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# PREFACE

The Institute of International Legal Studies (IILS) of the University of the Philippines (UP) Law Center is pleased to announce the release of the 2024 Edition of the Asia-Pacific Journal of International Humanitarian Law. With the guidance of the Journal's esteemed Board of Experts, the APJIHL continues to provide commentaries on significant developments in International Humanitarian Law and related fields, emphasizing the voices and perspectives of the region. Now in its fifth year of publication, we take stock of the Journal's gains over the years.

The Inaugural Issue of the APJIHL (2020 Edition), published at the height of the COVID-19 pandemic, was formally launched on 10 November 2020. Drawing on their expertise and experience, former International Criminal Court Judge Raul C. Pangalangan of the University of the Philippines College of Law, Dr. Helen Durham of the International Committee of the Red Cross, and Prof. Suzannah Linton of China University of Political Science and Law led the discussion on international humanitarian law (IHL) in the Asia-Pacific, with emphasis on the region's perspective and contribution to the development of this body of rules.

The 2020 Edition included the following articles:

- Deciphering the Landscape of International Humanitarian Law in the Asia-Pacific
- Crime and Omission: Command Responsibility from Manila to Rome
- Malaysia and the Rome Statute of the International Criminal Court: A Call for Ratification
- Gunshot Wound Reporting Legislation in the Asia-Pacific Region: A Need to Ensure Better Consistency with IHL
- The Road to Ongwen: Consolidating Contradictory Child Soldiering Narratives in International Criminal Law
- Justice for Syrians Under the International Criminal Court: Applying the Myanmar Model of Territorial Jurisdiction for Cross-Border Crimes

- Radio Silence: Autonomous Military Aircraft and the Importance of Communication for their Use in Peace Time and in Times of Armed Conflict under International Law
- Grey Zone Conflict in the South China Sea and Challenges Facing the Legal Framework for the Use of Force at Sea
- Malaysia and the Rome Statute: Panel Discussion during the Margins of the IHL Moot Court Competition at the International Islamic University Malaysia on 12 October 2019

The 2021 Edition was formally released in the Philippines on 16 October 2021 and in Malaysia on 1 November 2021. A smaller launch event for New Zealand was also held in November 2021, led by APJIHL Board of Experts members Professor Alberto Costi and Dr. Marnie Lloydd of Te Herenga Waka-Victoria University of Wellibong.

The 2021 Edition featured the following articles:

- Interview with Judge O-Gon Kwon
- Introductory Remarks on the Use of Lethal Autonomous Weapons System: An IHL Perspective
- The Humanitarian Exemption Challenge: Security of the Humanitarian Space Amidst Domestic Counterterrorism Measure
- The Red Cross Society of China in the Beiyang Government Period (1912-1927): A Civil Society Organization in an Early Democracy
- The Use of Military Units and Personnel for International Rescue and Relief Operations: Pertinent Issues Related to the 2011 East Japan Earthquake
- Displacement of the Rohingya before the ICJ and the ICC: Same conduct, different crimes in international law
- Prosecution of war crimes in Australia: prospects for victim participation
- Promoting the Comprehensive Protection of Cultural Property: The 8th Regional Conference on International

Humanitarian Law in Asia-Pacific, 24-26 September 2019, Bali, Indonesia
- Course and Meeting Report: International Humanitarian Law Course for Academicians and Practitioners 2019

For the first time since the Journal's inception, the 2022 Edition was launched in person in Manila, Philippines, on 12 October 2022. This was followed by an online launch event in Indonesia in November and an in-person launch in New Zealand in December of the same year.

The 2022 Edition included the following articles:

- Interview with Dr. Helen Durham
- Book Review of "Revisiting the Geneva Conventions: 1949-2019
- Redefining Rescue Operations in Contemporary Naval Warfare: A Necessary Interplay between Maritime Bodies in International Law
- Commissions of Inquiry as Bulwards Against Impunity

In 2023, the Philippine Launch was once again held online and had Dr. Ai Kihara-Hunt of the University of Tokyo, Mr. Jonathan Kwik of the T.M.C. Asser Institute, The Hague, and Ms. Kelisiana Thynne of the International Committee of the Red Cross as panelists.

The 2023 Edition had the following articles:

- Child Soldier to Warlord Overnight: Sentencing Ongwen in the International Criminal Court
- Prohibition of the use of nuclear weapons under Islamic Law: filling the gap of International Humanitarian Law?
- Ethical Paradigm of Buddhism: A Buttress for Compliance with International Humanitarian Law
- Protecting the child who bears arms: How the status of Zones of Peace for Children under Philippine Act No. 11188 distorts International Humanitarian Law

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

After a rigorous publication process that involves several layers of article assessment, including a double-blind peer review, we are happy to publish the following articles this year: *Dominating Demography, Altering Destiny: India's settler-colonialism in Kashmir*, which delves into the issue of occupation, arguing that it accelerates loss of a native population's distinctiveness and capacity for self-determination; *Modern Interpretations of International Humanitarian Law's Martens Clause - Opening the Door to Strategies to Better Protect the Environment and Indigenous Peoples During Armed Conflict,* which explores modern interpretations of the field's Martens clause, originally used to "other" Indigenous Peoples, as having the potential to open the door to Indigenous knowledge and international environmental law, international human rights law and international criminal law principle through "the principles of humanity"; *Cultural Cleansing as an Emerging Form of Mass Atrocity: A Comparative Analysis of the Protection Against Intentional Destruction of Cultural Heritage under International Law and Islamic Law,* which argues that the gaps and limits of the international humanitarian and criminal law frameworks could be addressed by adopting a culturally and legally inclusive approach, using Islamic law as a case study; *The Relevance of the Islamic Principle of Humane Treatment of Prisoners of War (POWs) in Contemporary Practice: An Overview*, which investigates how Islamic Law of Armed Conflict (ILAC), in particular its principle of humane treatment, can play a role in modern conflicts due to its alignment with the same principle provided by IHL; and *China and Humanitarian Law: Evolution, Contemporary Influence and Prospects of Traditional Ethics in Modern-day Practice*, analyzes the historical evolution of Chinese humanitarian law ethics, examine the impact of ethics on the practice of IHL in China, explore the influence of Chinese ethics on the international community, and assess the application of IHL in China in conjunction with traditional Chinese ethics.

We are also excited to share that Board of Experts member Dr. Jonathan Kwik has published a new book for T.M.C. Asser Press entitled, "Lawfully using Autonomous Weapon Technologies." In his book, Dr. Kwik confronts the responsible use of autonomous weapons, combining law, technical

knowledge, and operational expertise for a practical examination of military artificial intelligence from the perspective of commanders on the field.

With what has been a fruitful five years, IILS would like to thank the research and administrative staff of the UP Law Center, particularly Ms. Marilyn Cellona, the Administrative Officer of IILS. The 2024 Edition would also not be possible without the continued hard work and efforts of Associate Editor Atty. Joan Paula Deveraturda, Assistant Editor Prof. Michael T. Tiu, Jr., Editorial Assistants Ella Edralin, Chester Louie Tan, Wenona Dawn Catubig and Aira Lynn Cunanan, Copy Editor Allison Riosa, and layout artist Alyanna Bernardo. We also thank the members of the Journal's Board of Experts and the blind peer reviewers, without whom the 2024 Edition would not have been possible.

While the intersections, challenges, and possibilities of ways forward for IHL scholarship continue to evolve, APJIHL will likewise continue to pursue its purpose of creating a space for inter-disciplinary discussions for voices from the region, necessary in advancing the body of rules in situations of armed conflict.

ROMMEL J CASIS
Managing Editor

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# Dominating demography, altering destiny: India's settler-colonialism in Kashmir

***Mah-Nashit Uzma****

*University of Hong Kong, Alumni*

The author discusses the demographic invasion of Indian Occupied Kashmir, which has been in process since 1947, with a focus on post-2019 legislative and policy measures taken by the Indian State. When understood in comparison with other cases of forced demographic changes worldwide, this article argues that there is an accelerated pace towards the erosion of the political, cultural, linguistic and social distinctiveness of the native population. The article reflects on how India's unchecked sovereignty over Kashmir, its unilateral abrogation of the special status of the region within the Indian polity and its post-abrogation settler-colonial strategies are arguably aimed at frustrating the outcome of a prospective self-determination exercise covered under UN Security Council resolutions on the Kashmir situation.

*Mah Nashit Uzma is a licensed attorney-at-law in India. Currently, she serves as the Managing Editor of a law journal (Journal of Legal Theory and Practice) and heads a legal research team at the Young Lawyers Forum (a non-government, non-profit legal organisation focusing on public interest and pro-bono litigation, legal awareness and legal research). Uzma completed her Master's in Human Rights Law (LLM) from the University of Hong Kong in 2023 as a Wong Family Scholar. Prior to that, she earned her Bachelor of Laws (BA.LLB), graduating as a gold medallist.

Her areas of specialization include Public International Law, Human Rights and Humanitarian Law, and Gender Rights. Throughout her career, she has engaged with various human rights organizations, working on critical issues such as human trafficking, torture, enforced disappearances, use of pellet guns, gender-based violence, and minority rights.

In pursuit of her passion for human rights research, she is currently embarking on the journey to apply for a PhD in Human Rights Law.

***Keywords*:** Settler-colonialism, Kashmir dispute, United Nations, Demographic changes, India, Pakistan, Occupied Territories, International law

## I. Introduction

French Philosopher August Comte wrote, "Demography is destiny." This statement means that the future of a nation-state is determined by its population, trends of its growth and decline, its distribution, choices and developmental patterns. Demography can be connected to various fields like politics, economics, sociology, geography, biology, law and others. The links to multiple subjects can be attributed to the interconnection of matters with the population, and how population changes impact almost everything. The relevance of this phrase to international law can be seen from times when tribes and clans existed - the clashes and subsequent control over territories altered the world's demography then. Moving a little ahead in time, conquests by kings while expanding their kingdoms affected the population and occasionally caused migrations. In the recent past, regimes altered demographic characteristics of lands either by eliminating whole or parts of populations, as in the case of the Holocaust and the Bosnian genocide.

This short old phrase still holds water in the current times, particularly in the international legal arena, be it refugee crises resulting from armed conflicts or situations of illegal occupation around the world. These events catalyse demographic shifts within state populations, reshaping the trajectory of future developments in that territory. As society transforms, the interplay of diverse perspectives brings about both innovation and tension, ultimately redefining the region's identity and its role on the global stage. Some contemporary examples include the armed conflict in Syria, which has produced millions of refugees from the Syrian population, their deaths, displacement and continuous migration, subsequently altering the demographic structure in Syria. Similarly, Myanmar's genocide of

Rohingya Muslims in an attempt to convert Myanmar into an all-Buddhist State has wholly impacted the demography of Myanmar as millions of Rohingya Muslims either fled or were butchered by the State. Israel's forceful evacuation of Palestinians and implantation of settlers within the Palestinian land, including areas of Jerusalem, Golan-Heights, the Gaza Strip and West Bank, is another example of altering the demography of a territory.

One such case discussed in this article is India's occupation of Indian-administered Kashmir and its relevance to demographic changes within the region. The article is focused on how occupation, demographic alteration and international law are interconnected when the question of the Kashmir dispute arises. Concurring with the general rule of occupation, in the present case, occupation serves as a powerful tool for implementing settler colonialism by restructuring the landscape and society of Kashmir to favour settlers over indigenous populations. Through a systematic process of land appropriation and policies that encourage settlement, the occupiers impose their governance designs, culture, and economic practices, effectively erasing the existing systems. This creative manipulation of space is being carried out under the garb of development through construction of new infrastructure, such as roads and settlements, but in turn these are instruments facilitating the influx of settlers and assuring their presence and dominance. As these new systems take root, a narrative that legitimises this brutal occupation and marginalises the voices, history and culture of natives is being popularised portraying it as a natural extension of progress. These demographic changes by altering the region's population composition and erasing the identity of the indigenous community are raising significant concerns regarding violations of international law, particularly principles related to self-determination and the protection of human rights.

The Indian-Administered Kashmir is an international territorial dispute between India and Pakistan. Both these regimes or states control parts of the region. The United Nations Security Council has resolved to

have a free and fair referendum in Kashmir so the native population can have a choice to decide their political status. Over the past seventy years, various political regimes in India have implemented policies to control Kashmir, carry out the occupation and prevent referendums. The two dominant parties, Congress and the Bharatiya Janata Party (BJP), have adopted contrasting approaches to the Kashmir issue, despite sharing the same overarching goal. Historically, Congress has pursued a conciliatory strategy, characterised by a "soft" approach aimed at secular integration. In contrast, the BJP has adopted a hardline stance, particularly evident after the abrogation of Article 370 in August 2019, seeking to alter Kashmir's religious demographics and solidify its integration into India. Recent developments on the Indian-administered side suggest that the Indian State's actions may change the future course of events, including the prospect of a free and fair referendum, by altering the demography of the territory under their control.

## II. Settler-Colonialism and Self-Determination

Theodor Herzl, founder of modern political Zionism, wrote in his novel titled 'The Jewish State', "If I wish to substitute a new building for an old one, I must demolish before I construct."[1] The idea of settler colonialism is based on the same principle. Settler colonialism is a persistent system which demands either the annihilation or displacement of indigenous inhabitants, the expropriation of their resources including land, and the settlement of outsiders in the natives' territory, claiming it as their own. This structured process causes the obliteration of the identity, traditions, and culture of the natives and, most importantly, their claim to the territory. Wolfe[2] and other scholars[3] explain this phenomenon as a

[1] Theodor Herzl, "The Jewish State", available at https://www.jewishvirtuallibrary.org/quot-the-jewish-state-quot-theodor-herzl (all internet resources were accessed on or before 10 June 2024).

[2] Patrick Wolfe, "Settler colonialism and the elimination of the native", *Journal of Genocide Research*, Vol. 8, No. 4, pp. 387–409, available at https://doi.org/10.1080/14623520601056240.

[3] Linda Tuhiwai Smith, K. Wayne Yang, Eve Tuck, *Indigenous and decolonizing studies in education: Mapping the long view*, 1st ed, Routledge, 2019.

perpetual form of colonisation, a structure rather than a historical event because it continues to exist as long as the encroachers live on the appropriated land.

However, Veracini distinguishes settler colonialism from colonialism on the premise that the founding philosophy and desired objectives on which the former and latter rest are competing rather than concurrent. In the case of colonialism, the coloniser maintains what Veracini calls "exogenous domination".[4] The colonisers require the native population to stay within the territory to exploit them for various purposes like slavery and labour of different kinds (physical, sexual, religious or others) intending to subordinate them permanently. In contrast, in the case of settler colonialism, the colonizers or the occupiers want the native population to be replaced. This replacement can either be done via displacement, forced migration, physical termination, genocide or the destruction of the natives' culture and identity by assimilation in the settlers (occupier's) population. The list is not exhaustive and there can be other methods and ways of replacement. Veracini[5] also distinguishes settler-colonialism from decolonisation. He explains that during decolonisation, the occupier departs, ending the relation of domination between the coloniser and the occupied. In contrast, in settler colonialism, he settles in the occupied territory and continues to exercise control over the occupied. Englert[6] and Prof. Hayes[7] also distinguish settler-colonialism from franchise colonialism. In franchise colonialism, the colonisers do not settle or intend to reside in the colonised territory permanently. They are interested in the exploitation of native labour and resources, not in creating settlements on the territory. The control and domination are exercised by agents of the colonising state who serve a period of duty in the colonised territory and then return to the home country (colonizer's territory), being

[4] Veracini, L. (2011).Lorenzo Veracini, "Introducing", *Settler Colonial Studies*, Vol. 1, No. 1, pp. 1–12, available at https://doi.org/10.1080/2201473x.2011.10648799.
[5] *Ibid.*
[6] Sai Englert, "Settlers, workers, and the logic of accumulation by dispossession" *Antipode*, Vol. 52, No. 6, pp. 1647–1666, available at https://doi.org/10.1111/anti.12659.
[7]Alan L. Hayes, "Indigenous and Settler Christianities in Canada". available at https://individual.utoronto.ca/hayes/indigenous/indigenous6_settler_colonialism.html.

replaced by successive colonial agents. This administration helps to serve the interests of colonisers and maintains the subordinate status of the colonised territory.

One aspect of the present case is settler-colonialism; the other is the self- determination. The right to self-determination, which has now achieved the status of *jus-cogens i.e.* peremptory norm, is a collective right where people exercise their free will to determine their political status and choose their sovereign.[8] This also includes their right to wilfully pursue their cultural, economic and social development. This right is embodied within Article 1 of the UN Charter (1945) and features as the first right in two fundamental Human Rights Covenants: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

The concepts of self-determination and settler colonialism are two sides of the same coin. At its core, self-determination is about the collective rights of native or indigenous people to determine their political status according to their own will and freely pursue their cultural, economic and social development.[9] In contrast, settler colonialism is a process of foreign occupation and encroachment of that very collective right. While objectives of self-determination include protection of native cultures, languages, and identities, settler colonialism aims to eradicate or eliminate the same. The settler-colonial setup is built to forcibly displace, relocate or commit genocide of the native communities for elimination whereas self-determination is designed to protect the indigenous against these violations. The settlers are inclined to exploit resources, land and labour in a non-consented manner in contrast to self-determination which guarantees security of economic development at the native community's will. The settlers impose their own political institutions and decision-making authority over indigenous populations rather than respect their

[8] International Law Commission, *Peremptory norms of general international law (jus cogens),*. 2022, United Nations, pp 87-88, available at https://legal.un.org/ilc/reports/2022/english/chp4.pdf,

[9] Hurst Hannum, "Legal aspects of self-determination. In The Princeton Encyclopedia of Self-Determination", *Princeton University*, available at https://pesd.princeton.edu/node/511.

right to self-govern, the very essence of self-determination. Therefore, it is important to note that settler-colonialism inherently infringes upon the right to self-determination. This process not only displaces indigenous populations but also undermines their autonomy and ability to govern themselves, resulting in significant cultural and political ramifications.

