence of 'earth jurisprudence' which affords moral weight on the worth of non-human entities[27]; and treats the non-human environment as deserving greater respect and formal recognition by humans[28].

Robyn Eckersley identifies the following traits in explaining the significance of an eco-centric worldview: (a) recognizing the full range of human interests in the non-human world; (b) recognizing the interests of the non-human community; (c) recognizing the interests of future generations of human and non-humans and (d) adopting a holistic rather than an atomistic approach since it values populations, species, ecosystems etc. as inter-related entities[29]. The idea of inter-relatedness of all phenomena i.e., seeing the world as an '[…] intrinsically dynamic, interconnected web of relations in which there are no absolutely discrete entities and no absolute dividing lines between

'The Fate of Sustainable Development under neo-liberal regimes in developing countries' (1999) 20:2 International Political Science Review 197

[26] Joe Gray, Ian Whyte and Patrick Curry, 'Eco-centrism: What it means and it implies' (2018) 1:2 The Ecological Citizen 130

[27] Judith E. Koons, 'What Is Earth Jurisprudence?: Key Principles to Transform Law for the Health of the Planet' (2009)18 Penn State Environmental Law Review 47

[28] David Schlosberg, Defining Environmental Justice: Theories, Movements and Nature (Oxford University Press, 2007) 9

[29] Eckersley (§12) 46

the living and the nonliving[30]' — and the inclusiveness demonstrated by recognizing the intrinsic worth of both human and non-human environment makes the eco-centric approach more protective of the ecological system than an anthropocentric perspective[31]. In other words, eco-centrism provides a more profound ontological premise that induces humans to think beyond their immediate self-interest, and to locate the position of humans within the larger ecological matrix.

The emergence of earth jurisprudence as mentioned before denotes the influence eco-centric thought is having on legal thinking. Environmental jurisprudence of non-western countries is increasingly contributing towards the legal recognition of the nature for its intrinsic value[32]. In the area of international law, though the dominant logic has been anthropocentrism, expressions of the eco-centric logic also persist as a non-dominant tradition[33]. The lineage of this alternative tradition can be sought back to the United Nations World Charter for Nature (1982) which proclaimed five principles for ecological sustainability on the understanding that '[…] every form of life is unique, warranting respect regardless of its worth to man'[34]. The United Nations General Assembly has adopted a series of resolutions stressing the need for human and nature co-existence[35]. While initiatives like the Earth Charter (2000) have demonstrated the need for an eco-centric approach, the dominant logic that informs international law addressing environmental matters has so far been the anthropocentric imperative. Thus, the quest to strengthen the eco-centric logic in international law still continues[36].

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[30] Ibid, 49

[31] Ibid

[32] see *T.N. Godavarman Thirumulpad* v. *Union of India* [WP (Civil) No. 202 of 1995], *Centre for Environmental Law v Union of India* (IA No.3452 in WP(C) No.202 of 1995) [Indian jurisprudence]; The Law of the Rights of Mother Earth (Law 071 of the Bolivian Plurinational State); Article 10 constitution of Ecuador ([...]Nature shall be the subject of those rights that the Constitution recognizes for it), article 71-74 on the rights of nature

[33] Sara De Vido, 'A Quest for an Eco-centric Approach to International Law: the COVID-19 Pandemic as Game Changer' (2021) 3 (2) Jus Cogens 105

[34] Preamble, World Charter for Nature

[35] UNGA Resolution No. 74/224 'Harmony with Nature' (A/Res/74/224, 2019-12-19). Also see Resolutions under the same theme: 73/235 (2018); 72/223 (2017); 71/232 (2016);70/208 (2015); 69/224 (2014);68/216 (2013); 67/214 (2012); 66/204 (2011); 65/164 (2010); 64/ 196 (2009)

[36] De Vido (§ 34)

Similar to other areas of international law, the law of armed conflict remains to be a largely anthropocentric regime[37]. Areas of international law that intertwine with armed conflict situations — International Humanitarian Law (IHL), International Criminal Law (ICL) and International Human Rights Law are deeply anthropocentric in their orientation. Though armed conflict situations cause enormous harm to the natural environment, and belligerent parties tend to treat environment as a secondary consideration or a mere object in warfare[38] — the natural environment has been a marginal consideration under the aforementioned legal regimes. As the term itself indicates, 'Humanitarian law' is more interested in ensuring human welfare rather than environmental integrity in an armed conflict context.

Traditional IHL rules were largely ignorant on environmental issues. Only with the adoption of Additional Protocol 1 (Add. Prot. 1) to the Geneva Convention in 1976 that an explicit reference was made to the natural environment. Out of the two articles of Add. Prot. 1 referring to the environment, only one treats destruction of the environment alone as a breach of law[39]. As it will be explained later in this article, this sole provision also has proven to be inadequate. The blind spot towards the environment is replicated in International Criminal Law too where only a single provision of the Rome Statute — accompanied with a complex, rigid threshold — refers to environmental destruction[40].