Throughout history, structural inequities and power imbalances between the colonisers and the colonised have resulted in the former outrightly denying or gradually undermining the right to self-determination of the indigenous population. The garb of 'need for civilising' or 'development' has been a convenient tool to exploit native lands, eliminate indigenous cultures or populations and subsequently justify marginalisation, coerced displacements or the amalgamation of the indigenous into the population of the colonisers. Exercising self-determination rights would mean that some power (political, economic and cultural) whether in entirety or partially will cede from the hands of colonisers and be restored to the indigenous, an affair which generally settlers have historically denied to do. This transfer of authority or power may be a reason why despite being featured in all international instruments, self-determination remains one of the most challenging rights to be executed by the international community even today. Globally indigenous communities continue to fight for their rights over their native lands, preservation of their cultures, languages and restoration of their political and economic autonomies. Most of the cases pertaining to exercise of self-determination remain either buried under the debris of international resolutions and severe oppression or are slowed down by unending processes extending over generations like resistance, negotiations or reparations. The Kashmir case for self-determination is one of such struggles that has been slowed down and is being hollowed out by the Indian State so that it can collapse on its own through the model of settler colonialism.

## III. Brief Historical Background

History reflects that Kashmir witnessed several invasions and consequentially several ruling dynasties. Kalhana, a noted historian of Kashmir, traces back the colonial history of Kashmir to King Gonada I, whereas other historians mark it from Ashoka, who ruled during the third century BC. For the two thousand succeeding years after Ashoka, many powers ruled over Kashmir.[10] Until 1846, Jammu and Kashmir were separate territories and ruled by distinct powers.

Kashmir was ruled by Rianchin Shah (who later renamed himself Sadruddin) in 1339 A.D.[11] The Shahmirs took control in 1342 AD for the next 212 years. They were followed by Chaks who ascended the throne in 1554 and continued to rule for 35 years. The Chaks were defeated by Mughal King Akbar in 1586 and the Mughals ruled over Kashmir for the next century and a half i.e. 150 years. The Mughals in Kashmir were overthrown by Afghan conqueror Ahmad Shah Abdali. The Afghans and Pathans continued to rule through various governors appointed by the King of Kabul for approximately 70 years. The Afghan-Pathan rulers lost Kashmir to Sikh ruler Maharaja Ranjit Singh and the Sikh rule in the valley lasted for over 25 years.

In the eighteenth century, Jammu was ruled by Dogra chief (Rajput descent), Ranjit Deo who died in 1780 AD. Following his death, a battle for succession broke out leading to Jammu being converted to a dependency by Sikh rulers. In 1808, it was annexed to Sikh territory and given to Gulab Singh.

Ladakh was under the control of the Mongols and tributary of Tibet for centuries until the Mughals took over and ruled it for over a century.

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[10] Michael Brecher, (1953). *The struggle for Kashmir*. Oxford University Press, New York, 1953, available at https://archive.org/details/dli.csl.5975/page/n9/mode/2up.

[11] Naghma Mangrio, "A Historical and Political Perspective of Kashmir Issue". available at https://www.qurtuba.edu.pk/thedialogue/The%20Dialogue/7_3/Dialogue_July_September2012_255-264.pdf.

In 1834, Gulab Singh, the ruler of Jammu conquered Ladakh, Lhasa, Skardu and Baltistan.[12]

In 1845, a battle broke out between Sikh rulers and the British, which had then colonised India. Gulab Singh aided the British against his allegiance to Sikh Darbar or Sikh rulers.[13] In exchange for this aid, Gulab Singh and his heirs were granted the territory of Jammu and Kashmir, including the territory of Ladakh under the Treaty of Amritsar as an independent possession forever.[14] This is how the states of Jammu and Kashmir became one consolidated territory. Gulab Singh and his descendants continued to rule the territory independently until the British decolonised India in 1947.

From pre-historic times and under most of the above-mentioned regimes, the native population continued to suffer as their voices and concerns remained unaddressed and their exploitation continued at the hands of different governing authorities. However, that is a different discussion. The author has not delved into that because none of the regimes before the partition practised settler-colonialism or tried to eliminate or replace the native population. Most of them were colonisers who wanted to rule, subjugate the population and exploit the resources of the territory. The phenomenon of settler-colonialism in Kashmir began only after the partition of British India in 1947.

## IV. The backdrop of the conflict

The present conflict over the Kashmir region began in 1947 when the sub-continent was divided into the two separate dominions of India and Pakistan at the end of the British colonisation era. At that time, Jammu

[12] *Imperial Gazetter of India*, Volume XV, 1908, p. 95.

[13] Bazaz, *History of Struggle for Freedom in Kashmir--cultural and political*, available at https://archive.org/details/dli.pahar.3009/page/103/mode/2up.

[14] The Treaty of Amritsar, available at https://uploads-ssl.webflow.com/6031a13f23a42e1120a8c37c/60b418625ece85bb13d7c3cd_Treaty%20of%20Amritsar%20with%20context%20and%20receipt.pdf.

and Kashmir (J&K) existed as an independent princely state under the reign of the Dogra rulers. Importantly, it shared borders with India and Pakistan with both dominions wanting Kashmir to merge within their territories. After India and Pakistan achieved independence from British rule, the princely states could either assert their independence or accede to one of the dominions.[15] The then Dogra ruler of Kashmir, Maharaja Hari Singh, was harbouring hopes of declaring independence, which is why he did not accede to any of the dominions.[16] That being the case, he decided to initiate a 'standstill agreement with India and Pakistan' and with this intention, he sent invitations to India and Pakistan on August 12, 1947.

To this offer, the dominion of Pakistan responded in an affirmative and a standstill agreement was signed between the two.[17] However, the Indian side sent a cross-invitation to the Maharaja to send any of his representatives to negotiate over the standstill agreement. Therefore, no definitive agreement was signed between India and Jammu and Kashmir.[18] While this was still in progress, however, cadres of radical Rashtriya Swayamsevak Sangh (RSS) and Dogra forces carried out a massacre, assisted by both Hindus and Sikh migrants from Pakistan from the Jammu region.[19] Up to two hundred thousand Muslims were butchered to death,and more than half a million were forcibly made

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[15] Sarath Pillai, "Kashmir and The Forgotten History of India's Princely States", *The Diplomat,* 4 August 2020, available at https://thediplomat.com/2020/08/kashmir-and-the-forgotten-history-of-indias-princely-states/.

[16] Ganguly, Sumit, *The Crisis in Kashmir*, Cambridge University Press, 1997, available at https://books.google.com.hk/books?id=Fi66mjIqR1IC&pg=PA9&lpg=PA9&dq=maharaja%2Bhari%2Bsingh%2Bharboring%2Bhopes%2Bof%2Bindependence&source=bl&ots=ofUOlcx_t_&sig=ACfU3U3litmo_t3sSRdpDRQM5BqKOZzn2g&hl=en&sa=X&ved=2ahUKEwiu44GEldv7AhXFAN4KHbTwBtoQ6AF6BAgcEAM#v=onepage&q=maharaja%20hari%20singh%20harboring%20hopes%20of%20independence&f=false.

[17] Victoria Schofield, *Kashmir in conflict: India, Pakistan and the unending war,* IB Tauris, Bloomsbury, 2021, pp. 40.

[18] *Ibid.*

[19] Saeed Naqvi, *Being the Other*, Aleph, 2016, pp. 176, available at https://books.google.co.in/books/about/Being_the_Other.html?id=b2BSAQAACAAJ&redir_esc=y.

refugees and displaced across the border into the freshly carved state of Pakistan.[20] According to Christopher Snedden, the Jammu massacre played the role of a precursor to the historical precedents underlying the protracted regional tensions between the two South Asian neighbours.[21] In response to the massacre, from October 20 to October 27, 1947, tribal militias from Pakistan invaded Kashmir.[22] As a measure to save his state, Maharaja, after a letter communication with Lord Mountbatten, asked for assistance and entered into a conditional accession[23] with the dominion of India, which was eventually meant to be put to rest on the restoration of law and order. In the same communication, it was expressly realised that the collective will of the state's people would be the final way to determine the future political status of Jammu and Kashmir.[24] Maharaja validated this Instrument of Accession (IOA) on October 27, 1947. Pakistan did not accept this arrangement, and several historians have also challenged its validity due to the circumstances under which it was signed.[25] That is an entirely different debate, but the general presumption is that it was signed between the then-independent state of Jammu and Kashmir and the Dominion of India. The Instrument of Accession contained the submission of authority limited to matters about defence, communication and foreign issues to India.[26] It, however, clearly stated that the

[20]Salma Malik, "Explaining Jammu & Kashmir Conflict Under Indian Illegal Occupation: Past & Present", *Margalla Papers,* Vol. 25, No. 1, 2021, available at https://www.academia.edu/59428515/Explaining_Jammu_and_Kashmir_Conflict_Under_Indian_Illegal_Occupation_Past_and_Present?rhid=28671214991&swp=rr-rw-wc-38089677.

[21] Christopher Snedden, (2001) "What happened to Muslims in Jammu? Local identity, "the massacre" of 1947 and the roots of the Kashmir problem.", *Journal of South Asian Studies*, Vol. 24, No.2, pp. 111.

[22] V. Schofield, above note 17, pp. 47.

[23] Text of Lord Mountbatten's letter dated 27 October 1947 to signify his acceptance of the Instrument of Accession, available at https://www.mtholyoke.edu/acad/intrel/kasmount.htm.

[24] *Ibid*.

[25] V. Schofield, above note 17, pp. 53.

[26] The Instrument of Accession between the Maharaja of Jammu and Kashmir and Indian Dominion, available athttps://www.satp.org/satporgtp/countries/india/states/jandk/documents/actsandordinances/instrument_accession.htm.

Government of India was not authorised to buy or acquire land in Jammu and Kashmir and could not enact any law in this regard.[27] Additionally, it expressed that: ultimate sovereignty vested in the hands of the king of Jammu and Kashmir, and that the IOA could not be amended or changed by any variation in the Indian Independence Act unless approved by (the) Maharaja himself.[28] It also clearly stated that "nothing contained in the Instrument could be deemed allegiance to adopting the Indian Constitution in the future", thereby highlighting its conditional nature.[29] The Indian State argues that accession has granted them absolute sovereignty as the territory in question has merged into the Indian dominion and that Jammu and Kashmir territory is integral to India.[30] It becomes crucial to analyse the distinction between accession and merger at this stage. The terms "accession" and "merger" are often in debate when the status of Jammu and Kashmir is in question. The term "accession" means a treaty or agreement to a demand or request.[31] In contrast, "merger" means "blend or cause to blend gradually into something else to become indistinguishable from it, combine or cause to combine to form a single entity".[32] Had the merger been signed between the two, it could have been concluded that Jammu and Kashmir was a part of India. However, unlike other princely states that agreed to a merger,[33] the Instrument of

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[27] Venkatesh Nayak, "The Backstory of Article 370: A True Copy of J&K's Instrument of Accession", *The Wire*, 5 August 2019, available at https://thewire.in/history/public-first-time-jammu-kashmirs-instrument-accession-india.

[28] *Ibid*.

[29] "Legal Documents: Instrument of Accession" (*Kashmir*) <https://jammukashmir.com/documents/instrument_of_accession.html> Last Accessed December 2, 2023.

[30] Sajid Ali, "How, on This Day 72 Years Ago, Jammu & Kashmir Agreed to Become a Part of India", *The Print*, 26 October 2019, available at https://theprint.in/past-forward/how-on-this-day-72-years-ago-jammu-kashmir-agreed-to-become-a-part-of-india/311724/.
Also see "'Jammu and Kashmir Was, Is and Shall Forever Remain an Integral Part of India'", *The New Indian Express,* 26 February 26, 2020, available at https://www.newindianexpress.com/world/2020/feb/26/jammu-and-kashmir-was-is-and-shall-forever-remain-an-integral-part-of-india-2108856.html.

[31] Bryan A. Garner, Black's Law Dictionary, 11th ed, Thomson Reuters.

[32] Merriam-Webster, "Merge", *Merriam-Webster*,available at https://www.merriam-webster.com/dictionary/merge. Also see Oxford languages for Merger (law).

[33] (For example, Orrisa, Baroda, Uttar Pradesh, Coachin).

Merger was never signed between these two states (Jammu and Kashmir and India). Therefore, to begin with, this accession between the two is a treaty signed between two sovereigns heading two independent states. Furthermore, there is no mention of sharing or giving up sovereignty by Maharaja under the Instrument of Accession. On the contrary, there is a clear assertion of sovereignty by the Dogra ruler. Therefore, the Instrument of Accession cannot be implicitly presumed or treated as a merger. Reiterating that it is a treaty, it must also be recalled that under the Vienna Convention[34] (Articles 18 and 26), both parties to this treaty (IOA) have obligations to abstain from any action or omission which defeats or tends to defeat "object and purpose of the treaty".[35] The parties are duty-bound to perform the obligations laid out in the treaty in good faith.[36]

This accession's effect on the ground paved the way for Indian Armed forces to step on Kashmir soil. The Indian armed forces and the tribal group supported by Pakistan clashed in Kashmir.

Around the same time, India and Pakistan brought the matter before the UN Security Council to settle the dispute of Jammu and Kashmir.[37] Both states claimed total control, but neither could establish it. [38] Eventually, both agreed before the United Nations that it is an internationally disputed territory and that its people must decide its future through a free and fair referendum. Evident in the opening statement of Warren Austin, the then US representative at the Security Council, in his

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For a detailed explanation of merger, see Holden Furber, "The Unification of India, 1947-1951", *Pacific Affairs,* Vol. 24, No. 4, December 1951, pp. 4-7, 11, 12, 16-18, available at, https://www.jstor.org/stable/pdf/2753451.pdf.

[34] Vienna Convention on the Law of Treaties,1969, available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[35] Vienna Convention, above note 34, Art. 18.

[36] Vienna Convention, above note 34, Art. 26.

[37] United Nations India-Pakistan Observation Mission (UNIPOM) – Background, available at https://peacekeeping.un.org/en/mission/past/unipombackgr.html.

[38] Alistair Lamb, *Incomplete Partition: The Genesis of the Kashmir Dispute 1947-1948,* Oxford University Press, 2003.

initial comments following opening remarks of Indian and Pakistan's cases, where he announced, on January 24, 1948, that "another point that I want to have in the record is a recognition of the significant fact that when India accepted accession of Kashmir, it did its act… that it was conditional on a fair plebiscite being held to determine the will of the people of Kashmir concerning accession. Now comes Pakistan, which agrees to stand for the exactly same doctrine…"[39] The Security Council passed 18 resolutions that discussed several plans for a referendum in Kashmir.[40] However, three things have been consistent in these resolutions and are relevant to this article. These are:

1. Both countries have acknowledged Kashmir as a disputed territory.[41]
2. The Indian Armed Forces will have to withdraw from Kashmir.[42]
3. The natives or the "permanent residents/state subjects" (under earlier law) of Jammu and Kashmir will exercise their right to referendum granted under the resolutions to decide the political future of this territory.[43]

The armed forces, however, did not withdraw in line with these resolutions and neither reduced their strength to a minimum; instead, they exercised control over the territory by occupation with full force making Kashmir "the most militarised zone in the world".[44] At the United

[39] *Ibid.*

[40] UNSC Res. 38 (1948), 39 (1948), 47 (1948), 51 (1948), 80 (1950), 91 (1951), 96 (1951), 98 (1952), 122 (1957), 123 (1957), 126 (1957), 209 (1965), 210 (1965), 211 (1965), 214 (1965), 215 (1965), 303 (1971), 307 (1971), available at https://www.securitycouncilreport.org/un_documents_type/security-council-resolutions/page/1?ctype=Jammu+and+Kashmir&cbtype=jammu-and-kashmir#038;cbtype=jammu-and-kashmir.

[41] *Ibid.* Also see A. Lamb, above note 38.

[42] *Ibid.*

[43] *Ibid.*

[44] Rani Singh, "Kashmir: The World's Most Militarized Zone, Violence after Years of Comparative Calm", *Forbes*, 13 July 2016, available at https://www.forbes.com/sites/ranisingh/2016/07/12/kashmir-in-the-worlds-most-militarized-zone-violence-after-years-of-comparative-calm/?sh=52e592253124.

Nations, Kashmir remains a long-standing international dispute between Pakistan and India.[45] India and Pakistan have fought three full-fledged wars over the Kashmir issue in 1947, 1965 and 1971 while the debate is still pending in the Security Council.

## V. Does India's control over Kashmir fit for the case of occupation

The term occupation finds its mention in the 1907 Hague Regulations which lays down that a territory is considered to be occupied when it is "actually placed under the authority of the hostile army".[46] Moreover, where the occupying force's authority has been established and can be exercised, the occupation extends only to that territory.[47] The Geneva Conventions of 1949 under Article 2, i.e. the common article, widen the ambit of application of the law of occupation to any such territory which is occupied during the course of international armed conflicts. Crucially, this includes scenarios where the occupation transpires without encountering overt armed resistance. The legal framework pertaining to occupation is embodied in the UN Charter and the precepts of *jus ad bellum*. However, the determining factor for the applicability of international humanitarian law in this regard is that the empirical conditions or factual circumstances must satisfy the conditions of occupation. The law of occupation is undergirded by humanitarian considerations and factual circumstances on ground. Consequently, it becomes immaterial whether the occupation is lawful or whether the semantic appellation ascribed to the occupation is "invasion," "liberation," "administration," or "occupation".[48] The occupation ends when either the

[45] UNIPOM, above note 37.