However, in light of rapid environmental deterioration in contemporary times, the need for the humanitarian community to take the matter of natural

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[37] Matilda Advidsson and Britta Sjöstedt, 'Ordering Human-Other Relationships' in Vincent Chapaux, Fredric Megret and Usha Natarajan (eds), *The Routledge Handbook on International Humanitarian Law and Ecologies of Armed Conflicts in the Anthropocene* (Taylor and Francis, 2023) 122; Carsten Stahn, Jens Iverson and Jennifer S. Easterday, 'Introduction: Protection of the Environment and Jus Post Bellum: Some Preliminary Reflections' in Carsten Stahn (ed), Environmental Protection and Transitions from Conflict to Peace (Oxford University Press, 2017) 1

[38] Susi Snyder (ed), 'Witnessing the Environmental Impacts of War - Environmental case studies from conflict zones around the world' (Amnesty International et al., 6 Nov. 2020)

[39] Add. Prot. 1 articles 35 (3) and 55

[40] Rome Statute, article 8 (2) b iv

environment seriously has been stressed in many forums[41]. More eco-centric thinking is needed in this area of law in order to develop the norm that humans should refrain from certain types of activities that are grossly detrimental to the environment even in an armed conflict situation. The idea to criminalize large scale environmental damage — and to treat such action as a grave crime similar to genocide has to be assessed in this context where the inadequacy of law of armed conflict has become apparent in terms of providing protection to the natural environment.

3. The crime of ecocide

Concept of ecocide – a brief history

The concept of ecocide was first framed by American bioethicist Arthur Galston at the 1970 Conference on War and National Responsibility. This idea was proposed in the context where the adverse impact of warfare on the natural environment was becoming increasingly apparent in the post-second world war scenario, especially due to the harm taking place in Vietnamese battlefields due to the widespread use of the herbicide known as agent orange and excessive use of Napalms[42]. Taking the lead from the term genocide, Galston proposed an international convention banning systematic destruction of the environment[43]. The draft International Convention on the Crime of Ecocide, drafted by Richard Falk in 1973 — a document that addressed environmental damage in the context of warfare recognized a range of military actions that 'disrupt or destroy, in whole or in part, a human ecosystem' as constituting ecocide[44]. It should be noted that Falk's definition, which is one of the earliest manifestations of framing ecocide as a crime treats

[41] Karl Mathiesen, 'What's the environmental impact of modern war?; (The Guardian, 6 Nov 2014); 'Joint statement on the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict' (November 6 2018) <https://www.savethetigris.org/joint-statement-on-the-international-day-for-preventing-the-exploitation-of-the-environment-in-war-and-armed-conflict/>

[42] Giovanni Chiarini, Ecocide: from the Vietnam war to international criminal jurisdiction? procedural issues in-between environmental science, climate change and law (2022) 21 COLR 1

[43] Gauger et al. (§6)

[44] Richard A Falk, 'Environmental Warfare and Ecocide – Facts, Appraisal, and Proposals' (1973) 4(1) Bulletin of Peace Proposals 80 9

the prohibition of ecocide as absolute. Similar to genocide, no justification could be invoked to argue for its necessity[45].

The idea of crime of ecocide entered the United Nations discourse with bodies like the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Legal Committee of the General Assembly and the International Law Commission time to time considering and debating about making a law that prohibits systematic environmental destruction. Although the International Law Commission considered identifying ecocide as an international crime at the drafting stage of the Rome Statute, the idea was later abandoned[46]. Recognizing 'widespread, long-term and severe damage' to the natural environment excessive to the military advantage was the only reference Rome Statute made to the environment[47].

At the aftermath of the adoption of the Rome Statute, certain environmental activists — particularly Scottish activist Polly Higgins initiated the campaign to include ecocide as the fifth international crime in the Rome Statute alongside with genocide, war crimes, crimes against humanity and crime of aggression. Though some national legislations had declared ecocide as a crime[48], the transboundary nature of the ecological question was seen by

[45] The full definition reads as follows: 'In the present Convention, ecocide means any of the following acts committed with intent to disrupt or destroy, in whole or in part, a human ecosystem: The use of weapons of mass destruction, whether nuclear, bacteriological, chemical, or other; The use of chemical herbicides to defoliate and deforest natural forests for military purposes; The use of bombs and artillery in such quantity, density, or size as to impair the quality of soil or to enhance the prospects of diseases dangerous to human beings, animals or crops; The use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes; The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war; The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives.'

[46] For a history of legal debate on ecocide see Gauger et. al (§ 6)

[47] Rome Statute, article 8 (2) b 4

[48] For example see Ecuador: "crimes against the environment and nature or Pacha Mama and crimes against biodiversity" (Penal code, Article 98); Vietnam: "ecocide, destroying the natural environment" (Penal Code, article 278); Russia 'Massive destruction of the animal or plant kingdoms, contamination of the atmosphere or water resources, and also commission of other actions capable of causing an ecological catastrophe' (Penal code article 358) ; Kazakhstan: 'Mass destruction of flora or fauna, poisoning the atmosphere, land or water resources, as well as the commission of other acts which caused or a [sic] capable of causation of an ecological catastrophe,' (Penal code) article 161 ; Ukraine: 'Mass destruction of flora and fauna, poisoning of air or water resources, and also any other actions that may cause an environmental disaster'(Penal code article 441)

activists as requiring a response at the international level. In 2010, Higgins submitted the following definition to the UN International Law Commission on the crime of ecocide:

> 'The extensive damage to, destruction of, or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished[49]'

Two observations about Higgin's intervention should be highlighted. First, unlike Falk and early generation theorists, Higgins expands the definition of ecocide into peace times too. Thus, warfare is only one human action that can cause ecocide among many other practices such as business conduct that happen outside an armed conflict context. Second, Higgins argues to make ecocide a crime of strict liability where *mens rea* is not required to establish the crime[50]. She offers several arguments to justify that proposal which includes the following propositions: a) the gravity of the crime requires attributing responsibility disregarding the criminal mind; b) strict liability helps in preventing the crime because human actors would be more diligent about environmental consequences (duty of care) once the prohibition of ecocide is in place[51].