[46] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Art. 42, available at https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907?activeTab=undefined.

[47] *Ibid.*

[48] Tristan Ferraro, "Determining the beginning and end of an occupation under international humanitarian law", *International Review of the Red Cross*, Vol. 94, No. 885, 2012, available at https://www.rulac.org/assets/downloads/Ferraro_-_Beginning_and_end_of_occupation.pdf.

occupying forces withdraw from the occupied territory or when they transfer absolute sovereignty to be exercised by the local government.[49]

In the present case, it must be noted that neither India nor Pakistan are signatories to Fourth Hague Convention 1907 from which the Hague Regulations originate. However, since these regulations have achieved the status of customary international law, they are applicable to both states, irrespective of whether states ratify it or not[50] This status has been reinforced by the International Court of Justice in the Advisory Opinion delivered by the International Court of Justice (ICJ) in the case concerning the Legality of the Threat or Use of Nuclear Weapons and the Palestinian Wall case.[51] In its opinion, the ICJ affirmed that even in extreme circumstances, such as armed conflict, states remain obligated to respect the rules of international humanitarian law, which include the principles outlined in the Hague Regulations.[52]

In para. 157 of the judgement of the Palestinian Wall Case, the ICJ recalled this Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons stating "many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and elementary considerations of humanity," that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (I. C. J. Reports 1996 (I), p. 257, para. 79). In the Court's

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Also see "Occupation and international humanitarian law: questions and answers – ICRC", *International Committee of the Red Cross,* 2004, available at https://www.icrc.org/en/doc/resources/documents/misc/634kfc.htm.

[49] *Ibid*.

[50] "International standards", *OHCHR: Protecting human rights during conflict situation,* 2024, available at https://www.ohchr.org/en/protecting-human-rights-conflict-situations/international-standards.

[51] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, available at https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf.

[52]International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons,* available at https://www.icj-cij.org/case/95.

view, these rules incorporate obligations which are essentially of an *erga-omnes* character."[53]

In line with the criteria laid under Hague Regulations[54] and Geneva Conventions to ascertain if the present case is a fit case for occupation, the following constitutive elements of occupation need to be analysed:

A. Is the Indian State exercising effective control over Jammu and Kashmir?
B. Was Jammu and Kashmir *"Terra nullius"* at the time when India occupied it?
C. Is India entitled under international law to exercise power over Jammu and Kashmir?
D. Whether there is a presence and exercise of control or power by a hostile army?

EFFECTIVE CONTROL: The answer to the first question is in the affirmative. Although the exercise of effective control under IHL does not essentially require that the occupier in practice holds absolute control over the territory, mere capacity to exercise such a type of force, authority or power is a sufficient ground to prove effective control.[55]

In the present case, the Indian State exercises effective control over the territory. Subjects including defence, foreign affairs, security, matters concerning administration, human rights, and land and citizenship, among others, are being directed and controlled by the Indian State. [56]

TERRA NULLIUS: Coming to the question of *"terra nullius",* the term *"terra nullius"* was a "legal term of art employed in connection with "occupation" as one of the accepted legal methods of acquiring sovereignty

[53] International Court of Justice, above note 51.
[54] Convention, above note 46.
[55] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Art. 2, available athttps://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-2/commentary/2016#159.
[56] Rais Akhtar, William Kirk, Government and society, *Encyclopædia Britannica*, available at https://www.britannica.com/place/Jammu-and-Kashmir/Government-and-society.

over territory."[57] The term means a "territory belonging to no one" or a "territory without a master." Under international public law, when a territory is declared as *terra nullius*, another state can claim sovereignty and legitimise its occupation of the same.[58] This method of acquiring a territory is legal under international law under the doctrine of discovery.[59] The International Court of Justice has also approved this method as legal.[60] In the case of Western Sahara, The International Court of Justice (ICJ) held that, in order to have a legitimate acquisition of a territory, it must be *terra nullius*.[61] It further stated that if the territory is not *terra nullius*, the control is illegitimate.[62]

Applying the rule laid down to the present case, when India occupied Kashmir, Kashmir was not *terra nullius*. It is argued that it was a sovereign territory governed by a king and had a full-fledged established system of governance. Back then the territory of Kashmir qualified as a state under The Montevideo Convention on the Rights and Duties of States.[63] Article 1 of this convention lays down four criteria which, if met, enable the qualification of a territory as a state.[64] These are "a permanent population, a defined territory, a government and a capacity to enter relations with other states".[65] In the case of Kashmir, prior to India's occupation all these essential elements were satisfied.

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[57] International Court of Justice, *WESTERN SAHARA (ADVISORY OPINION)*, 16 October 1975, available at https://www.icj-cij.org/sites/default/files/case-related/61/061-19751016-ADV-01-00-EN.pdf, pp. 39.

[58] Sookyeon Huh, "Title to Territory in the Post-Colonial Era", *The European Journal of International Law*, Vol. 26, No. 3,. available at https://www.ejil.org/pdfs/26/3/2602.pdf, pp. 715.

[59] Legal Information Institute, "terra nullius", *Cornell Law School*, available at https://www.law.cornell.edu/wex/terra_nullius.

[60] *Ibid.*

[61] International Court of Justice, above note 57.

[62] *Ibid.*

[63] Montevideo Convention on Rights and Duties of States, 2021, available at https://www.colombohurdlaw.com/montevideo-convention-on-the-rights-and-duties-of-states/.

[64] Montevideo Convention, above note 63, Art. 1.

[65] *Ibid.*

i. Permanent Population: Kashmir has a diverse and stable population that has lived in the region for centuries. This population is not only permanent but also possesses a unique cultural identity, primarily marked by its distinct languages, traditions, and religious practices.[66]
ii. Defined Territory: Geographically, Kashmir is delineated by natural boundaries, including the Himalayas to the north and the Chenab River to the south. Its territorial boundaries have been historically recognized, and prior to the conflict, it was governed as a princely state with clear administrative borders.[67]
iii. Government: Before the 1947 conflict, Kashmir had its own government led by sovereign Dogra ruler Maharaja Hari Singh. This government managed local affairs, implemented laws, and maintained order, demonstrating the capacity for self-governance and administrative control.[68]
iv. Capacity to Enter Relations with Other States: Kashmir engaged in diplomatic interactions, particularly with Pakistan, after the partition of British India in 1947. The Instrument of Accession signed by Maharaja Hari Singh allowed Kashmir to establish formal ties with India, showcasing its ability to enter into relations with other states.[69]

Since all essentials required under Montevideo Convention were met, it qualified for a state and hence, was not *terra nullius*.

ENTITLEMENT: As discussed previously, the United Nations Security Council resolutions clarify that neither of the countries are legitimate title holders to the territory of Kashmir and the future of Kashmir has to be

[66] Marc Aurel Stein, Kalhana's Rajatarangini, Vol. 1 Translated available at https://archive.org/details/dli.pahar.1527/page/n17/mode/2up.
[67] V. Schofield, above note 17.
[68] Syed Damsaz Ali Andrabi, Dogra Rule: State of Jammu and Kashmir (1846-1952), available at https://archive.org/details/15DograRuleStateOfJammuAndKashmir18461952_201809.
[69] V. Schofield, above note 17. Also see Legal Documents: Instrument of Accession, above note 29.

decided through a fair and free plebiscite.[70] The lack of legal title in favour of Indian State can also be determined by the Instrument of Accession in clause 7 which reads, "*Nothing in this Instrument shall be deemed to be a commitment in any way as to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangement with the Governments of India under any such future Constitution."*[71] Clause 7 of the Instrument of Accession reflects that the accession was not an outright transfer of sovereignty and effectively challenges the legitimacy of any unilateral assertions of sovereignty by India over Kashmir. It highlights the contingent nature of the initial agreement and suggests that any future relationship was intended to be negotiated rather than imposed. As already discussed in foregoing chapters that Instrument of Accession can be looked on as a treaty, therefore India was incapacitated by a treaty to have a title over Kashmir.

HOSTILE ARMY: Regarding the hostility of the army, there are a number of factors to determine if an army is hostile. One of them is the "unconsented-to presence of foreign forces", and the "other is the ability of the foreign forces to exercise authority over the territory concerned in lieu of the local sovereign."[72] The potential conflict between occupant and occupied is yet another determinant.[73] In the present case, the presence of the Indian Army in Kashmir is not consented by The United Nations Security Council Resolutions which demand Indian Armed forces to withdraw from the land of Kashmir.[74] Moreover this presence and severe exercise of control hinders exercise of right to self-determination and violates the Instrument of Accession. The overwhelming presence[75] of

[70] UNSC, above note 40.
[71] V. Schofield, above note 29.
[72] Geneva Convention, above note 55.
[73] Eyal Benvenisti, *International Law of Occupation*, 2nd Edition, Oxford University Press, 2011.
[74] UNSC, above note 40.
[75] Rani Singh,"Kashmir: The World's Most Militarized Zone, Violence After Years Of Comparative Calm", *Forbes*, available at https://www.forbes.com/sites/ranisingh/2016/07/12/kashmir-in-the-worlds-most-militarized-zone-violence-after-years-of-comparative-calm.

Indian Armed Forces along with legal impunity[76] and unaccountability[77] for blatant violation of human rights[78] has been a subject of concern for the international community and disastrous for the native population for over seven decades. Since the army has not withdrawn nor the power exercise has been transferred to the local authorities, the territory of Jammu and Kashmir can be safely termed as an occupied territory.

## VI. Kashmir pre-2019 and state-subject laws

Although the Maharaja government was overturned and replaced with a new form of government, including the President (Sadr-e-Riyasat) and Prime Minister taking over the governance, decades back, the treaty provisions of Instrument of Accession remained effective. It is essential to note that prior to 2019, the treaty provisions of Instrument of Accession continued to apply and the change in government didn't have any impact on the flag, constitution or state subject laws framed under the Dogra rule. According to the existing state subject laws,[79] state subjects could be categorised under the following classes: Class I included persons and their descendants born and permanently inhabiting within the territorial limits of Jammu and Kashmir before 1942.[80] Class II included persons, in addition to those belonging to Class I, who were permanently living/settled within the State and had successfully acquired an

[76] Caesar Roy, "THE DRACONIAN ARMED FORCES (SPECIAL POWERS) ACT, 1958 – URGENCY OF REVIEW" available at https://www.files.ethz.ch/isn/180712/b5167a3995c057f77ff0ae3a230c2744.pdf.

[77] "'DENIED' Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir", *Amnesty International*, 2015, available at https://www.amnesty.org/en/wp-content/uploads/2021/05/ASA2018742015ENGLISH.pdf.

[78] "INDIA: Summary of human rights concerns in Jammu and Kashmir", *Amnesty International,* 1995, available at https://www.amnesty.org/en/wp-content/uploads/2021/06/asa200021995en.pdf.

[79] Government of the State of Jammu and Kashmir Notification No I-L/84, 20 April 1927, available at https://www.satp.org/satporgtp/countries/india/states/jandk/documents/actsandordinances/State_Subject_Rules.htm.

[80] *Ibid.*

immovable property before the end of the samvat year of 1968.[81] Under Class III, permanent residents who had secured an immovable property under Riayat Nama or WIZO and could acquire the said property after ten years of residence therein under an ijazatnama were also covered.[82] Under Class IV, companies previously registered within Jammu and Kashmir could be declared state subjects. [83]Additionally, the state subjects' laws included descendants of any of the above-mentioned categories and any immigrant who was the wife or widow of the state subject if she continued to reside in the state permanently or did not remarry.[84] It even included any emigrants from Jammu and Kashmir and their descendants born abroad up to two generations as state subjects upon fulfilment of certain conditions.[85] Only state subjects under the law were entitled to purchase property, enjoy employment opportunities in the government sector and exercise voting rights.[86]

Pre-2019, India's relationship with Kashmir was governed by two articles of the Indian Constitution, Article 35A[87] and Article 370.[88] These articles reiterated the unique status of Jammu and Kashmir and its relation to the Indian State in line with terms agreed upon in the instrument of accession and state-subject legislation. After decades of peaceful and uncontested application of these laws in Kashmir and India's maintenance of relations with Kashmir on the agreed-upon grounds, India unilaterally removed the application of both these articles to Kashmir on 5th August 2019. The series of actions which followed, reflect upon the Indian State's intent to colonise Kashmir and establish a settler colonial project in the

[81] *Ibid.*
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*
[86] *Ibid.*
[87] Constitution of India 1949, *Indian Kanoon*, Art. 35(a), available at https://indiankanoon.org/doc/487/.
[88] Constitution of India, above note 87, Art. 370.

territory.[89] India argued that the provisions (Article 370) contained in its constitution were listed under the sub-heading of temporary provisions. Therefore, changing its constitution did not require external intervention or validation. The argument here is partially valid. Article 370 was a part of the Indian Constitution, the bridge for India, through which it governed its relation with Jammu and Kashmir. Through the international law lens, it is immaterial if India removed a provision from its domestic law because it is still bound by the treaty (IOA), which was signed in 1948 between the Indian State and sovereign of Jammu and Kashmir and which clearly excluded India from having any sovereign title over Jammu and Kashmir. Relying on the principle that non-performance of treaty obligations cannot be defended by citing domestic law, India is still obligated to abide by the Instrument of Accession.[90] As there is no concrete evidence that the article/ provision was temporary because of internal arrangements or was subject to change according to government policy, it can be validly argued that the transient nature of the said provision pointed out to temporary structures between sovereigns which were subject to the outcome of a referendum in UNSC resolutions.

## VII. Post-2019 developments in Kashmir

After August 5, 2019, the Indian occupying governance clamped down on the entire region of Jammu and Kashmir, blocked the internet and communication pathways, including mobile networks and landlines, haltered local media services, arrested all mainstream political and separatist leadership, set the whole territory under a lock-down and unilaterally altered articles in their constitution governing relations with

[89] "India's Modi visits kashmir: How has the region changed since 2019?", *Al Jazeera,* 7 March 2024, available at https://www.aljazeera.com/news/2024/3/7/indias-modi-visits-kashmir-how-has-the-region-changed-since-2019.

[90] Article 23, Excuses for Failure to Perform, *The American Journal of International Law Supplement: Research in International Law,* Vol. 29, No. 1, 1935, available at https://www.jstor.org/stable/pdf/2213690.pdf, pp. 1029-1031.

Jammu and Kashmir.[91] As mentioned in the earlier chapters, a typical characteristic of a settler is that it forcefully imposes its laws upon the indigenous population. The Indian state, post abrogation, directly imposed its laws upon Jammu and Kashmir. It announced the non-application of earlier laws without any legal authority, soundness or backing and divided the Indian Administered territory of Kashmir into two parts, the "Union Territory of Jammu and Kashmir" and the "Union Territory of Ladakh".[92] The abrogation of Articles 370 and 35A, accompanied by the reorganisation of the former state, has drawn criticism for its perceived lack of adherence to the constitutional requirement of state legislature participation. The process has been characterised as being executed through covert means and deception.[93] Consequently, the hearings pertaining to a set of petitions challenging the decision in the Supreme Court of India encountered multiple delays, solidifying the perception of a *fait accompli*.[94] A great part of this decision affected the access to the land, economy and citizenship of the native population.

This move strategically replaced the state-subject laws with a new domicile policy. Going against the previously existing state-subject rules, the domicile policy of 2019 introduced a new process through which any Indian Citizen could become a permanent resident in Jammu and Kashmir.[95] In line with the basic characteristics of settler colonialism, this

[91] "How 2019 Changed the Kashmir Dispute Forever", *Al Jazeera*, 1 January 2020, available at https://www.aljazeera.com/news/2020/1/1/how-2019-changed-the-kashmir-dispute-forever.

[92] Hannah Ellis-Petersen, "India Strips Kashmir of Special Status and Divides It in Two", *The Guardian*, 31 October 2019, available at https://www.theguardian.com/world/2019/oct/31/india-strips-kashmir-of-special-status-and-divides-it-in-two.

[93] Ather Zia, "Erasing Kashmir's autonomous status" *Al Jazeera*, 14 August 2017, available at https://www.aljazeera.com/opinions/2017/8/14/erasing-kashmirs-autonomous-status

[94] '"Clear threat': Kashmiris on India top court upholding removal of autonomy". *Al Jazeera,* 12 December 2023, available at https://www.aljazeera.com/news/2023/12/12/clear-threat-kashmiris-on-india-top-court-upholding-removal-of-autonomy.