SEF ecocide definition

The current debate on criminalizing ecocide is largely centered around the definition published in 2021 by the Independent Expert Panel appointed by the 'Stop Ecocide Foundation' — the campaign organization founded by Higgins. The SEF engages in further lobbying to trigger the process to amend the ICC Statute to recognize the crime of ecocide[52].

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[49] Polly Higgings, *Dare to be Great: Unlock Your Power to Create a Better World* (Flint, updated edition, 2020) 164

[50] Polly Higgins, *Eradicating Ecocide: Laws and governance to prevent the destruction of our planet* (Shepheard-walwyn publishers, 2010)

[51] Ibid, ch. 5

[52] For activities of the SEF see the campaign website https://ecocidelaw.com/

The SEF proposes to add a new international crime — the crime of ecocide to the Rome Statute (proposed article 8ter). Ecocide is defined as follows:

> 'Unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts[53]'

Following the structure of article 7 of the Rome Statute on crimes against humanity, the proposed article 8ter defines the elements of the crime after defining what ecocide is. Thus, definitions to the terms wanton[54], severe[55], widespread[56], long-term[57] and environment[58] are mentioned in the article.

According to the definition, to establish the crime of ecocide, two thresholds should be met: First, *the act should entail a substantial likelihood to cause severe and either widespread or long-term damage to the environment.* As the drafting panel thinks that this threshold alone would be over-inclusive since legally permitted and socially beneficial certain activities during the peacetimes [such as certain business activities] would be counted as ecocide under such a situation, a second threshold is also introduced[59]. Thus, *the conduct in question should be of an unlawful or wanton nature.*

Under this formulation, apart from proving an act or an omission has caused severe and either widespread or long-term damage, the article also requires establishing that the act at the same time was either unlawful or

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[53] Independent Expert Panel for the Legal Definition of Ecocide: Commentary and core text (Stop Ecocide Foundation, June 2021)

[54] Wanton: 'reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated'

[55] Severe: 'damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources'

[56] Widespread: 'damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings'

[57] Longterm: 'damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time'

[58] Environment: 'the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space'

[59] (§ 54)

wanton. The definition of the term 'wanton' introduces a proportionality assessment. Thus, reckless damage caused should be 'clearly excessive to the social and economic benefits anticipated'. During peace times, this means the exemption of 'socio-economically beneficial' activities that brings more benefits than the damage caused such as development of housing, railroads etc.[60]. The panel states that in a wartime context, this definition reaffirms the position expressed in article 8 (2) b 4 of the Rome Statute which balances the element of severe, widespread and long-term environmental damage with the concern of anticipated military advantage[61].

4. Proposed article 8ter – an eco-centric analysis

When looking from an eco-centric standpoint, the SEF definition of ecocide represents a mixed picture. The main strength of the definition lies in its potential in strengthening the eco-centric logic within the law of armed conflict. As explained before, environmental concerns have been a peripheral consideration in IHL and ICL frameworks. However, being marginal is different from having no presence at all. The eco-centric logic co-exists as a non-dominant, minor rationale alongside the dominant anthropocentric logic. To understand the contribution proposed article 8ter can offer, first it's imperative to have a closer look at the existing legal framework and to what extent the eco-centric logic persists within the law.

IHL and ICL: eco-centric tendencies

Article 35 (3) of the Add. Prot. 1, which represents a basic rule with reference to means and methods of warfare states as follows:

> It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

This article reflects an eco-centric leaning since the unlawful act i.e., damage to the natural environment is defined independent of its

[60] ibid
[61] ibid

consequences to the human beings[62]. This can be differentiated from Add. Prot. 1 article 55 which also refers to the natural environment. The latter necessitates duty of care to protect the environment against widespread, long term and severe damage to the environment and lays down a prohibition on methods and means of warfare which are intended or may be expected to cause damage to the environment and '[…] thereby to prejudice the health or survival of the population[63]'. In the case of article 55, environment damage is deemed undesirable due to the harmful impact it has on human population. Article 35 (3), together with basic IHL principles such as the principle of distinction and precaution offers protection to the natural environment independent of human concerns.

The ICRC identifies the prohibition laid down in article 35(3) as a rule of customary international law[64]. The prohibition is understood as an absolute prohibition, cannot be justified by the overriding concern of military necessity[65]. Due to this absolute nature, the threshold of the prohibition has been set at a higher standard. Thus, for a violation to occur, the destruction of the natural environment should meet the cumulative criteria of having a 'widespread, long-term and severe' effect. This can be contrasted with the provisions of the Convention on the Prohibition of Military or any Hostile use of Environmental Modification Techniques (1976) (ENMOD). ENMOD also refers to the elements of 'widespread, long-lasting or severe' damage in prohibiting the development of techniques that modify the functioning of the environment[66]. ENMOD refers to the three terms in a disjunctive manner. Thus, *widespread or long-lasting or severe* damage amounts to a violation of the convention. In contrast, Add. Prot. I adopts a cumulative criterion. The problem with this high threshold is the difficulty in establishing a violation of all three elements at the same time. As the Committee established to review

[62] ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Martinus Nijhoff, 1987) 410
[63] Add. Prot. 1, Article 55
[64] Rule 45, International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law: Volume I: Rules* (Cambridge University Press, 2005) 151
[65] Ibid, 157
[66] ENMOD, Article 1

the NATO bombing campaign against Yugoslavia has also observed: '[…] the threshold was so high as to make it difficult to find a violation[67]'.