[95] Iyer KSand P, "Decoding the New Domicile Law of Jammu and Kashmir", *Observer Research Foundation,* 30 June 2020, available at https://www.orfonline.org/expert-speak/decoding-new-domicile-law-jammu-kashmir-68777/&gt.

law provided an open opportunity to the settlers from India to build settlements, occupy the territory and exploit its resources. The new law stated that any person who acquires a domicile certificate would have the right to purchase land and other immovable property,[96] would be entitled to vote or contest elections[97] and secure jobs in government services in Jammu and Kashmir.[98]

Reiterating that the elimination of natives is another trait of settler colonialism, the new laws excluded the migrant Kashmiri people and their children (the indigenous) who do not have permanent residence in Kashmir; in other words, members of indigenous community who live outside the state. The Kashmiri emigrants' status for participation in self-determination is recognised under Security Council resolutions and the previously existing state-subject laws.[99] The Indian government has made numerous attempts to coerce the earlier state subjects into showing compliance with the said provisions. For example, the Domicile Certificate is a prerequisite for admission to educational institutions and application to any professional service/employment opportunity.[100] The state-subject certificate, which was earlier a valid document for applications, admissions or purchase of property and the validity of which was upheld by the High Court of Jammu and Kashmir on various

[96] Peerzada Ashiq, "J&K Throws Open Local Real Estate to All Citizens of Country", *The Hindu,* 28 December 2021, available at https://www.thehindu.com/news/national/other-states/jk-throws-open-local-real-estate-to-all-citizens-of-country/article38050455.ece.

[97] "Uproar in Kashmir as India Allows Voting Rights to Non-Locals", *Al Jazeera,* 19 August 2022, available at https://www.aljazeera.com/news/2023/8/19/uproar-in-kashmir-as-india-allows-voting-rights-to-non-locals.

[98] "Jammu and Kashmir Domicile Law: Meaning and Ramifications", *The Kashmir Walla,* May 31 May 2020, available at https://thekashmirwalla.com/jammu-and-kashmir-domicile-law-meaning-and-ramifications/.

[99] Government of the State of Janmu and Kashmir, above note 79.

[100] Peerzada Ashiq, "J&K Makes Domicile Certificate Mandatory for Admissions to Educational Institutions, Professional Exams", *The Hindu,* 20 May 2020, available at, https://www.thehindu.com/news/national/other-states/jk-makes-domicile-certificate-mandatory-for-admissions-to-educational-institutions-professional-exams/article31636972.ece.

occasions, is now reduced to a mere proof of residence and is no longer recognised for any other purpose.[101]

For example: In February of 2020, the Indian regime decided to terminate the recruitment process of Jammu and Kashmir Bank (one of the key public sector institutions in Jammu and Kashmir) for over 1,450 positions, which had been in progress since 2018.[102] This process involved recruitment only for permanent residents of Jammu and Kashmir (the state subjects). Subsequently, in June 2020, the bank initiated a new advertisement for 1,850 positions, inviting applications from individuals who meet the domicile requirements.[103] The replacement of state-subject with domicile paved the way for non-native population to participate in the process of recruitment and gradual naturalisation.[104]

For quick imposition of this domicile rule, the authority of the issuance of these certificates to any Indian Citizen is assigned to junior-most administrative officers (tehsildars) with little by way of checks and balances. Such a document has to be issued within fifteen days of application; the failure to comply with it results in a penalty to the concerned officer in the amount of 50,000 Indian Rupees.[105] The statistics show an increase in the purchase of land by outsiders using this method. According to official statistics, 185 non-Kashmiri people bought properties in the territory between 2020 and 2022.[106] The data also revealed that even less than a year after abrogation, more than 25,000 non-local people were

[101] Mirza Saaib Beg, "J&K's New Domicile Order: Disenfranchising Kashmiris, One Step at a Time", *The Wire*, 30 May 2020, available at https://thewire.in/rights/kashmir-domicile-law.

[102] Anuradha Bhasin, 20 June 2020, "Bringing the Israeli model to Kashmir" *Al Jazeera*, available at https://www.aljazeera.com/opinions/2020/6/20/bringing-the-israeli-model-to-kashmir.

[103] *Ibid.*

[104] *Ibid.*

[105] The Kashmir Walla, above note 98.

[106] "185 outsiders bought land in Jammu and Kashmir in last 3 years: Govt", *State Times,* 6 April 2023, available at https://statetimes.in/185-outsiders-bought-land-in-jk-in-last-3-years-govt/.

granted domicile certificates.[107] According to the Indian Government, 3,231,353 non-native applicants were issued Domicile Certificates by the end of 2020.[108] It is important to note that numerous bureaucrats and members of the Indian Armed Forces have been stationed in the region for more than a couple of decades during their postings, making it easy for them to be eligible to be a domicile and enjoy privileges under the new regulations.[109] Political analysts and human rights experts argue that in the following years, the number of domiciles issued will continue to grow, every year higher than the previous. Given the non-accountable corrupt nature of the system, it is quite presumable how these laws will be twisted to benefit the non-native population and create settlements within the territory of Jammu and Kashmir.

On one hand, India's domicile law sets up the flow of Indian citizens for their settlement in the disputed territory, paving the way for a constant cycle of citizenship through naturalisation. On the other hand, it is forcefully evicting the indigenous Kashmiri Gujjar-Bakerwal community. This is another method of elimination followed by the Indian State. This indigenous community has lived in the forests of Jammu and Kashmir for generations.[110] The forceful eviction of natives from those lands is the first step to clearing the land for private investors.[111] The Gujjar-Bakerwal community is comprised of an estimated three and a half million members from Jammu and Kashmir, whose homes are demolished, forcing them to

[107] "Kashmir Muslims fear demographic shift as thousands get residency", *Al Jazeera,* 28 June 2020, available at https://www.aljazeera.com/news/2020/6/28/kashmir-muslims-fear-demographic-shift-as-thousands-get-residency.

[108] GOVERNMENT OF INDIA MINISTRY OF HOME AFFAIRS LOK SABHA STARRED QUESTION NO. *287, Sansad, 16 March 2021, available at https://sansad.in/getFile/loksabhaquestions/annex/173/AS287.pdf?source=pqals.

[109] A. Bhasin, above note 102.

[110] Aakash Hassan, "'We Would Prefer Death': Kashmiri Muslim Nomads Fear Eviction", *Al Jazeera,* 20 *November* 2020, available athttps://www.aljazeera.com/news/2020/11/20/tribal-community-face-eviction-from-forests-in-kashmir.

[111] Joe Wallen, Aakash Hassan Kanidajan, "'I Will Burn Myself to Death': Kashmir's Nomads Evicted from Homes amid Anti-Muslim Crackdown", *The Telegraph,* 31 December 2020, available at https://www.telegraph.co.uk/news/2020/12/31/will-burn-death-kashmirs-muslim-nomads-evicted-homes-amid-anti/.

become migrants and internally displaced persons.[112] India's strategic move to occupy Kashmir involves the government's proposal to provide land to various companies[113] and corporations to set up units and branches in Kashmir. Between 2019-2022, as per the official records provided by the Government of Jammu and Kashmir, it has been reported that a total of 1,559 Indian companies, which also include multinational corporations, have made substantial investments in the territory of Jammu and Kashmir.[114] Moreover, the law governing "land lease" prior to 2019 was also done away with by the Indian State. As a consequence, the state refused to extend the leases of native hoteliers. Instead, it decided to auction those permits, which would result in numerous Kashmiri hoteliers losing ownership of their properties.[115] These lands would then be leased to outsiders through e-bidding, preferably by former members of the Indian Armed Forces, war widows and migrant workers, according to the government's notification.[116] Similarly, in January 2023, Indian state authorities dispatched bulldozers to various locations in Jammu and Kashmir. The purpose of this operation was to demolish properties that were alleged to have been constructed on state land deemed to be encroached upon.[117] A petitioner brought forth a case regarding the matter

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[112] "In Photos: Kashmir's Bakarwal Tribe Faces Existential Crisis", *BBC News,* 23 September 2023, available at https://www.bbc.com/news/world-asia-india-62886711.

[113] Peerzda Ashiq, "Jammu and Kashmir Transfers 289-Acre Land for Housing, Dubai Realtors Likely to Invest", *The Hindu,* 2 February 2023, available at https://www.thehindu.com/news/national/other-states/jammu-and-kashmir-transfers-289-acre-land-for-housing-dubai-realtors-likely-to-invest/article38365187.ece. Also see, "Jammu and Kashmir Govt Inks 39 MoUs Worth Rs 18,300 CR with Country's Real Estate Investors", *The Economic Times*, available at https://economictimes.indiatimes.com/industry/services/property-/-cstruction/jammu-and-kashmir-govt-inks-39-mous-worth-rs-18300-cr-with-countrys-real-estate-investors/articleshow/88522715.cms?from=mdr.

[114] "185 outsiders bought land in Jammu and Kashmir in last 3 years: Centre", NDTV, 5 April 2023, available athttps://www.ndtv.com/india-news/185-outsiders-bought-land-in-jammu-and-kashmir-in-last-3-years-centre-3922369.

[115] "In 2022, India came for Kashmir's land, votes and journalists", *Al Jazeera,* 30 December 2022, available at https://www.aljazeera.com/news/2022/12/30/2022-india-continues-series-of-controversial-policies-in-kashmir.

[116] *Ibid.*

[117] Shakir Mir, "2023: A year of ironies and paradoxes in J&K", *The Wire*, 31 December 2023, available at https://thewire.in/rights/2023-a-year-of-ironies-and-paradoxes-in-jk.

before the Jammu, Kashmir and Ladakh High Court. From a technical perspective, the petitioner's argument held merit, as the laws in force in Jammu and Kashmir before 2019 permitted his contentions and assertions. However, the judges set aside the petitioner's plea due to the absence of Section 133(2) of the Jammu and Kashmir Land Revenue Act, 1996, whose absence in its previous form rendered the petitioner, as well as numerous other landholders susceptible to eviction and the potential demolition of their properties.[118]

Additionally, the government of India has been making constant efforts to make Hindu[119] and military settlements[120] to alter the religious demography of the Muslim-majority territory. In this regard, in July 2020, the Indian administration granted permission to the "Indian Army, Border Security Forces, paramilitary forces and similar organisations" to freely acquire land and undertake construction beyond military cantonment areas without requiring them to obtain a special certificate and a "no objection certificate" (NOC) clearance from the region's home department, which was mandated by previous laws including the 1971 circular.[121] The occupying regime, starting from 2023, is also bringing in and providing accommodations to migrant workers who hail from outside Jammu and Kashmir in the form of flats; another way of bringing in settlers to the region.[122]

However, the plan doesn't end here. The delimitation or redrafting of boundaries of election balloters/peripheries on religious grounds is

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[118] *Ibid.*

[119] "India's BJP to Revive Hindu Settlement Plan in Kashmir: Report", *Al Jazeera,* 12 July 2019 https://www.aljazeera.com/news/2019/7/12/indias-bjp-to-revive-hindu-settlement-plan-in-kashmir-report. Also see https://www.mha.gov.in/sites/default/files/2023-07/Annexure20_28072023.pdf.

[120] *Ibid.*

[121] "India eases rules for Security Forces to acquire land in Kashmir", *Al Jazeera,* 28 July 2020, https://www.aljazeera.com/news/2020/7/28/india-eases-rules-for-security-forces-to-acquire-land-in-kashmir .

[122] "J&K govt. hands over 192 flats to migrant workers in Jammu", 3 August 2023, available at https://www.thehindu.com/news/national/jk-govt-hands-over-192-flats-to-migrant-workers-in-jammu/article67151092.ece.

another significant example of settlement propaganda that marginalises and suppresses Muslim communities.[123] This decision made by the Delhi government to commence the delimitation process, entailing the redrawing of electoral constituency boundaries, is anticipated to have a profound impact on the local political landscape, particularly within the predominantly Hindu region of Jammu. Several leaders from the Bharatiya Janata Party (BJP) have put forth two proposals aimed at achieving this objective. Firstly, there is a suggestion to base the enumeration process on geographical area, departing from the prevailing norm of population-based enumeration throughout India.[124] Secondly, there is a proposition to allocate the 24 vacant seats from Pakistan-administered Kashmir (PAK) and Chinese-controlled Aksai Chin, which have remained unrepresented for the past 70 years, to the Jammu region by providing representation to Hindu and Sikh refugees from Pakistan-administered Kashmir.[125] Implementation of these ideas would engender a reconfiguration of electoral constituencies and potentially reshape the prevailing political dynamics in the area.

The Indian government's crackdown on bonafide buyers of Hindu-minority properties purchased in the 1990s, without ascertaining the merits and facts of each case unveils another aspect of its propaganda to evict Kashmiri natives.[126] Claiming to resettle minorities back in Kashmir, but not vacating Hindu-owned properties occupied by the government and instead encroaching upon Muslim buyers who are genuine owners of such estates, reflects the depth of bias that the government holds against Muslims.[127] Moreover, in an attempt to further alienate the Muslim population and allow demographic intrusions, the Indian government is recruiting more and more people from outside Jammu and Kashmir,

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[123] Al Jazeera, above note 119.

[124] A. Bhasin, above note 102.

[125] *Ibid.*

[126] Ashutosh Sharma, "India's Push to Resettle Kashmiri Hindus Exposes Old Fault Lines", *Al Jazeera,* 1 April 2023, available at https://www.aljazeera.com/news/2022/4/1/india-push-to-resettle-kashmir-hindus-exposes-old-fault-lines.

[127] *Ibid.*

leaving thousands of natives jobless and victims of the state's settler policy.[128] Post-abrogation of Article 370 of the Indian Constitution, almost all the top bureaucratic roles in the Jammu and Kashmir administration are in the hands of outsiders.[129] According to an initial evaluation conducted by the Kashmir Chamber of Commerce (KCCI) in the year 2020, it was estimated that the economy of Kashmir suffered losses amounting to approximately $5.32 billion.[130] The same study revealed a significant rise in unemployment with over 100,000 individuals losing their jobs in the territory, attributing it to the revocation of Kashmir's special status by the Indian government.[131] Consequently, a considerable portion of the native Kashmiri population has been compelled to seek economic opportunities elsewhere, both within India and abroad, conveniently pushing them to become economic migrants.

## VIII. Demographic Changes: New step or Continuum

Indian politics facilitates a multi-party system, but walking down the lanes of history and analysing the current situation, there are two major ideologies and both ideologically run contrary to each other. On one side is the Indian National Congress, which is built on the ideology based on inclusivity, secularism, social welfare and a democratic set-up where people from different religions or castes can live together with equal respect and harmony. In contrast is the Bharatiya Janata Party which promotes a right-wing Hindutva agenda, where it is on a mission to convert the Indian democratic State into a Hindu-state. Under this Hindutva ideology, people belonging to religions outside Hinduism must be treated as subjugates or second-class citizens or be eliminated altogether. These fundamental ideological differences between the two major political parties in India have significantly shaped their respective

[128] A. Bhasin, above note 102.
[129] *Ibid.*
[130] Womic Baba & Anam Zakaria, "The false promise of Normalcy and development in Kashmir", *Al Jazeera*, 5 August 2020, *available at* https://www.aljazeera.com/opinions/2020/8/5/the-false-promise-of-normalcy-and-development-in-kashmir.
[131] *Ibid.*

policy platforms and agendas. Though it may appear that the positions of the BJP and the Congress are diametrically opposed, both can be situated within a broader ideological continuum when the issue pertains to Kashmir.

Though the state-subject and demographic laws were finally torn down under the BJP regime when it illegitimately abrogated Article 370, Congress had been hollowing out the basis of this Article since the last 50 years of its rule. Congress has traditionally advocated for the autonomy of Jammu and Kashmir, but in practice it has maintained a complex and at times ambiguous relationship with Article 370, gradually diluting its own provisions and the clauses of the Instrument of Accession over the decades, eroding the state's autonomous status.

For example: under the 1952 Delhi Agreement the government led by the Congress Party extended Part III of Indian Constitution (fundamental rights), citizenship law, trade and commerce rules to Jammu and Kashmir, diluting the treaty clauses of Instrument of Accession and special status under Article 370.[132] Over a period of time, Congress signed accords in 1975 and 1986 with a regional political party, "National Conference" and gradually extended its control over the territory under the garb of protection of special status.[133] Congress' gradual undermining of Jammu and Kashmir's autonomy, coupled with its own shifting ideological positions, laid the groundwork for the BJP's plans to execute.[134] The only major difference that can be identified between the two is that BJP wants to convert Kashmir, the only Muslim-majority territory, to a Hindu state[135]

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[132] The Delhi Agreement, 1952. available at https://www.satp.org/satporgtp/countries/india/states/jandk/documents/papers/delhi_agreement_1952.htm.

[133] Bashir Assad, "Dumb charades: How Congress went so wrong on Article 370", *The Sunday Guardian Live*, 24 December 2023, available at https://sundayguardianlive.com/opinion/dumb-charades-how-congress-went-so-wrong-on-article-370.

[134] *Ibid*.

[135] Kaisar Andrabi & Zubair Amin, "Modi Is Trying to Engineer a Hindu Majority in Kashmir. (2021). In Foreign Policy", 11 August 2021, available at

within the Indian nation whereas Congress wants to assimilate the population with the Indian mainlanders irrespective of considering the religions the people predominantly follow. The policies and strategies have remained different but the goal of settler-colonialism remains constant. While Congress' strategies can be better explained through the phrase, "an iron hand in a velvet glove", the Bharatiya Janata Party is a true reflection of the phrase "might is right."

Several international law experts, including Dr. Sheikh Showkat Hussain[136], a former professor of international law, have also argued that India has tried to alter demography since the late 1940s, when India took control over Jammu and Kashmir, but now it is more expressive and faster. In his book, "*Kashmir-Palestine in the Making*",[137] Dr. Sheikh Showkat Hussain tracks the population changes in Indian-administered Kashmir and attributes this change fundamentally to the religious identity of the state subjects. He points out the deliberate attempts by the Indian government since the early years of their control to alter the Muslim population in the territory. According to his work,[138] the Indian administration used various tactics in varied phases, including the genocide in the early years of governance, where a hundred thousand Muslims in Jammu province of Indian Administered Kashmir were massacred and around a hundred thousand people were coerced to migrate. Another scholar, Ian Stephens, presents the same argument in his work[139] where he writes that by the end of 1947, around half a million population had disintegrated around two lakh (two hundred thousand) could not be traced, which indicates that they were either killed or died while they tried to flee. In contrast, some managed to cross the border and escape to the Punjab province of Pakistan. This led to a 9% decline (78%

https://foreignpolicy.com/2021/08/11/modi-is-trying-to-engineer-a-hindu-majority-in-kashmir.