Furthermore, compared to the ENMOD, Add. Prot. 1 defines the constitutive elements of the cumulative criteria in a rigid manner. The term 'widespread' is defined by the Add. Prot. 1 as 'thousands of square kilo meters' as opposed to 'hundreds of square kilo meters' in the ENMOD framework. While the ENMOD defines 'long-lasting' as a period of several months or a season, Add. Prot. 1 defines 'long term' as a period of decades[68]. This comparison shows that the Add. Prot. 1 tends to adopt a strict criterion compared to ENMOD in defining the scope of unlawful environmental harm. The customary status of ENMOD is disputed[69], and it only abides parties to the convention. Further, in terms of scope of application, the ENMOD is applicable to both wartime and peacetime situations and covers geo-physical warfare in which techniques are used to alter environmental patterns[70]. On the other hand, Add. Prot. 1 is specific to armed conflict situations, a part of the *lex specialis* applicable to such contexts and covers ecological warfare[71]. Also, article 35 (3) reflects a customary international law rule. Thus, in a wartime scenario, the rigid formula reflected in article 35 (3) is likely to be applied.

The next provision deserving our attention is the Rome Statute article 8 (2) b iv. The article which comes under the provision of war crimes reads as follows:

> 'Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.

[67] Commentary Customary IHL, (§ 65) 157
[68] Commentary Add. Prot. (§ 63) 416
[69] (§ 65) 157
[70] (§ 63) 420
[71] Ibid

This provision has been described as an 'non-anthropocentric war crime' since the subject matter of the latter part of the provision concerns about the damage to the environment itself[72]. Article 8 (2) b iv is a secondary rule which is derived from the primary rules concerning the destruction of the natural environment embedded in IHL[73]. The threshold 'widespread, long-term and severe' damage reflects the cumulative criteria adopted in Add. Prot. 1 article 35 (3).

However, the Rome Statute does not specify the meaning of these terms. This raises the question about the definition ought to be followed[74]. The International Criminal Court (ICC) has never adjudicated on this provision, and therefore it is yet to be seen which definition the court would prefer. However, there is general scholarly agreement on the likelihood of adopting the strict IHL definition; not of the ENMOD because ICL rule is likely to be seen as derived from the provisions of the Add. Prot. I [75]. Similar to Add. Prot. Article 35 (3) the strict actus reus criteria Rome Statute article 8 (2) b iv encompasses has been explained as '[…] nearly impossible to meet in all but the most egregious circumstances[76]'.

Despite these similarities, article 8 (2) b iv differs from Add. Prot. 1 article 35 (3) in the crucial aspect of the former's association with a proportionality assessment. Widespread, long-term and severe damage would amount to a war crime only if the damage is 'clearly excessive in relation to the concrete and direct overall military advantage anticipated'. Thus, even if an incident of environmental damage meets the strict cumulative criteria, it would not be considered as a war crime if the prosecution fails to establish that the damage was clearly excessive to the anticipated military advantage.

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[72] Jessica C. Lawrence and Kevin Jon Heller, 'The limits of article 8(2)B (IV) of the Rome Statute, The First eco-centric environmental war crime (2007) 20 Geo. Int'l. L. Rev. 61

[73] Micheal Bothe, 'War crimes' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds) The Rome Statute of the International Criminal Court: A Commentary, volume1 (Oxford University Press, 2002) 379

[74] Kai Ambos (ed), The Rome Statute of the International Criminal Court: A Commentary (3rd ed, Beck, Hart, Nomos, 2015) 375

[75] Mark Drumbl, 'Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes'(1998) 22 FORDHAM INTíL L.J. 122, 145; Lawrence and Heller (§ 73)

[76] Lawrence and Heller (§ 73) 68

The prohibition is not absolute, and a commanding officer can order the destruction of the natural environment if there is imperative military necessity. The adjective 'clearly' used before the term 'excessive' denotes that criminal responsibility would be invoked only in cases where the excessiveness of the damage was obvious[77].

Linking article 8 (2) b iv with a proportionality test raises a serious question about to what extent the provision can be considered as 'non-anthropocentric'. In the last instance, if military (human) advantage can be invoked as a justification for serious environmental destruction, it seems that the intrinsic worth of the environment has been subordinated to human concerns. The present article will address this point in detail later in the next section when discussing the limitations of the ecocide definition.

In addition, the *mens rea* element of Article 8 (2) b iv also poses difficulties to the prosecution. Article 8 (2) b iv requires to establish that the accused person intentionally launched an attack with the knowledge that the attack would result in widespread, long term and severe environmental destruction. Thus, the prosecutor has to prove that: a) the attacker knew the attack would cause serious environmental destruction; b) also was aware that the damage clearly exceeds the anticipated military advantage and c) still intentionally decides to launch the attack. The prosecutor has to prove there was both knowledge and intent in carrying on the attack. And also, that the commander has concluded through a value judgement that the environmental harm was clearly excessive to the anticipated military advantage. The subjective formulation of the proportionality assessment poses an onerous task for the prosecutor. As Lawrence and Keller have observed '[…] it is difficult to imagine a situation in which a commander would launch an attack even though she consciously concluded that it would inflict a clearly excessive amount of environmental damage[78]'.

The above discussion shows that despite the overall anthropocentric orientation of IHL and ICL, the presence of eco-centric elements in the form of Add. Prot. 1 article 35 (3) and Rome Statute article 8 (2) b iv can also be observed in those areas of law. Thus, we can locate a marginal existence of

[77] Ambos, Commentary (§ 75)
[78] Lawrence and Heller (§ 73) 25

the eco-centric logic. However, this logic exists in a non-dominant form subjected to a number of limitations. The high *actus reus* threshold consisting of a rigid cumulative test, linking the actus reus standard with a proportionality assessment and the high *mens rea* standard undermines the effectiveness of article 8 (2) b iv. The very fact that no single charge has been brought under this provision before the ICC even after twenty-years of its existence arguably testifies to this ineffectiveness.

SEF ecocide definition: potentials

The proposed article 8ter represents an advance in several aspects from the current position of the law of armed conflict. This advance can be summarized in five points.

First, the elevation of crimes against the environment to the status of a core-international crime will indicate the willingness of international criminal law to view damage to the environment as a serious concern. As it stands now, the environment is a marginal consideration of the Rome Statute regime. Article 8 (2) b iv is yet another war crime among numerous other crimes. Furthermore, even article 8 (2) b iv is also not solely about the environment — the reference to the environment comes at the latter half of the provision whereas the former half addresses injury to civilians. Thus, the current position is that there is no provision that *exclusively* refers to crimes against the environment.

Recognizing ecocide as a standalone crime will indicate that International Criminal Law would treat the protection of environment as an utmost concern. The significance of this elevation is twofold: in symbolic terms, ecocide criminalization would signify a shift in values by giving an indication that environmental protection due to its intrinsic worth is considered as a core value in international law of armed conflict. This would not alter the overall anthropocentric nature of the legal framework. International criminal law would still be a system that is more interested in crimes against humanity. But insertion of article 8ter will lead to the strengthening of the eco-centric logic which hitherto remained as a marginal, non-dominant logic. This will bring the eco-centrist reasoning to the center of

international criminal law and reshape the balance between anthropocentric and eco-centric logics.

In practical terms, the deterrent effect created by criminalizing ecocide — along with the attribution of individual criminal responsibility — is likely to compel parties involved in warfare to think seriously about environmental matters. In a world that treats serious environmental damage as something horrible as genocide, decision-makers have to be careful and exercise due diligence when their decisions interact with the natural environment. Similar to genocide, large-scale environmental destruction and destruction of ecosystems would result in a massive uproar in the international public opinion. As it was famously declared at the Nuremberg trials, atrocities are committed by actual individuals, not by abstract entities[79]. Deterrence on individuals in positions of power is the main strength of using criminal law to combat harmful environmental practices[80]. The problem is not the inability or inappropriateness of employing criminal law to ensure environmental protection, but the marginal status of environmental provisions in the existing body of law. Proposed article 8ter would remedy this deficit by recognizing harm against the environment as a fundamental crime.

The second strength of the proposed ecocide scheme lies in its scope, which transcends some of the limits of article 8 (2) b iv. The *actus reus* standard in the proposed article [severe and either widespread or long-term damage] reflects a more liberal position than the cumulative severe, widespread and long-term damage criteria in article 8 (2) b iv. Thus, the establishment of severe damage either widespread or long-term is sufficient to meet the threshold. As explained before, establishing all the three elements cumulatively is a difficult task. Proving the damage was serious and grave is not sufficient; it has to be damage that has an effect covering a significant geographical area (several thousand kilo meters) and having a long-lasting effect (for several decades). Needless to say, many historic incidents involving significant damage to the natural environment would not qualify as environmental damage under this criterion. For instance, the Israeli

[79] 'Judicial Decisions "International Military Tribunal (Nuremberg), Judgment and Sentences' (1947) 41 American Journal of International Law 172 221
[80] Lawrence and Heller (§ 73)

bombardment of Lebanese storage tanks at the Jiyeh thermal power plant during the 2006 Israel-Lebanon conflict had a serious pollution effect on the Mediterranean Sea. Though the harm was substantial to the oceanic ecosystem, such an incident would not fall within the ambit of article 8 (2) b iv because it did not spread to several thousand square kilo meters[81].

However, the drafters of the proposed ecocide definition have also avoided adopting the disjunctive criteria of the ENMOD convention.

Add. Prot. 1 / Rome Statute	ENMOD	SEF ecocide definition
widespread, long-term and severe damage to the natural environment (cumulative)	widespread, long-lasting or severe (disjunctive)	severe *and* either widespread or long-term

Definitions of environmental destruction: a comparison

The SEF definition takes an intermediate position between the more liberal ENMOD standard, and the strict cumulative standard. The risk of adopting the ENMOD standard would be the possible inclusion of environmental damage that is not warranted to be called ecocide into the category. If the term ecocide is to have any meaning, the term should be reserved to refer to serious and grave acts of destruction. Unnecessarily lowering the threshold would risk characterization of less destructive acts as ecocide. The intermediate position represents an optimum stance which would make prosecution more realistic by relaxing the rigid cumulative criteria while preventing the risk of over criminalization.