[136] Dr. Sheikh Showkat Hussain is a Kashmiri political analyst and a prominent scholar of human rights and international law, he has authored several books on the Kashmir conflict.

[137] Kashmir-Palestine in the Making, pp. 7

[138] *Ibid.*

[139] Ian Stephens, *Horned Moon*, Chatto & Windus, 1953, pp. 138.

to 69%) in the state's Muslim population between 1941 and 1961.[140] Some works indicate that faulty census procedures[141] and relatively minor invisible settlements have also contributed to earlier attempts to change the demography. A suitable example would be a comparison of the 1961-1971 and 1971-1981 census records. In 1971, 42,470 native Hindi speakers existed in the valley.[142] In contrast, under the 1981 census record, the number dramatically increased to 1,012,808 native Hindi speakers compared to native Kashmiri and Dogri speakers (two primary languages used in the territory), which showed an increase of 30% and 27% respectively in the same period.[143] Ironically, there is no reciprocal decline in any language to balance a mere 29% population growth in the same decade. This indicates the settlement of non-state subjects in Jammu and Kashmir or faulty census procedures that included migrants in the records.[144] It is also possible that massacres, mass killings and other human rights violations in the following decades in the region may have also impacted adversely on the demography. As mentioned in the foregoing chapter, the current regime in India is building multiple settlements, giving livelihood opportunities and granting domicile certificates to non-natives to alter the demography of Jammu and Kashmir.

[140] Kashmir-Palestine in the Making, above note 137. Also see, Jawahar Lal Nehru speeches, VI Publications division government of India, pp. 165.
[141] Kashmir-Palestine in the Making, above note 137, pp. 10.
[142] *Ibid.*
[143] *Ibid.*
[144] *Ibid.,* pp. 11.

## IX. International Law and demographic changes in occupied territories

It is interesting to note that various scholars, including Ather Zia,[145] Azad Essa,[146] and others, have recently compared the model used by India in Kashmir to that used by Israel in Palestine. Ironically, India's state representatives have sometimes acknowledged that they are using and further intend to use Israel's model on Palestine in Kashmir.[147] With time, a systematic pattern can be identified which makes these remarks a reality of India's actions in Kashmir.

When analysed using the lens of international law, the series of actions that have unfolded in and after 2019 reflect numerous violations of international law. For example: contraventions of Instrument of Accession (treaty violations), breach of international humanitarian law provisions that prohibit the forceful transfer of occupied populations out of the occupied territory or inducing of occupier's people in it (both custom and treaty principles), efforts to destroy the possibilities of the fair and free plebiscite and violation of self-determination rights (defeat the purpose and object of UN Security Council resolutions).

To begin with, India allotting land violates Article 6 of the Instrument of Accession, which explicitly prohibits India from purchasing or

[145] "Ather Zia is assistant professor of anthropology and gender studies at the University of Northern Colorado. She is the founder-editor of Kashmir Lit, an online journal of Kashmiri and diaspora writing, and the cofounder of Critical Kashmir Studies, an interdisciplinary network of scholars working on the Kashmir region. She has authored several books and articles on the Kashmir conflict." This information has been derived from google books, author information section.

[146] "Azad Essa is a senior reporter for Middle East Eye based in New York City. He worked for Al Jazeera English between 2010-2018 covering southern and central Africa for the network. He is the author of numerous articles about Kashmir and a book titled, 'Hostile Homelands: The New Alliance Between India and Israel' (Pluto Press, Feb 2023)"- this information has been derived from the website for Middle East Eye, New York.

[147] "Anger over India's Diplomat Calling for 'Israel Model' in Kashmir", *Al Jazeera,* 28 *November* 2019, available athttps://www.aljazeera.com/news/2019/11/28/anger-over-indias-diplomat-calling-for-israel-model-in-kashmir.

acquiring land or immovable properties in the territory of Kashmir for any purpose.[148] It is important to remember that the general rule is that treaties neither terminate on their own nor do changes in internal government or successor regimes terminate treaty obligations.[149] Mere alteration in the form of government and subsequent recognition[150] by parties to the treaty leaves no scope in this case for non-application of treaty obligations. Secondly, international humanitarian law expressly prohibits, under Article 49 of the Fourth Geneva Convention,[151] forcible transfer of population from occupied territory, whether in the occupier's part or otherwise in any other region, or inducing of the occupier's population in occupied territory. Under the same article, temporary and partial evacuations within the environment are allowed only in case of military necessity (where no other alternative is available), followed by mandatory rehabilitation of the victims and resettlement immediately after the end of hostilities.[152] These evacuation circumstances do not apply to the present case under consideration. Therefore, India's forcible transfers were using immediate eviction or indirectly forcing victims to be displaced, which violates Article 49, Section III of the Fourth Geneva Convention. Article 49 also expressly prohibits deportations and movements of civilians in the occupied territory.[153] In the current case, India's policies and series of activities involving the settlement of its civilian entities in Jammu and

[148] "Instrument of Accession of Jammu and Kashmir", available at https://cjp.org.in/wp-content/uploads/2019/08/instrument_of_accession_of_jammu_and_kashmir_state.pdf.

[149] § 10:13. Treaties and changed regimes, 2 Litigation of International Disputes in U.S. Courts § 10:13 [Unable to access link]

[150] Both India and the Government of Jammu and Kashmir upheld the principles of Instrument of Accession on many occasions. India included its reference in their constitution, and Jammu and Kashmir government upheld the same laws the previous regime had including the treaty obligation under Instrument of Accession.

[151] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf.

[152] *Ibid.*

[153] *Ibid.*

Kashmir violate the convention. Adam Roberts[154] claims in his work[155] that one of the factors for the occupier to provide occupation is imposing any disruptive change and not engaging in the annexation of occupied territory. He continues to add that the rights of the sovereign there have to be preserved and where the outcome is pending because of a peace settlement negotiation, the occupier is bound to facilitate "the prospects for an eventual peace agreement and the rules against transfers of populations into and from occupied territories, partly reflect this purpose."[156] As far as the above-stated law is concerned, India, being a party to the Fourth Geneva Convention, is in absolute violation of Article 49, and its act of moving its population to Kashmir is an express violation of the stated law. India has also violated Articles 18 and 26 of the Vienna Convention on the Law of Treaties of 1969 and its obligations therein which impose a duty on the states to not act contrary to the "object and purpose of the treaty" and to "perform the treaty in good faith" respectively.

Under customary international humanitarian law, Rule 130 prohibits states from deporting or transferring their civilian population, even if such movement is limited or partially carried out into a territory under their occupation.[157] The Rome Statute enlists it in the list of war crimes.[158] Many states, including Australia, Canada, Netherlands, the United Kingdom, South Africa and the United States of America, incorporate this principle in their domestic laws and military manuals.[159] Other states, including India, have made official statements upholding the stand against the practice of settler colonisation and moving an occupier's population into

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[154] "Montague Burton Professor of International Relations, Oxford University; and Fellow of Balliol College".

[155]Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", *American Journal of International Law,* Vol. 84, No. 1, January 1990, par. 46.

[156] *Ibid.*

[157] "Rule 130. Transfer of Own Civilian Population into Occupied Territory", *Customary IHL - Rule 130. Transfer of Own Civilian Population into Occupied Territory*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule130.

[158] The Rome Statute, Article 8(2)(b)(viii).

[159] Customary IHL - Rule 130, above note 157.

the land it forcefully occupies. The Permanent Representative made an official statement reiterating India's perspective in an open debate session at UNSC.[160] The Representative stated that it was fundamentally important that settlement activities be immediately and wholly stopped in the Middle East as it obstructs the peace process. What is ironic here is that India referred to Israel's settlement policies and activities in Palestine as illegal and a root cause of violence and humanitarian issues in the region. India went on in 2012 to "reiterate its call for Israel to stop all settlement activities."[161] In 2020, eight years later, India bluntly admitted that the model India follows in Kashmir is Israel's model that it followed in Palestinian-occupied territories.[162]

The United Nations Security Council has adopted numerous resolutions in different situations involving the question of former Yugoslavia, Israel-Palestine, and Iraq-Kuwait, among others, wherein it has clarified that setting up settlements by the occupier in occupied land, coerced relocation or forceful transfer of the native people of such territory which remains under occupation, subversion of demographic records of occupied territory, or other activities by occupier which alter the "physical character, demographic composition, institutional structure or status" are a severe violation of the Fourth Geneva Convention and are not legally valid under international law.[163]

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[160] "Displacement and Displaced Persons", *Customary IHL - Practice Relating to Rule 130. Transfer of Own Civilian Population into Occupied Territory*, https://ihl-databases.icrc.org/customaryihl/eng/docs/v2_chapter38_rule130_13D5BE.

[161] *Ibid.*

[162] "Anger over India's Diplomat Calling for 'Israel Model' in Kashmir", *Al Jazeera,* 28 November 2019, https://www.aljazeera.com/news/2019/11/28/anger-over-indias-diplomat-calling-for-israel-model-in-kashmir.
Also see Nayanima Basu, "Indian Consul General in US Suggests Israel Model for Kashmiri Pandits' Return, Kicks up Row", *The Print*, 27 November 2019, available at https://theprint.in/diplomacy/indian-consul-general-in-us-suggests-israel-model-for-kashmiri-pandits-return-kicks-up-row/327302/.

[163] International Court of Justice, above note 157.

The United Nations General Assembly has also condemned occupational settlements and demographic changes induced by the occupier in different situations before it. It has continuously reiterated its stand reaffirming illegality and opposition to settlement and related activities in the occupied territories.[164] The General Assembly, however, widened the ambit of settler-colonialism and included exercises associated with "confiscation of land, disruption of the livelihood of protected persons and the de-facto annexation of land".[165] The International Court of Justice[166] and United Nations High Commissioner of Human Rights,[167] discussing Israel's settlement in occupied territories of Palestine as in breach of international law, reaffirmed the Security Council's position that settler-colonialism and related activities are violations of international law.

According to a report on "*the human rights dimensions of population transfer, including the implantation of settlers*",[168] population transfer, whether in the form of sending the occupier state's population into occupied territory or forcefully moving the natives from their land (occupied zone) to the occupier's environment or another state, is against international legal principles. It violates both international humanitarian law and human rights law. This opinion is well-received and highly validated by the Commission on Human Rights.[169] The report clarifies that state policies and activities that involve "implanting settlers" to establish hegemony over the native inhabitants of the occupied region are prima

[164] "Ukraine: UN General Assembly Demands Russia Reverse Course on 'Attempted Illegal Annexation", *United Nations*, available at https://news.un.org/en/story/2022/10/1129492.
[165] UNGA Res. 10/13, October 2003, available at https://www.jewishvirtuallibrary.org/un-general-assembly-resolution-es-10-13-october-2003.
[166] International Court of Justice, above note 51.
[167] Customary IHL – Rule 130, above note 157.
[168] "Human Rights Dimension of Population Transfer, Implantation of Settlers - CHR Sub-Comm. - Special Rapporteur Report (Excerpts) - Question of Palestine", *United Nations,* 8 December 2023*,* available at https://www.un.org/unispal/document/auto-insert-179611/#:~:text=Al%2DKhasawneh%2C%20as%20Special%20Rapporteur,4.
[169] *Ibid,* par. 2.

facie illegal.[170] Occupation is similar to acquisition by war. The defence that the settlers in occupation do not forcefully push out the native inhabitants is no good defence under Article 49 of the Geneva Convention IV (1949). Similarly, the argument that the occupier has a "better title to the territory under occupation than the ousted sovereign" is equally vague and non-acceptable, and the international community denies any such title.[171] The main reasons for this are that it would lead to the absolute failure of the application of international law of conflict (IHL) and would purposely assist the occupier in exceeding its power and limits. Under international law, occupying forces have a limited area to use their control, including orderly governance, use of resources and military necessity, and this cannot be stretched "beyond the quantum and duration." If it is, then it becomes legally invalid.[172] The occupier under no circumstances can declare the occupied territory as part of its territory or cannot treat the population in occupied zones as its subjects. Similarly, the occupier cannot confer rights on properties, whether the state/private, in occupied territory apart from the purposes stated earlier (for a limited duration only).[173]

The legal regime of international law, including international humanitarian law, provides a detailed analysis of what occupation is, how conflicts must be dealt with and what rules should operate. However, it doesn't provide any clue on how these laws will be enforced, who should enforce them and within what time frame must the law be executed. This point of execution of law is where the whole process gets frustrated. The enforcement challenges of international law are not unique to the case being discussed here but have been a universal problem with the application of international law.

Many scholars have highlighted that international law can only be incorporated to the extent to which a state cooperates and complies with

[170] *Ibid,* par. 35.
[171] CHR Sub-Comm, above note 168, par. 82.
[172] Julius Stone, "Legal Controls of International Conflict", *The Yale Law Journal,* Vol. 64, No. 6, 1955.
[173] *Ibid.*

it.[174] Some scholars further mention that any issue which involves the competing interests of two sovereigns and their national interests becomes even more difficult to resolve because the conflicting states prioritise their interests over compliance with international law.[175] This hinders the achievement of lasting or permanent solutions. Another factor that remains essential is the power imbalance.[176] Many states like the United States keep violating international law at great lengths without being held accountable for their actions, whereas the African nations are now and then held on trials for lapses in adhering to international law. These biased applications also hinder the strength and uniformity of international law. Moreover, the foreign policies of conflicting states, their international lobbies and their relations with superpowers complicates the issue further. For example, Russia being an ally to India has vetoed restraining the UNSC to give effect to its resolutions on Kashmir Issues.[177] Similarly the recent UN resolution regarding Palestine was vetoed by the United States since the US is an ally to Israel.[178]

The laws and arguments cited make it clear that international law does not support or endorse occupational regimes. It doesn't underpin the demographic changes such regimes bring about on occupied territories; therefore, India, in this case, is no exception. The UN Resolutions have laid down a solution to the problem being discussed in the article but even after more than seven decades have passed, the resolutions have neither

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[174] Jack L. Goldsmith & Eric A. Posner, "The Limits Of International Law", *Oxford University Press*, 2011, available at https://iuristebi.wordpress.com/wp-content/uploads/2011/07/the-limits-of-international-law.pdf.

[175] Anne-Marie Slaughter, "International law in a World of Liberal States", *European Journal of International Law*, available at https://www.ejil.org/pdfs/6/1/1310.pdf.

[176] Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables", *International Organization,,* Vol. 36, No. 2,1982, pp. 185-205.https://www.jstor.org/stable/2706520

[177] "Veto to blame for non-resolution of Kashmir issue: Pakistan", *The Economic Times,* 11 March 2016, available at https://economictimes.indiatimes.com/news/politics-and-nation/veto-to-blame-for-non-resolution-of-kashmir-issue-pakistan/articleshow/51357318.cms?from=mdr.

[178] "Meeting Two Weeks after United States Vetoes Security Council Resolution Recommending Full UN Membership for Palestine, General Assembly Debates Ramifications"; *United Nations Meetings Coverage and Press Releases,* 1 May 2024, available at https://press.un.org/en/2024/ga12595.doc.htm.

been enforced nor has international law been able to address violations in this regard. Victoria Schofield[179] and Alistair Lamb[180] blame the lack of a universally accepted framework and inconsistent application of international law to Kashmir in matters of self-determination and territorial integrity for this failure whereas Hasnat[181] attributes this failure to lack of effective mediation and the inability of the United Nations Security Council to execute its own resolutions.

## X. Conclusion

India's attempt to alter demography may not appear like a direct violation of any of the conditions set in the UNSC resolutions or the international legal provisions. Nevertheless, if we draw a nexus between India's activities in Kashmir and the international legal position, it is arguable that it is violative of UNSC resolutions. On the surface, it may seem normalised because of the use of state-sponsored media to cover up the state's occupational hazards on one hand and the new media policy capping any journalism to unmask India's ruthless occupational developments on the other. India's attempt to settle its population in Kashmir by replacing the state-subject law with the domicile policy and building settlements at an alarming pace will have irreversible consequences. It will be nearly impossible to identify who would have a right to vote in the referendum if citizenship criteria for original residents and the newly induced population are the same as against the older state-subject laws which enabled segregation. It will be challenging to prevent the amalgamation of natives and outsiders because of social factors like intermarriage between Indians and Kashmiris when they are in proximity, further diminishing the possibility of a fair and free plebiscite. The native cultural elimination, the coercively induced migration of original residents and the application of brutal policies and laws of the occupier will further

[179] Victoria Schofield, "The Kashmir Conflict: A Study of What Led to the Impasse", Bloomsbury Publishing, 2010.
[180] Alistair Lamb, "The Kashmir Dispute: A Study in India-Pakistan Relations", 1991, Routledge.
[181] S. F. Hasnat, "The United Nations and the Kashmir Dispute", 2005, JSTOR.

terminate the possibility of exercising self-determination. To sum up, if this is not reversed, there are chances that a decade later, it would not be possible to achieve the resolutions because the question of mass migrations of these new settlers would be looked at through the lens of refugee-producing situations. The whole of these activities will lead to escalation and new challenges in realising the Security Council Resolutions and invite new problems to address.