Third, the relaxation of the cumulative criteria is associated with giving a nuanced and a dynamic definition to the constitutive elements of the formula. The term 'widespread' is defined as 'damage which extends beyond

[81] For a report on the incident see United Nations, 'Environmental Emergency Response to the Lebanon Crisis : Consolidated Report on Activities Undertaken Through the Joint UNEP / OCHA Environment Unit' (United Nations, November 2006)

a limited geographic area, crosses state boundaries or is suffered by an entire ecosystem or species or a large number of human beings.' The problem with defining what is widespread with reference to a specified number of square kilo meters as the Add. Prot. 1 and ENMOD does is that it might not capture certain grave destructions which may not spread along a vast geographical area, but still the destruction affects an entire ecosystem. Think of a hypothetical example where an entire population of some endangered species concentrated in a limited geo graphical area are destroyed. Neither the Add. Prot. 1 or the ENMOD would cover such a situation.

The innovative idea of linking the reference to a geographical area disjunctively with the notion of 'ecosystems or species' would allow to bring in such destructions into the purview of ecocide. Further, whether destruction is widespread or not is a relative question, depending on the context and facts of the scenario. Rather than artificially stipulating a number of square kilometers to define what widespread is, the approach taken by the SEF — adopting a flexible criterion ('extending beyond a limited geographical area with a cross border effect') would enable a dynamic use of the concept taking specific circumstances of the case into consideration.

This dynamic approach can also be seen in the definition given to the term 'long-term'. Rather than defining what is long term in terms of months or decades, the SEF adopts the following interpretation:

> 'Long-term' means damage which is irreversible or which cannot be redressed through natural recovery within a *reasonable period of time*.

Similar to the definition of the term 'widespread', the fluid nature of the phrase 'irreversible or cannot be redressed through natural recovery within a reasonable period of time' would allow for the construction of the article sensitive to the particularity of the destruction in question.

The fourth consideration is the expansive manner the article has defined the *mens rea* element of the crime of ecocide. In the Rome Statute, the default *mens rea* standard is provided in article 30 which refers to the categories of intent and knowledge. If the specific crimes do not specify their *mens rea*

standard, article 30 applies as the default standard. The proposed article 8ter introduces 'reckless disregard' or *dolus eventualis* as the *mens rea* standard since the SEF panel considers categories embedded in article 30 are too narrow to capture the specificity of the crime of ecocide[82]. Criminal intent assumes three forms: *dolus directus* (perpetrator foresees the illegality of the consequences of his act, and desired the consequences); *dolus indirectus* (perpetrator foresees that illegal consequences *will* arise as a necessary corollary, but still decides to commit the act) and *dolus eventualis* (perpetrator foresees that illegal consequences *may* arise from the act, but continues to commit the act disregarding them)[83]. The difference between *dolus indirectus* and *dolus eventualis* is that in the former case it is certain that an illegal consequence will arise due to the action in question. In the latter scenario, the illegal consequence is only a possibility — not a certainty.

The strength of this approach lies in the lowering of the *mens rea* threshold. As explained before, the subjective nature of the *mens rea* element in Rome Statute article 8 (2) b iv makes prosecution a difficult task. The introduction of *dolus eventualis* as a standard of *mens rea* indicates that the law demands a high standard of due diligence from the part of the commanding officers in planning an attack. The commander should be concerned not only about environmental damage that will definitely arise as a consequence of the attack, but also of the damage that might occur due to the attack. Recklessness slightly differs from negligence. In negligence, the perpetrator foresees the consequences that might occur but is negligent to them. Recklessness introduces a more objective standard — the perpetrator 'should have known' that illegal consequences might occur but has disregarded them in action.

The SEF definition has been criticized for not using the term 'reckless' directly — and trying to introduce it in a disguised form by linking the concept with the term 'knowledge'[84]. The *mens rea* standard has been a controversial

[82] Independent Expert Panel (§ 54)

[83] Johan D. Van der Vyver, 'The International Criminal Court and The Concept of Mens Rea in International Criminal Law' (2004) 1:12 University of Miami International and Comparative Law Review 57

[84] Heller (§ 7), Michael Karnavas, 'Ecocide: Environmental Crime of Crimes or ill-Conceived Concept?' (OpinioJuris,29-07-2021) <http://opiniojuris.org/2021/07/29/ecocide-environmental-crime-of-crimes-or-ill-conceived-concept/>

aspect of the proposed definition because it significantly deviates from the default Rome Statute standard. Under the current arrangement, only in exceptional circumstances like the employment of child soldiers and superior responsibility that the *dolus eventualis* standard is applied[85]. Thus, commentators have raised doubts whether state parties would accept the proposed *mens rea* standard because ultimately, the question of amending the Rome Statute is a question of consensus among state parties. This article does not seek to address this *political* aspect of the issue. Even whether the very concept of ecocide would be accepted by a majority of state parties to the Rome Statute is still uncertain. If we leave aside the fact whether the definition is politically acceptable or not, the lower *mens rea* standard represents a legal innovation, inviting state parties to see the matter of environmental damage as an exceptional situation similar to recruitment of child soldiers.

Fifth, the crime of ecocide is proposed to be applied to both international and non-international armed conflict situations. This entails a significant transformational potential since most of the armed conflicts today occur within a non-international context. Rome Statute article 8 (2) b 4 is applied only to international armed conflicts. Not addressing the impact of non-international conflicts to the natural environment is a major defect of the existing Rome statute arrangement[86]. The broader scope of application the SEF definition offers is another aspect where the proposal reflects progress.