# Cultural Cleansing as an Emerging Form of Mass Atrocity: A Comparative Analysis of the Protection Against Intentional Destruction of Cultural Heritage under International Law and Islamic Law

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Cultural cleansing, understood as the intentional destruction of cultural heritage in the pursuit of homogeneity, has increasingly become a tactic utilised, notably by militant factions purporting to advocate for Islam, in their efforts to impose a uniform, tightly controlled identity. The international community's response has been largely limited by the sources of law at its disposition. This paper argues that the gaps and limits of the international humanitarian and criminal law frameworks should be addressed by adopting a culturally and legally inclusive approach. Islamic law can thus contribute in many ways: firstly, by addressing the inconsistencies of the current international law frameworks in its understanding of the implications of cultural heritage and its destruction, and secondly, through its potential of generating further compliance and legitimacy to the current overwhelmingly western-oriented framework of international law.

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## 1. INTRODUCTION

Cultural cleansing, a term which has gained significant momentum since the Taliban's destruction of the Buddhas of Bamiyan, has been repeatedly quoted in relation to the looting and destruction of cultural heritage in Mali, Syria and Iraq.[182] Although this term is not used exclusively in relation to the latter conflicts, its relevance has become prominently illustrated after continuous, intentional attacks against cultural property. These are carried out in the pursuit of "homogeneity", through the elimination of that which historically represents any diversity of thought, religion and ultimately identity.[183]

The intrinsic link between the destruction of cultural heritage and cultural cleansing is substantiated by the inherently anthropocentric nature of cultural heritage. Whether they are monuments, artefacts or intangible manifestation of culture, these elements represent an identity common to a community or identifiable group. Far beyond any material worth they may hold, cultural heritage, at its core, is protected and valued because of its deep connection to collective and individual identity. Thus, any act of deliberate destruction propagates an erasure – or cleansing – of diversity as well as collective history and memory of group identity.

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[182] Irina Bokova, "Culture on the Front Line of New Wars",, *The Brown Journal of World Affairs,* Vol. 22, No. 1, 2015.
[183] Noelle Higgins, *The Protection of Cultural Heritage during Armed Conflict: The Changing Paradigms*, 1st ed., Routledge, Abingdon, 2020, p. 37.

Such destructive strategies have been repeatedly exemplified in contexts of contemporary armed conflicts, particularly by extremist factions purporting to advocate for Islam. The 2001 destruction of the Buddhas of Bamiyan in Northern Afghanistan by the Taliban, in particular, significantly highlighted the pattern of such calculated attacks on culture.[184] Since then, and following the onset of the conflict in Iraq, belligerent acts akin to these have been committed by extremist group ISIL. Notable examples include the looting of invaluable cultural items at the Mosul Museum as well as at the National Iraqi Museum in Baghdad, the bulldozing of the ancient Assyrian city of Nirmud, and the destruction of the World Heritage Site, Hatra. UNESCO has identified these acts as mechanisms of domination and perpetuation of extremist propaganda, making them part of an ongoing strategy of cultural cleansing in the region.[185]

Following the outbreak of the civil war in 2011, Syria has experienced significant destruction to its cultural heritage. As a consequence, each of the six registered World Heritage Sites within its borders have been damaged to varying extents, including the Site of Palmyra and parts of the Ancient City of Aleppo.[186] In 2015, the monastery of Mar Elian, situated in Qaryatayn – a small settlement recognised as an oasis at the convergence of Damascus, Homs and Palmyra – was destroyed by Daesh. [187] The demolition of this site has been identified as the cause of significant negative impacts on the mental wellbeing of multiple affected communities. This monument served not only as the religious centre of town for Christians and Muslims alike, but also as "the tangible proof of a foundation myth central to their self-perception".[188]

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[184] Kevin Chamberlain, "Casualties of Armed Conflict: Protecting Cultural Property", in Terry D. Gill, Robin Geiβ, Heike Krieger, Tim McCormack, Christopher Paulussen, Jessica Dorsey (eds), *Yearbook of International Humanitarian Law*, Vol. 17, 2014, p. 191.

[185] "Destruction of Hatra marks a turning point in the cultural cleansing underway in Iraq' say heads of UNESCO and ISESCO", 7 March 2015, available at: https://whc.unesco.org/en/news/1245 (all internet references were accessed on 08 August 2024).

[186] K. Chamberlain, above note 3, p. 191.

[187]Emma Loosley Leeming, "Cultural memory as a mechanism for community cohesion: Dayr Mar Elian esh-Sharqi, Qaryatayn, Syria" in Veysel Apaydin (ed),, *Critical Perspectives on Cultural Memory and Heritage,* UCL Press, 2020, p. 211.

[188] Ibid, p. 212.

The most comprehensive definition of cultural heritage is found in the United Nations Educational, Scientific and Cultural Organisation's (UNESCO) 1972 convention concerning the Protection of the Tangible and Intangible World Cultural and Natural Heritage.[189] The latter describes cultural heritage as monuments, groups of buildings, sites and expressions which are considered to be of "outstanding universal value".[190] However, international law frameworks have not necessarily assimilated around this definition and instead what is found is a piecemeal approach to cultural heritage across and within different frameworks. While there is no actual definition for "cultural heritage" in the Qur'an, the concept is very much present in Islamic law and its protection is clear, despite the misinterpretation and misuse of classical approaches, which neglect relevant contexts.[191]

Following the emergence of this tactic of cultural cleansing in the region, the three frameworks that will be considered within this paper are that of International Humanitarian Law (IHL), International Criminal Law (ICL) specifically pertaining to war crimes, and Islamic Law. This analysis will follow each of their respective positions on the intentional destruction of cultural heritage. While the three frameworks in this paper may have different approaches to the prohibition of intentional destruction of cultural heritage in armed conflict, to say these differences would prevent a mutually reinforcing approach to the prosecution of crime would be short-sighted.

In order to address how these three frameworks could better work together, this paper will review how each, individually, addresses protection of cultural heritage, followed by an analysis of the compatibility of their respective normative frameworks. This will lead to an assessment of the mutually reinforcing potential of combining the strengths of the three frameworks to address cultural cleansing. The aim of this paper will be to

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[189] UN Educational Scientific and Cultural Organization (UNESCO) Convention Concerning the Protection of the World Cultural and Natural Heritage (entered into force 17 December 1975), Art. 1.

[190] *Ibid.*

[191] Fatimah Alshehaby, "Cultural Heritage Protection in Islamic Tradition", *International Journal of Cultural Property,* Vol. 27, No. 3, pp. 293.

guide the discussion towards an appreciation of the multi-faceted meaning and implications behind the term cultural heritage as well as the opportunity for greater international compliance, by harmonising Islamic Law and international law for the protection of cultural heritage in armed conflict.

## 2. CULTURAL CLEANSING UNDER THE INTERNATIONAL HUMANITARIAN LAW (IHL) FRAMEWORK

### 2.1 Cultural Heritage Under the 1954 Hague Convention

Cultural heritage has historically been considered collateral damage in armed conflict. In response to this, UNESCO drafted the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, which conferred special protective status upon registration on its World Heritage Lists, and thus considered to be of "outstanding universal value".[192] This convention has had a remarkable influence on informing international law instruments and principles, which are not necessarily based solely on UNESCO recognition, despite it being indicative.[193]

However, as important as the UNESCO convention may be, addressing the protection of cultural heritage in armed conflict inevitably requires an assessment of its position within the rules governing armed conflicts themselves. Thus, attention is drawn to the circumstances and actions triggering such protection under International Humanitarian Law (IHL). The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ("1954 Convention") was a landmark development for its time in two key ways: firstly, it included the first comprehensive definition of cultural property, which following the aftermath of the Second World War and the extensive destruction caused to landmark cultural sites, was considered a necessity.[194] This definition, found in Article 1 of the

[192] 1972 UNESCO Convention, above note 8.

[193] Uzma S. Bishop-Burney, "Prosecutor v. Ahmad Al Faqi Al Mahdi", *The American Journal of International Law,* Vol. 111, No. 1, 2017, pp. 126, 131.

[194] Victoria Arnal, "Destructive trends in contemporary armed conflicts and the overlooked aspect of intangible cultural heritage: A critical comparison of the protection of cultural

Convention, clearly and exclusively relates to tangible manifestation of culture and covers only property considered to be "of the greatest importance to cultural heritage", which in itself raises a number of questions in relation to criteria, as well as inevitably creating a level of hierarchy, and a risk of marginalisation of specific cultures which may not be considered of greatest importance according to Western ideals.[195]

Secondly, the convention established two protective regimes based on the obligation to safeguard or respect.[196] The latter acts as an important and distinctive feature of this convention relating to the scope of its application, which unlike most of the sources governing IHL, applies in a preemptive manner, insofar as it imposes certain obligations based on the protection of cultural property in anticipation of armed conflict.[197]

The 1954 Convention was then completed by the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1999 ("Second Protocol"). The main provisions further extend the scope of protection to conflicts of a non-international character, provide for a clarification for the notion of enhanced protection, and establish the basis for linking the convention with what was at the time an emerging practice of individual responsibility following establishment of the first permanent international criminal court ("ICC") in 2002 and the adoption of the Rome Statute. In the context of this paper, a crucial advancement introduced by this Second Protocol of 1999 is the refined definition of enhanced protection. This designation grants pertinent cultural property immunity, subject only to limited exceptions, thereby bestowing upon it the highest degree of safeguarding.[198] Additionally, the Second Protocol narrows

heritage under IHL and the Islamic law of armed conflict", *International Review of the Red Cross,* 2020, pp. 539, 544.

[195] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240, 14 May 1954 (entered into force 7 August 1956), 249 UNTS 240, Art. 1(a).

[196] *Ibid*, Arts. 2-4.

[197] Berenika Drazewska, "Military Necessity in International Cultural Heritage Law", International Humanitarian Law Series, Vol. 61, No. 885, 2021, p. 24.

[198] Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2251 UNTS 369, Arts. 10-11.

the scope of the waiver to the obligation to respect cultural property based on the principle of military objective, pursuant to Additional Protocol I to the Geneva Conventions of 12 August 1949, and requires that "there is no feasible alternative available to obtain a similar military advantage".[199]

There is no doubt that the 1954 Hague Convention and its 1999 Protocol have been instrumental in terms of consolidating mechanisms and general awareness of the international community surrounding the need for specific protection of cultural property during armed conflict. Nevertheless, given the contextual significance of safeguarding cultural heritage in the aftermath of the destructive repercussions of World War II, and the opportunity presented by this convention to elucidate and establish a robust protective framework during armed conflict, it appears to have fallen short of expectations. In analysing the substantive content of the Convention, it is argued that the instrument is weak in terms of enforcement and lacking in significant depth in terms of defining culture and its properties. Moreover, in practice, the Convention provides for dysfunctional implementation and compliance mechanisms, which provide little in terms of actual enforcement.[200]

However, as Chechi reveals, this result may not have been wholly unintentional. At the time, the Convention itself was never intended to create a new standard that would supersede or rectify the shortcomings of international law, but rather as a complement to existing treaties or norms of IHL.[201] Therefore, if we draw this assessment of the framework of the Hague Convention and its Additional Protocol back to the specific context of this paper, we see that protection may be conferred on a basic level in so far as it provides legal recognition to the violations committed against cultural heritage in the conflicts such as in Mali, Iraq and Syria. However, this is strictly reserved to the material and tangible dimension of these attacks against cultural heritage. This one-dimensional approach neglects the central material of the attacks carried out and fails to address the core of a

[199] *Ibid*, Art. 6(a)(ii).

[200] Roger O'Keefe, "The Protection of Cultural Property in Armed Conflict", *Amicus Curiae*, No. 71, 2007, p. 4.

[201] Alessandro Chechi, *The Settlement of International Cultural Heritage Disputes,* Oxford University Press, Oxford, 2014, p. 72.

phenomenon such as cultural cleansing by protecting alterations of intangible culture through attacks on the tangible.[202]

## 2.2 Cultural Heritage under the 1949 Geneva Convention

Considering the intended complementary nature of the 1954 Hague Convention, attention is naturally drawn to an alternative source of IHL in establishing enforceable protection of cultural heritage in armed conflict. Customary law, the 1949 Geneva Convention[203] and most specifically its Additional Protocols (API and APII) have provided key rules pertaining to the protection of cultural heritage.[204] In general, IHL customary law provides that:

> "Parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives."[205]

This provides a first basis upon which cultural heritage may find protection during armed conflict, as it ensures that attacks are not to be carried out against those objects which do not fall under the ambit of military objectives. However, in itself, this does not guarantee specific protection for cultural heritage. Thus, alongside this, customary law has evolved specifically in relation to wartime's treatment of cultural heritage and explicitly prohibits attacks on cultural property unless imperatively required by military necessity

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[202] Hirad Abtahi, "Adjudicating attacks targeting culture: revisiting the approach under state responsibility and individual criminal responsibility", Vol. 10, *Leiden Studies on the Frontiers of International Law*, 2023, p. 1.

[203] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, (entered into force October 1950), 75 UNTS 287.

[204] 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 II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 8 June 1977), 1125 UNTS 609.

[205] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 7.

and its destruction.[206] In relation to ensuring that cultural property does not become a military object, customary law holds that:

> "The use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity."[207]

A reflection of these principles is found in Article 53 of the API, which explicitly establishes the special status of cultural property in times of conflict of an international character, by prohibiting:

> "(a) to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
>
> (b) to use them in support of the military effort."[208]

Article 16 of the APII supplements the latter provision by expanding the scope of this protection to conflicts on a non-international character, with nearly identical wording.[209] The broader meaning of cultural heritage adopted in these provisions and the specific reference to "spiritual" in addition to cultural heritage, can arguably been seen as planting the seeds of protection of intangible culture.[210] The likeliness that this was the intention of the drafters is uncertain, but even so, this stipulation, intentional or not, demonstrates the indivisibility of tangible cultural property and the intangible cultural heritage it represents. This relationship lies at the heart of comprehending cultural cleansing and the escalating crimes against culture in the affected regions. These issues have largely remained overlooked in the substantive content of IHL and arguably within international law more broadly.

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[206] *Ibid,* Rule 38.
[207] *Ibid,* Rule 39.
[208] Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (entered into force 7 December 1978), 1125 UNTS 609, Art. 53.
[209] *Ibid,* Art. 16.
[210] V. Arnal, above note 13, p. 545.

### 2.3 The Applicability of Geneva Conventions in Contemporary Manifestations of Cultural Cleansing IHL

A key consideration when assessing the efficacy of the IHL framework within the context of cultural cleansing is its applicability to the specificities of contexts such as in Mali, Syria and Iraq in relation to parties involved. While it is true that the APII addresses non-state armed groups (NSAG), many of the Geneva conventions and protocols are considered customary international law and are thus considered to be applicable to armed groups such as the Islamic State of Iraq and Levant (ISIL), Al-Nusrah Front (ANF) and another Al-Qaida associated NSAGs.[211] In relation to the 1954 Hague Convention, its scope of applicability to NSAGs is only addressed within one provision, where it addresses the obligation of "all warring parties" including NSAGs to apply to a minimum the obligation to respect cultural heritage in times of armed conflict.[212]

Despite this, enforcement and accountability mechanisms for NSAGs are difficult to implement. This is most likely due to the state-centric nature of these conventions, which often lead to a lack of knowledge and accessibility of these rules to NSAGs. This was illustrated in the 2017 preliminary findings of a scoping study conducted by Geneva Call, which delves into the intricate dynamics between armed non-state actors and cultural heritage.[213] Another notable finding was the apparent reluctance of NSAGs in Muslim-majority states to acknowledge the legitimacy of international regulations safeguarding cultural heritage, despite the fact that "none of the ANSAs interviewed as part of the study expressed disagreement with these rules".[214]

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[211] Above note 37, Art. 1.

[212] Above note 14, Art. 19(1).

[213]Geneva Call, "Culture Under Fire", 2018, available at: https://www.biicl.org/documents/39_cultural_heritage_study_final_highres_no_cover_page.pdf.

[214] Ibid, p. 49.

## 2.4 Compartmentalisation of tangible vs. intangible heritage in IHL

In assessing the wider IHL framework and drawing this back to the specific nature of the crime being addressed in the paper, namely the wiping of community or group identity through cultural cleansing, a gap in the IHL framework becomes obvious – there is an absence of protection for intangible cultural heritage.

As previously mentioned, the 1954 Hague Convention and its 1999 Additional Protocol are still purely grounded in the arguably outdated, yet not unimportant, considerations of cultural "property". This provides only one dimension of the larger picture of cultural heritage protection and thus in an attempt to complete this picture within the IHL framework, it is natural that attention is turned to the Geneva Convention and its Additional Protocols. However as seen above, the latter does not provide further means of expanding the understanding of protected cultural heritage. Both direct protection of cultural heritage, under the Additional Protocols, and indirect protection, under the general protection of civilian objects, are tangible-centred.[215] Even with the inclusion of references to "spiritual" and cultural heritage in the API and APII, allowing for inferences to be drawn and connections to be made with intangible cultural heritage, their impact may be limited if not recognized in practice. Therefore, the extent to which cultural cleansing can be said to be addressed under IHL is limited, though arguably not without potential.