Limitation: incomplete eco-centrism

The discussion so far highlighted the strengths and potentialities the SEF definition of ecocide offers. To that extent, the definition would contribute to strengthening the eco-centric logic in the law concerning armed conflict.

However, from an eco-centric view, the SEF ecocide definition suffers from a crucial limitation, which it inherits from Rome statute article 8 (2) b iv. This defect lies in the fact of coupling the threshold of severe and either widespread or long-term damage with a second threshold requiring a

[85] Greene (§ 7)
[86] Heller (§ 73).

proportionality assessment. The second threshold necessitates the action to be either 'unlawful' or 'wanton'. The term wanton is defined in following terms:

> "Wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated[87]

Jurisprudence indicates that the meaning of wanton is intending or recklessly disregarding prohibited consequences[88]. The SEF expert panel justifies the proportionality assessment on the following grounds: a) balancing environmental damage against social and economic benefits is an established principle in international environmental law; and b) war crimes in the Rome Statute, including article 8 (2) b iv already encompasses such proportionality assessment where the destruction is weighed against military advantage or necessity[89]. Since the SEF definition also covers activities during peace times, it seems that the panel of experts have been careful to exclude development activities which might cause environmental harm, but still produce greater socio-economic advantage from being labelled as acts of ecocide. In an armed conflict context, this indicates that the SEF has resolved to retain the proportionality requirement of article 8 (2) b iv.

The introduction of a proportionality assessment undermines the eco-centric character of the crime of ecocide. The very essence of criminalizing ecocide is that severe and large-scale damage to the non-human environment should be treated as a serious crime akin to genocide. The vantage point is the intrinsic value of the environment. No overriding human concern can justify such severe, large-scale destruction of ecosystems. But once the law allows to balance the destruction with military advantage (or socio-economic benefits), that inevitably will lead to recognize human concerns as overriding considerations. In a hypothetical situation where a military commander foresees a greater military advantage in destroying a natural ecosystem, carrying on such destruction would not be unlawful according to article 8ter

[87] § (54)
[88] ICTY, Kordic and Cerkez case (IT-95-14/2) (Trial Chamber Judgement, 2001)
[89] § (54)

as long as the destruction turns out to be of a lesser degree than the advantage anticipated. In the way of proportionality assessment, anthropocentric reasoning has creeped into the ecocide definition.

If the idea of ecocide is to be meaningful, the prohibition should be absolute similar to genocide. In the case of genocide, no military necessity can be invoked to justify the annihilation of a population or a part of that population. Ecocide does not refer to each and every environmental harm. It refers to serious and severe types of damage that result in irreversible loss of entire ecosystems. This should be an exceptional crime. Allowing military necessity or socio-economic concerns to justify such destruction entails the risk of eroding the originality of the proposed innovation. Responding to the question whether the proposed definition is eco-centric or not, SEF expert panel member Cristina Voigt has claimed that the panel did not anticipate formulating a purely eco-centric definition of ecocide as they had to work within the parameters of established international law[90]. However, if that is the case, it would have been better to name the crime otherwise because the originality of the idea of ecocide lies in treating destruction of environment as a crime regardless of its consequences to human beings.

At this point, the question arises where does the proposed article 8ter fit in in terms of the anthropocentric / eco-centric divide. Does the linking of the crime with a proportionality assessment negate the eco-centric character of the concept? One view, expressed by Kevin Jon Heller treats the SEF definition as an act that would amount to international law 'greenwashing' — avoiding criminalizing the acts that cause climate change while praising yourself for tackling the ecological question. Responding to a claim that the SEF definition signifies a legal revolution[91], Heller states:

> '[…] There is nothing revolutionary about the definition. On the contrary, if adopted by states, it would inscribe into the Rome Statute, the most important document in international

[90] 'Defining Ecocide – An Interview with Christina Voigt' (Völkerrechtsblog, 09-07-2021) < https://voelkerrechtsblog.org/defining-ecocide-an-interview-with-christina-voigt/>

[91] Romina Pezzot and Jan-Phillip Graf, 'Ecocide – Legal Revolution or Symbolism?' (Völkerrechtsblog, 03.02.2022) <https://voelkerrechtsblog.org/ecocide-legal-revolution-or-symbolism/>

> criminal law, the idea that the environment is worth protecting only when humans don't have a good enough reason to destroy it[92]'.

However, the present author prefers to take an intermediate position on the issue. The present author also argues that ecocide has to be an eco-centric crime, if we are to respect the integrity of the concept and the intellectual tradition from which the concept emerged. For instance, Polly Higgin's original definition of ecocide (which describes ecocide as '[..] the extensive damage to, destruction of, or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished') is devoid of any sign of anthropocentrism. Extensive destruction or the loss of ecosystems itself is identified as a crime. The destruction is not balanced with human interests. Therefore, it is reasonable to conclude that the insertion of a proportionality assessment contravenes the logic of ecocentrism.

But does that lead to the conclusion that the proposed SEF definition lacks eco-centrist leanings and amounts to 'little more than international law greenwashing?[93]'. If the adoption of the proportionality element totally nullifies any eco-centric merit, it would be difficult to call Rome Statute article 8 (2) b iv as a non-anthropocentric crime as scholars (including Heller)[94] have previously done so. Despite the element of imperative military necessity, article 8 (2) b iv has been identified as non-anthropocentric because the damage to the natural environment is treated as a crime independent of its repercussions to humanity. There is no reason to differentiate the proposed article 8ter from Rome Statute article 8 (2) b iv in this regard because the proportionality component remains the same.