### 2.4.1 Shifting Towards An Integrated Approach To Cultural Protection Under IHL

What is required to address the gap in protection is a shift from a tangible-centric outlook to one which is heritage-centred – meaning assessing damage beyond its typology, while also focusing on the relationship between damage to the tangible and the consequences of those damages on the identity of victims and natural persons.[216] The importance of tangible cultural heritage is

[215] H. Abtahi, above note 21, p.131.
[216] *Ibid*, p.155.

undeniable within the values that it holds in its own right, be that in relation to its historical or political aspects. However, a key and central dimension to the value of cultural property or tangible cultural heritage is through the contribution it provides to collective memory and identity. Most of the time, if not at all times, tangible cultural property will act as the physical manifestations of intangible heritage and identity, thus the growing trend of using the former in the aim of destroy the latter.[217] This is precisely the reason for ensuring that IHL, and International Law more broadly, moves away from a compartmentalised approach to tangible or intangible heritage and instead views and addresses these through an integrated approach. As Abtathi argues, "while these attacks manifest the destruction of the tangible, there always looms, in the background, the feeling of the intangible's alteration.[218]"

Without such shift, the IHL framework can only provide protection so far as the cultural property in question firstly fits within the traditional hierarchy of value conferred onto material objects and monuments by Western ideals and does so within its own rights as a tangible entity, rather than through its link to human identity. In its current form, the IHL framework runs the risk of "marginalising a certain type of heritage and therefore certain communities", thus providing little support as a tool against the commission of the crime of cultural cleansing.[219]

## 3. INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE AS A WAR CRIME

### 3.1 Development of Cultural Heritage in International Criminal Law

The International Criminal Tribunal for the former Yugoslavia has led to key advancements on the development of International Criminal Law in relation to cultural heritage and enforcing the principles of protection for which UNESCO stands. The Tribunal has been described as providing the "first concerted effort to establish that attacks against cultural property constituted

[217] *Ibid,* p. 1.
[218] *Ibid.*
[219] V. Arnal, above note 13, p. 546.

crimes under customary international law and to hold those most responsible for these crimes [...]individually accountable.'[220] The influence of the Tribunal on International Criminal Law may be traced back to a shift described by Janine Clark as one which defines cultural heritage primarily as "object-centric", to one which recognizes a conceptual link between cultural heritage and peoples' identity.[221] This hypothesis would suggest that International Criminal Law may go a step further than IHL and provide a promising tool in promoting a shift towards an integrated model by formally blurring of the current legal divisions between tangible and intangible components of cultural heritage.

The implication of the latter for this paper and the analysis of the destruction of cultural heritage in Islamic law contexts is that it recognizes the nuances of the recent attacks on cultural sites carried out in Iraq, Syria and Mali. Essentially, at first instance, ICL seems to be better apt to effectively prosecute these acts of cultural cleansing taking place in these contexts; the indivisibility of the destruction of cultural monuments and persecution of people in the aim of destroying diversity is more readily established.[222] Thus, the above progress has had significant effects on the prosecution of crimes committed against cultural heritage in the International Criminal Law framework. In fact, these developments heavily influenced what resulted in the first conviction in the International Criminal Court (ICC) for the war crime of intentionally directing attacks against buildings dedicated to cultural heritage, under article 8(2)(e)(iv) in the Al Mahdi case.[223]

## 3.2 Prosecuting Cultural Cleansing under the Jurisdiction of the ICC

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[220] Serge Brammertz, *et al,* "Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY", *Journal of International Criminal Justice,* Vol. 15, No. 5, 2016, pp. 1143, 1151.

[221] Janine Clark, "'The destruction of cultural heritage in armed conflict: the 'human element' and the jurisprudence of the ICTY", *International Criminal Law Review,* Vol. 18, No. 1, 2016, pp. 5-6.

[222] I. Bokova, above note 1, p.290.

[223] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Art. 8(2)(e)(iv); International Criminal Court, *The Prosecutor v. Ahmad Al Faqi Al Mahdi,* Case No. ICC-01/12-01/15, Trial Judgment, 27 September 2016.

The prohibition of deliberate targeting of cultural heritage can be found as a well-established principle in International Criminal Law.[224] Its explicit mention in the Rome Statute as well as the acknowledgement of "intention" has been key in pushing forward recognition of cultural cleansing. Although cultural cleansing has clear significance under more than one of the core Crimes of the ICC, namely Genocide and Crimes Against Humanity, this paper will focus on its prosecution under Article 8, pertaining to War Crimes. This is in part due to the fact that in order to establish genocidal intent, the cultural cleansing would need to aim to bring about the physical destruction of the targeted groups, which is not in itself the intent behind cultural cleansing.[225] While further discussion and much convincing academic literature does unpack the arguments surrounding this limiting factor, this is not the subject of this paper. In relation to Crimes Against Humanity, no case has yet been decided in relation to the destruction of cultural heritage in the ICC; however the potential is clear in relation to, firstly, the lower threshold of applicability, as the commission of crimes need not be done in the context of an armed conflict.[226] Furthermore, the provision prohibits the commission of acts based on the;

> "Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court."[227]

The explicit reference to persecution based on "cultural" grounds allows for clear inferences to be made, suggesting a compelling case could be established for the deliberate destruction of cultural heritage as constituting a

[224] Brian I. Daniels, "Is the Destruction of Cultural Property a War Crime", *Apollo International Art Magazine*, 28 November 2016, available at: https://www.apollo-magazine.com/is-the-destruction-of-cultural-property-a-war-crime/.

[225] Above note 42, Art. 6.

[226] International Criminal Court, *Elements of Crimes*, International Criminal Court, Art. 7, para. 1,Art. 7, para. 1, p. 3. available at: https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf.

[227] Above note 42, Art. 7(1)(h).

crime against humanity. However, whether the latter can truly address the crime of cultural cleansing and recognize the use of physical cultural destruction as a premise for the destruction of intangible cultural identity has yet to be seen.

The ICC judgement in the Al Hassan case offers an illustrative example of how the Court inferred cultural persecution, albeit indirectly, through the established grounds of religious and gender persecution. On 26 June 2024, Trial Chamber X delivered its judgement, holding Al Hassan accountable for crimes against humanity in Northern Mali. His accountability was upheld based on the leadership and organisation role he held as a senior member of the Islamic Police, where he took on a pivotal role in enforcing the oppressive coalition government formed by extremist groups Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM) in Timbuktu.[228]

The Court's decision particularly focused on Al Hassan's role in prohibiting local populations from engaging in cultural and social practices, as well as compelling them to conform their behaviours and religious practices to the rigid and enforced interpretations of the Ansar Dine/AQIM coalition.[229] Furthermore, women and girls were coerced into forced marriages with members of the armed groups, a practice that strongly contravened local cultural traditions where marriages typically occurred within local tribes.[230]

Despite these significant findings, the Court stopped short of explicitly recognizing a direct link between the persecution and the intention to destroy intangible manifestation of culture. Consequently, cultural cleansing as a constituent act of a crime against humanity remains to be unaddressed and unacknowledged by the Court. While the Al Hassan case may have laid the groundwork for potential future consideration of cultural cleansing under crimes against humanity, substantial efforts are still required to elucidate the ICC's approach to this issue. Such efforts could pave the way for more

[228] The International Criminal Court, *The Prosecutor V. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No ICC-01/12-01/18, Trial Judgement, 26 June 2024.
[229] *Ibid*, p. 718.
[230] *Ibid*, p. 793.

comprehensive judicial recognition and address the full scope of cultural cleansing.

3.2.1– Prosecuting Cultural Cleansing as a War Crime:

The Rome Statute initially addresses war crimes, categorised as 'Grave breaches of the Geneva Conventions of 12 August 1949. [231] The ways in which protection from cultural cleansing may fit into the latter has been previously discussed in detail in section 2.2 of this paper. The Statute then goes further and makes explicit reference to attacks against cultural heritage as a war crime under "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments". This is provided for in Article 8(2)(b)(ix), which covers conflict of an international character and under Article 8(2)(e)(iv) for those of an internal character. It is highly doubtful that during the drafting of the Statute, the reference to "intentionally directing attacks" against these monuments of cultural heritage was included in relation to the concept of cultural cleansing. However, such an interpretation may be shown in the Al Mahdi case – it is argued that despite there being no explicit reference to cultural cleansing, the core principles of the concept were readily established throughout.

The arrest of Al Mahdi occurred within the broader context of the armed violence in Mali in early 2012, following the withdrawal of Malian armed forces and the establishment of a coalition government between extremist groups of Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM). This coalition, as described above, imposed a series of religious and political edicts over the territory of Timbuktu, including the imposition of an extremist ideological tribunal, police force, media commission and morality brigade, known as the *Hesbah*. Al Mahdi played a pivotal role in supporting these armed movements as a recognized expert on religious matters. He was consulted in this capacity by the Islamic tribunal and appointed as leader to the Hesbah.

[231] Above note 42, Art. 8(2)(a).

The mausoleums of saints and mosques of Timbuktu were integral to the religious life of its inhabitants and constituted a shared cultural heritage for the community. Between 30 June 2012 and 11 July 2012, multiple attacks were carried out resulting in the destruction of ten of Timbuktu's most significant and well-known cultural heritage sites. Al Mahdi justified this destruction to journalists at the time stating that, "What you see here is one of the ways of eradicating superstition, heresy and all things or subterfuge which can lead to idolatry."[232]

The United Nations Special Rapporteur in the field of cultural rights, Farida Shaheed, stated that the events in Timbuktu constituted "a loss for us all, but for the local population it also means the denial of their identity, their beliefs, their history and their dignity".[233] Moreover, the approach taken during the trial has been described as a "culture-value approach", meaning the Prosecutor and Trial Chamber frequently referred to the importance of prosecuting attacks on cultural property as these amounted to attacks on cultural identity.[234]

While this attracted much support and was seen as pushing forward in the international justice agenda the protection of cultural heritage, in its entirety, it was also considered unsatisfactory in its limited clarification of the law in this area. As previously mentioned, the Statute does not depend on the classification of the UNESCO World Heritage list – therefore its protection may be broader than this. However, in the Al Mahdi case, nine out of the ten sites attacked were World Heritage sites and thus, the judgement did not provide any further explanation or analysis of what renders a particular site historically or religiously significant enough to fall within the ambit of Article

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[232] Ana Filipa Vrdoljak, "Prosecutor v Ahmad Al Faqi Al Mahdi: Judgment and Sentence & Reparations Order (Int'l Crim Ct):, *International Legal Materials,* Vol. 57, No. 1, 2018, p. 29.

[233] Farida Shaheed, "Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed: the right to freedom of artistic expression and creativity", UN Doc A/HRC/23/34, 24 December 2014.

[234] Mohamed Badar & Noelle Higgins, "Discussion Interrupted: The Destruction and Protection of Cultural Property under International Law and Islamic Law - the Case of Prosecutor v. Al Mahdi", *International Criminal Law Review,* Vol. 17, No. 3, 2017, pp. 486, 509-510.

8.[235] This landmark case was a missed opportunity for the Court to provide a precise analytical framework for future application of Article 8 in relation to destruction of cultural property. While there have been developments in the prosecution of attacks against cultural heritage, the development has been arguably stagnant since the Al Mahdi case. What was seen as an opportunity to set precedence and clarify and extend the law instead had limited effect in doing so. Thus, mechanisms and attempts to further clarify and explicitly address the weaponization of cultural heritage in the aim of cleansing relevant identities are still required.

## 4. PROTECTION OF CULTURAL HERITAGE IN ISLAMIC LAW

### 4.1 Islamic Law and Its Sources

Prior to the development and implementation of International Humanitarian or Criminal Law frameworks, or any established Western codification related to *jus in bello*, the Islamic Law of armed conflict already served as a regulatory source for fundamental principles governing the conduct of hostilities. Similar to the origins of Roman Law, Islamic law is largely the product of juristic interpretation, which while laying the foundations of Islamic legal thought, also led to significant debates and resulting divergences across what are known as the various "schools" of law.[236]

Far from being a monolithic construct, Islamic law is contained within and interpreted through its multiple authoritative sources. The primary and most authoritative source is the Qur'an, which is regarded as the most authentic record of the word of God. However, the Qur'an encompasses both legal and non-legal teachings, necessitating the development of a methodology for juridical interpretation, known as *fiqh* or normative Islamic jurisprudence.[237] The second primary source is known as the *sunnah* of the Prophet Muhammad, consisting of the records of actions and sayings of the

[235] U. Bishop-Burney, above note 12, p. 131.
[236] Farooq A. Hassan, "The Sources of Islamic Law", *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 76, p. 65.
[237] *Ibid*, p. 66.

Prophet, which were passed on to him through the revealed word of God.[238] Written accounts of these, termed *Hadith*, have been recorded by a number of well-known writers. As a result, though these are considered the second most authoritative source of Islamic law teachings, their authenticity and reliability are sometimes subject to scrutiny. The third and final primary source is the unanimous consensus of jurists, known as *Ijma*.[239] Though this may fall third in the hierarchy, it makes up the majority of Islamic jurisprudence.[240] Beyond these primary sources, jurists may engage in independent reasoning, known as *ijtihad*. The latter constitutes the secondary sources of Islamic law and are developed using different methods or methodologies, the primary one being *qiyas* (analogy).[241]

Islamic law is inherently progressive, with its normative framework allowing for the continued continuation of applicability rules unless new evidence warrants a change due to contemporary circumstances. As such, Islamic law of armed conflict should be understood based on how it approaches notions, justification and consequences of war, rather than through the specific formulation of rules at any particular historical period.[242]

### 4.2 Defining Cultural Heritage Under Islamic Law of Armed Conflict (ILAC)

Despite the lack of explicit mention of "cultural heritage" in the Qur'an, the concept of respect and protection of enemy property in armed conflict is often established based on a *hadith* of the Prophet Mohammad.[243] Jurists' deliberations on the latter are guided by two contradicting instances; first is based on the hadith and the relevant Qur'anic reference, where the Prophet

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[238] Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Macmillian, New York, 2011, p. 72.
[239] Sherman A. Jackson, "Jihad and the Modern World", *Journal of Islamic Law and Culture*, Vol. 7, No. 1, 2002, p. 2.
[240] F.A. Hassan, above note 55, p. 67.
[241] A. Al-Dawoody, above note 57, pp. 72-73.
[242] Cemil Çakmak and Güneş Güneysu, "Exploring Foundational Convergence between the Islamic Law of Armed Conflict and Modern International Humanitarian Law: Evidence from al-Shaybani's *Siyar al-Kabir*", *International Review of the Red Cross,* Vol. 102, No. 915, p. 1157.
[243] F. Alshehaby, above note 5, p. 291.

ordered his followers to cut down the palm trees of the tribe of Banu al-Nadir.[244] However, in stark contrast to this we find the subsequent 10 commandments of Abu Bakr, which included "do not cut down fruit-bearing trees; do not destroy buildings [...] do not burn or drown palm trees."[245]

Jurists interpret this disjunction in two ways: either that the command by the Prophet was later abrogated or that Abu Bakr's commandment followed a principle of necessity and avoidance of excess destruction.[246] Addressing the latter, this principle of necessity is supported by the principle that all wealth is supposed to be "a trust from God, [and] is considered a serious trespass to destroy it without cause".[247] In fact, "belligerent" property and even more specifically their religious monuments and places of worship are protected under Islamic law.

Firstly, the prohibition of attacks on religious sites is an Islamic law principle, as stated by Judge Mohammed Bedjaoui.[248] This is supported by the Hadith of the Prophet Muhammad and his position is arguably exemplified in The Charter of Privileges granted to the Monks of St Catherine: "None of their churches and other places of worship will be desolated or destroyed or demolished…"[249] Therefore, it seems as though there is an overall level of consensus over the fact that the destruction of religious property of belligerent parties is generally prohibited under Islamic law. Considering that cultural heritage is wider than simply property of a religious nature, even when considering the contradiction of the two guiding sources for the conduct of hostilities in relation to belligerent property in general, the principle of proportionality or necessity acts as a protective barrier to wanton destruction.

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[244] A. Al-Dawoody, above note 57, p. 129.

[245] *Ibid.*

[246] A. Al-Dawoody, above note 63.

[247] Karima Bennoune, "As-Salamu Alaykum - Humanitarian Law in Islamic Jurisprudence", *Michigan Journal of International Law,* Vol. 15, p. 622.

[248] A. Al-Dawoody, above note 57, p.126.

[249] Bilal Atkinson, "A Christian Convert to Islam Explores How the Holy Prophet Muhammad (sa) Treated Christians", *The Review of Religions*, 2 November 2020, available at: https://www.reviewofreligions.org/26069/a-christian-convert-to-islam-explores-how-the-holy-prophet-muhammad-sa-treated-christians/.

## 4.3 Addressing Cultural Cleansing and Protection of Intangible Cultural Heritage Under ILAC

Beyond tangible property, practices and what may be equated to "intangible cultural heritage" are also addressed in Islamic law and protected through the principle of respect of diversity and non-Muslim traditions. The relevance of understanding the Islamic law position on this is important when relating back to the idea of cultural cleansing and the erasing of cultural identity.