Instead of considering the anthropocentrism / eco-centrism division as binary opposites, it is preferable to conceptualize the categories in terms of a spectrum. Then through an analysis, it can be assessed how different

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[92] Kevin Jon Heller, 'Fiddling (With Ecocide) While Rome (and Everywhere Else) Burns' (Völkerrechtsblog, 18.02.2022)
[93] ibid
[94] See (§ 73)

formulations are positioned within the spectrum. Thus, there can be anthropocentric concepts with a leaning towards eco-centrism, or eco-centric concepts having a leaning towards anthropocentrism. This approach will be useful to determine the character of schemes that might entail both eco-centric and anthropocentric logics. Thus, the indicator is to determine the relative weight of a particular logic within that scheme. The mainstream discourse of sustainable development can be an example for a anthropocentric scheme with an eco-centric leaning , where the main attention is on protecting the environment for human well-being — while you also find peripheral references to endeavors like wildlife preservation which do not have a direct relevance to human welfare.

Present author suggests conceptualizing the proposed article 8ter as a combination of two elements. The premise of the article (the principle element) is to treat actions carrying a likelihood to cause severe and either widespread or long-term damage to the natural environment as a crime. There is no trace of anthropocentrism in this element since it strives to protect the environment for the sake of its intrinsic value. It is the second element which couples the premise with the notion of proportionality that introduces an anthropocentric aspect. As long as the main premise of the crime treats environmental harm as a crime independent of its consequences to humans, the definition remains within the ambit of eco-centrism. Thus, the better formulation will be to consider the definition as an eco-centric concept, with an anthropocentric leaning. This can be called a soft variant of eco-centrism. Though it might not constitute a legal revolution, bringing crimes against the environment to the center of the Rome Statute architecture by designating it as a core crime definitely amounts to a significant reform.

But this does not mean that those who are interested in an eco-centric shift in the law of armed conflict should be content with the soft eco-centrism the SEF definition offers. Delinking the ecocide definition from the proportionality assessment would remove the shadow of anthropocentrism and make the definition more consistent with a solid eco-centric approach. Article 35 (3) of the Add. Prot. I that considers severe, widespread and long-term damage to the environment as a violation but does not link the provision with a proportionality test offers a precedent to this approach. In such a scheme, the prohibition of severe and either widespread or long-term

destruction of the natural environment would be absolute. Revising the definition given to 'wanton' acts by removing the reference to proportionality assessment would lead towards this de-linking.

5. Conclusion

Anthropocentrism has been at the center of human thinking, at least since the rise of industrial civilization. Reckless disregard towards the environment that arises from the anthropocentric worldview has its imprint in all human activities — from industrial development to warfare where humans are insensitive to the environmental consequences of their actions. However, the ecological crisis that is looming does not allow mankind to continue on the same path. Thus, eco-centric thinking should be encouraged in diverse fields of thought, including the law of armed conflict.

International Humanitarian Law and International Criminal Law are not entirely devoid of any eco-centric element. Article 35(3) of the Add. Prot. 1 and Rome Statute article 8 (2) b iv reflect a non-anthropocentric approach as these provisions identify environmental harm independent of its human impact as a violation. However, these provisions are peripheral to the overall landscape of IHL and ICL which mainly concerns about human welfare during conflict situations. Furthermore, Rome statute article 8 (2) b iv entails several limitations: the rigid cumulative criteria to establish the *actus reus* element, the requirement of a proportionality assessment and the high *mens rea* threshold poses a difficult task to the prosecution and has rendered the provision largely ineffective.

The proposed article 8ter entails the potential of enhancing eco-centric thinking in the law of armed conflict through surpassing the inhibited limits of the existing Rome Statute provisions on the natural environment. The strengths of the definition are fivefold, which can be summed up in the following manner:

a) recognizing crimes against environment as a core-international crime would bring the matter of environment protection to the heart of the Rome Statute framework, and can contribute to engineering a normative shift;

b) relaxing the cumulative *actus reus* criteria (widespread, long term and severe damage) through adopting a moderate innovative criterion (severe or either widespread on long term damage) will make prosecution realistic while also avoiding the risk of overcriminalization;

c) defining the constituent elements of the cumulative criteria in a dynamic style without confining into rigid formulas (based on a number of square kilo meters or months / decades) in identifying environmental harm would facilitate context sensitive application;

d) introducing a more objective *dolus eventualis* standard would relax the *mens rea* requirement in crimes against the environment;

e) extending the protection of the environment to non-international conflicts would broaden the scope of application.

However, linking the establishment of the crime with a proportionality assessment — balancing the damage against military necessity (or socio-economic benefits) poses a difficult question. Through this requirement, article 8ter brings in an anthropocentric dimension to what is supposed to be an eco-centric crime. Proposed article 8ter inherits this defect from Rome Statute article 8 (2) b iv, and this status can be contrasted with the position of Add. Prot. 1 article 35 (3) which recognizes an absolute prohibition. The introduction of an anthropocentric proportionality test undermines the eco-centric foundations of the proposed definition, dilutes its originality and amounts to a soft form of eco-centrism — an eco-centric concept with an anthropocentric leaning. Delinking the eco-centric premise of the crime from the secondary proportionality criteria would make the definition compatible with a solid eco-centric approach.