Even when addressing the root causes of the destruction of the Buddhas of Bamiyan, it is evident that this was in fact part of a systemic plan aimed at eradicating ancient Afghan culture to avoid the risk that "gods of the infidels" be worshipped once again and ensure "implementation of Islamic order".[250] However, according to Fai Howeidy, "the Taliban edict was contrary to Islam, since "Islam respects other cultures even if they include rituals that are against Islamic law".[251] An important consideration here is where the Taliban drew such authority to base their actions on. As mentioned before, there is no direct reference to "cultural heritage" in the Qur'an, and neither is there to the prohibition of said icons and sculpture.[252] Therefore, the basis upon which these claims were made by the Taliban, and have been referred to by other extremist groups, are Hadiths of the Prophet which are often accused of being non-authentic or suffering from weak transmission.[253]

A further tool of manipulation used by extremists is the appropriation of Hadiths void of context – ISIL, for example, commonly refers to Hadiths attributed to a specific time, where Muslims were under intense persecution, and following the Prophet's victory, when they returned to Makkah, were

[250] Fancesco Francioni & Federico Lenzerini, "The Destruction of the Buddhas of Bamiyan and International Law", *European Journal of International Law,* Vol. 14, 2003, pp. 626-629.
[251] *Ibid,* p. 627.
[252] F. Alshehaby, above note 5, p. 297.
[253] Eleni Polymenopoulou, "Caliphs, Jinns, and Sufi Shrines: The Protection of Cultural Heritage and Cultural Rights under Islamic Law", *Emory International Law Review,* Vol. 36, 2022, pp. 743, 755.

ordered to destroy icons and symbols.[254] However, when context is considered, it is evident that this command was based on destroying symbols and icons that represented an oppressive regime and was done "as part of a strategy to allow for peaceful coexistence".[255] In fact, before this victory, another hadith of the Prophet says "When you are in Syria, you will meet those who remember God much in their houses of worship. You should have no dispute with them, and give no trouble to them".[256] This goes beyond the protection of religious sites and onto giving "no trouble" to "those who remember God 'in their houses of worship'", thus offering protection to the practices and intangible aspects of other cultures. As mentioned above in particular relation to IHL, the protection of intangible cultural heritage and the practices through which identity is preserved and transmitted addresses a common critique of the misplaced emphasis on material property in international law. As this hadith illustrates, Islamic Law provides a basis for enforcing a wider application of protection of cultural heritage by reframing it as also pertaining to the protection of identity.

Essentially, Islamic Law arguably addresses compartmentalisation concerns, particularly within the IHL framework, and recentres the practice of protecting cultural heritage around recognizing the plurality of its manifestations, be in tangible or intangible. *"*And if anyone of the idolaters ask protection of thee, grant him protection so that he may hear the word of Allah: then convey him to his place of security…*"*;[257] as noted by Rizwan Safir, this proclamation found in the Qur'an places upon Muslims an obligation to create a "place of security" and thus confers onto non-Muslims protection of the person and arguably their faith.[258] Therefore, respect for the idea of cultural heritage is clearly established in Islamic Law and additionally considers the link with intangible cultural heritage, through the respect of

[254] Hadrat Mirza Bashiruddin Mahmud Ahmad*, Life of Muhammad*, 6th ed., Islam International Publications Ltd, Surrey, 2013, pp. 163-145.

[255] Rizwan Safir, "Islam's Response to the Destruction of Cultural Heritage", *The Review of Religions,* 19 October 2015, available at: https://www.reviewofreligions.org/12238/islams-response-to-the-destruction-of-cultural-heritage/.

[256] H. Ahmad, above note 73, p. 149.

[257] Holy Qur'an, Surah Al-Hajj, Verse 41.

[258] R. Safir, above note 74.

diversity and practices. This connection that Islamic Law makes between what is closely comparable to Western conceptions of tangible culture, property, and intangible culture, religion and practices, reflects a similar and in some ways wider protection of cultural heritage than under International Law.

## 5. POTENTIAL FOR AN INTEGRATED MODEL FOR PROTECTION AGAINST CULTURAL CLEANSING

The discussion surrounding an integrated model of legal frameworks is hardly an unexplored topic. In fact, this idea is already present within international legal instruments. International laws were originally drafted to be based on and reflect principles of law recognized by "civilised nations", as inscribed in the Statute of the International Court of Justice.[259] Two main inferences may be made from this. Firstly, this general principle surrounding the sources of international law would in fact support an integrated approach, which may include relevant principles of Islamic law. In support of this, and specifically related to this paper, the ICC has an explicit provision[260] which prioritises consideration of all legal traditions, especially those most relevant to a particular case.[261]

Secondly, the intention behind "civilized nations" draws clear inferences to colonial powers as well as a hierarchy of Western influence over the institutions of international law. The effect of this archaic terminology is that it reflects the somewhat unidimensional sources of international law, which overwhelmingly represent Western legal principles, thus undermining the legitimacy of international law beyond these jurisdictions. It is therefore not unreasonable to argue that a criminal justice system based on an international law framework, which is not universally informed, will lack a key aspect of legitimacy and cultural competency. This could not be more relevant considering the current debate surrounding ongoing cultural heritage

[259] The United Nations Statute of the International Court of Justice, 26 June 1945 (entered into force 24 October 1945), Art. 38(1)(c).
[260] Above note 42, Art. 21(1)(c).
[261] E. Polymenopoulou above note 72, p. 769.

destruction in the pursuance of homogeneity. IHL and ICL's ability to address a phenomenon such a cultural cleansing may be decidedly strengthened by an ability to engage with the cultures and systems that it is trying to protect.

### 5.1 The Case for An Integrated Model and Debunking Misconceptions Around This Approach

Eleni Polymenopoulou describes three overarching reasons for reluctance to refer to Islamic law and its sources by international law bodies.[262] First is the complexity of Islamic law and the plurality of its sources. Second are the possible tensions of the limits of creative freedom under Islamic law, which are stricter than those under international human rights law standards. Finally, she addresses the issue of conflicting interpretations, not limited to those within schools of Islamic law, but also in between a classical Islamic Law approach and the contemporary system of laws of Muslims states, based on civil codes and common law principles. While it is true that to disregard these concerns would not be as much conducive to a robust integrated approach as it would be to an obscure and disjunctive system, allowing these concerns to invalidate any conversation of integration all together would be short-sighted.

The first concern, relative to the pluralistic and complex nature of Islamic law, is particularly relevant in this paper considering the general lack of jurists' consensus or "*ijma"* around many of the rules pertaining to protection of cultural property in armed conflict. However, recognizing that many of these rules are based on jurists' discretion and interpretation of principles of the Qur'an or the Sunnah of the Prophet may also be beneficial, as it reflects the changeable nature of Islamic law.[263] In reality, this complexity allows for a fluid and dynamic legal system based on the principle of *Ijtihab*, mentioned above, which provides for interpretation of law by jurists. This may then create space to interpret laws on the protection of cultural heritage within a

[262] *Ibid,* pp. 764-767.

[263] A. Al-Dawoody, above note 57, p. 129.

context where international criminal law creates space for a more pluralistic approach.

Polymenopoulou's second reason may be firstly addressed by looking at what an integrated model seeks to achieve, which is not replacing international standards with those of Islamic Law, but rather using the latter in a reinforcing manner. This means that the aim is not to find a compromise, which could in certain circumstances require human rights' standards to be lowered; instead, as this paper has aimed to show, Islamic Law does in fact confer substantial protection on cultural heritage, which can be in line with international law standards. Thus, harmonising the two frameworks in these instances may emphasise the legitimacy of international standards to Muslim States and most notably non-State actors that follow Islamic Law and often do not recognize the legitimacy of international conventions.[264]

Additionally, the Islamic Law position on protection of cultural heritage is not necessarily more restrictive than that of IHL or ICL. Islamic law does not prescribe protection of property based on the status of "outstanding universal value". Instead, protection is offered to property in general, with certain sources that address religious property more specifically. Moreover, the link drawn between cultural property and its intangible relevance to individuals' identity is more clearly made in Islamic law, thus offering a more protective approach to the concept of cultural cleansing.

Addressing the final apprehension, this paper refers back to the idea that Islamic Law jurists' constant reengagement with the Qur'an and Sunnah of the Prophet allow them to keep Islam's message alive and be responsive to contemporary needs.[265] However, this centrality of religion in the classical expression of Islamic law is a double-edged sword in respect to its support for international norms – in reality, when contradictions arise, "the higher demands of religion are likely to trump secular fear of punishment or a desire to obey human laws".[266] Therefore, contemporary legal codes of Muslim

[264] V. Arnal, above note 13, p. 555.
[265] *Ibid,* p. 555.
[266] Carolyn Evans, "The Double-Edged Sword: Religious Influences on International Humanitarian Law", *Melbourne Journal of International Law,* Vol. 6, 2005, p. 21.

States and their authority may help limit the influences of religion and encourage a pragmatic and symbiotic relationship between the religious sources of Islamic Law and International Law.

As mentioned above, the legal justifications used by extremist groups such as ISIL lack stable grounding under teachings of Islamic law. Additionally, upon examination of the situations pertaining to the ongoing looting and destruction of cultural heritage in Syria and Iraq, it is evident that these practices are motivated by political and financial gain, rather than a desire to preach and follow obligations under Islamic law.[267] This induced the UNSC resolution 1299 in 2015, which condemned the actions by ISIS and the Al-Nusrah Front (ANF) in Syria and Iraq.[268]

Despite this, these non-State groups are still able to hide behind manipulated expressions of Islamic Law because, firstly, they are not party to and thus do not consider themselves bound by the standards of international conventions such as the Rome Statute.

Secondly, and more broadly, these groups are often based on rejections of Western conceptions of political and legal philosophies. However, as this paper argues, Islamic Law in many ways is aligned with International Criminal Law's prohibition of deliberate destruction of cultural heritage and in its own way addresses and condemns the principle of the cultural cleansing taking place in Iraq and Syria. Subsequently, the lack of reference to Islamic Law in the case of Al Mahdi, was indeed a disappointing, missed opportunity, deliberate or not, by the Trial Chamber. This is particularly true considering the rarity of a situation as such, where Al Mahdi's guilty plea, resolute cooperation with the prosecution as well as his previously held influence in Islamic jurisprudence, could have been a key opportunity for the ICC to demonstrate the advantages of legal cooperation and reinforcement. Therefore, the prospect of International Criminal Law utilising the relevant teachings of Islamic Law as a basis for developing a modern formulation of

[267] R. Safir, above note 74.
[268] UNSC Res. 2199, 12 February 2015, UN Doc S/RES/2199, 12 February 2015.

international law could be seen to "add moral legitimacy and cross-cultural relevance to those rules".[269]

## 6. CONCLUSION

The current state of cultural heritage protection under international law appears fragmented and occasionally rests upon a superficial comprehension of cultural heritage nuances. This inadequacy hampers the development of a robust framework capable of effectively addressing the growing threat of cultural cleansing. To effectively combat this crime, it is imperative to acknowledge the intricate interplay between both tangible and intangible aspects of culture, which collectively constitute the broader spectrum of cultural heritage. These concerns are most evident within the framework of International Humanitarian Law, whereas International Criminal Law appears to offer greater potential for tackling cultural cleansing. However, the efficacy of this potential remains subject to future confirmation. So far, the ICC has had limited case law providing for the prosecution of deliberate attacks against cultural heritage; the landmark case of Prosecutor v. Ahmad Al Faqi Al Mahdi may have provided International Criminal Law with promising direction, however this may have limited impact on informing future cases of cultural cleansing in International Criminal Law considering the specific nature of this case.

Despite a lack of explicitly coined crime of "intentional destruction of cultural heritage" in Islamic law, a prohibition of the concept of cultural cleansing is clearly present when considering the protection of diversity and belligerent property, religious or not, during armed conflict within the different sources of Islamic law. In some ways, it is as though these armed groups have a better understanding of the anthropological significance of cultural heritage in contemporary societies, which is why the indivisibility of the tangible and intangible manifestations of cultural heritage is precisely the target of their attacks. As a result, what can only be described as a lag in the international law's approach or understanding of cultural heritage is of serious detriment to the protection it could otherwise offer. However, as indicated within the Geneva Call study, recognizing the intangible cultural

[269] C. Evans, above note 85, p. 12.

heritage embodied in physical sites will not ensure compliance without perceived legitimacy.[270] Protective measures are only effective so far as they are perceived to be comprehensive and legitimate by the relevant audiences. Thus, the relevance of a comprehensive approach to prosecuting the intentional destruction of cultural heritage in armed conflict, that uses relevant Islamic jurisprudence to inform policies under IHL and ICL, cannot be understated. The latter is especially true considering the effect that destruction of the Buddhas of Bamiyan had on informing UNESCO policies and the ongoing and growing practice of pillaging and looting of cultural heritage in recent conflicts in Iraq and Syria. Therefore, a formulation of the law prohibiting acts of cultural cleansing, which reflects a cooperative and supportive approach to the criminalization of intentional destruction of cultural heritage in Islamic Law and International Criminal Law and International Humanitarian Law would help foster a better understanding and avoid misinterpretation of Islamic law. In turn, this may encourage compliance with International Criminal law by Muslim States and non-State actors if it is seen to incorporate and be guided by influences beyond those of western legal systems and perspectives on international crimes.

[270] Marina Lostal, Kristin Hausler & Pascal Bongard, "Armed Non-State Actors and Cultural Heritage in Armed Conflict", *International Journal of Cultural Property,* Vol. 24, 2017, p. 425.

# The Relevance of the Islamic Principle of Humane Treatment of Prisoners of War (POWs) in Contemporary Practice: An Overview

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In contemporary armed conflicts, the universality of International Humanitarian Law (IHL) faces obstacles as certain Non-State Armed Groups (NSAGs) reject this framework, choosing to only apply Islamic Law. The paper investigates how Islamic Law of Armed Conflict (ILAC), in particular its principle of humane treatment, can play a role in modern conflicts due to its alignment with the same principle provided by IHL. It will demonstrate that minimum guarantees of protection can nevertheless be secured by solely relying on ILAC or by leveraging its commonalities with IHL to recognize the applicability of the latter, underscoring the importance of acknowledging this set of norms as a central tool to promote humane treatment in armed conflict. Lastly, by examining the diverse approaches to ILAC by Al-Qaeda and the MILF, the paper also offers examples of its application in practice.

***Keywords*:** International Humanitarian Law (IHL), Islamic Law of Armed Conflict (ILAC), MILF, Al-Qaeda, humane treatment, detention.

## I. Introduction

According to the International Committee of the Red Cross (ICRC), "deprivation of liberty is an ordinary and expected occurrence in situations of

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armed conflict"[1]. This statement is not only true today in the different parts of the world where armed conflicts exist, but it was also a reality throughout the history of warfare and humankind. Indeed, the importance of the treatment of Prisoners of War (POWs) is as ancient as that of armed hostilities, and the use of deprivation of liberty as a method of weakening the enemy was a common feature of past conflicts as well. Evidence of this can be found in different contexts and times, such as in Europe during the Middle Ages, where knights were required not to be cruel towards their prisoners[2] or in the Arab Peninsula during the life of Muhammed, the Prophet. In the latter context, when it comes to POWs, what stands out is that there was an elaborate principle of humane treatment, characterized by minimum standards and a set of behaviors that nowadays would arguably fall within the concepts underpinning the same principle enshrined in the Geneva Conventions. Despite having been formulated hundreds of years ago, the rules of Islamic Law – including Islamic *jus in bello* – can likewise be relevant today, as many Non-State Armed Groups (NSAGs) engaged in armed struggles only refer to this *corpus juris* as the main legal basis governing their actions. This is particularly important because finding common denominators with the universally shared rules of International Humanitarian Law (IHL) could enhance compliance with it, even when certain actors do not feel bound by it.

This paper will delve into the principle of humane treatment of POWs under Islamic law of Armed Conflict (ILAC) to see whether there are common grounds with the universal rules (IHL) governing this occurrence in modern times. Before entering into this discussion, a necessary remark must be made about the use of the term "POW". In the following chapters, this term will generally not be used in the IHL sense, but rather according to its ILAC counterpart. In the latter sense, persons referred to by this term are

[1] ICRC, *Strengthening Legal protection for Persons deprived of their Liberty in relation to Non-International Armed Conflict*, Regional Consultations 2012-13, p. 3.
[2] Henry J. Webb, *Prisoners of War in the Middle Ages*, Military Affairs, Vol. 12, No. 1, 1948, p. 46.

enemy fighters[3] captured during *Jihad*,[4] and not those falling under the different categories listed in the Third Geneva Convention (GCIII) or Additional Protocol I (API).[5] If translated into modern IHL terms, these individuals would likely be classified as "persons detained for reasons related to the armed conflict", since conflicts involving non-state armed groups applying Islamic rules are perforce of a non-international nature, where IHL specific rules on POWs and its terminology do not apply.

An overview of the practices and laws enacted by selected armed groups applying Islamic Law – especially, Al-Qaeda and the Moro Islamic Liberation Front (MILF) – will be included in order to assess the relevance of this framework today. The aforementioned armed groups have been selected because not only have they invoked *Jihad*,[6] making ILAC rules on POWs applicable in theory, but also because they exemplify two distinct categories in which ILAC has proven its importance and ongoing significance. Al-Qaeda stands out due to its explicit rejection of every other international norm and regulation, only acknowledging and applying Islamic precepts and rules. Conversely, the MILF represents an illustration of how IHL can be upheld and recognized by an armed group, owing to its alignment with the principles of ILAC. While focusing predominantly on Al-Qaeda and the MILF, the paper will also refer to other NSAGs such as the Mouvement National de Libération de l'Azawad, the Islamic State Group and Hezbollah.

The relevance of this topic not only lies in the fact that recent armed conflicts involving armed groups are often characterized by expressions of

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[3] *See*: Khalid Muhammad Z. Al Zamil, *The Legal Status of Prisoners of War in Islamic Law: Assessment of its Compatibility with the 1949 Geneva Convention Relative to the Treatment of Prisoners of War*, Ph. D. diss., University of Hull, 2002, p. 77.

[4] Troy S. Thomas, *Jihad's Captives: Prisoners of War in Islam*, U.S. Air Force Academy Journal of Legal Studies, vol. 12, 2002, pp. 87-93.

[5] The articles of reference are Art. 4 GCIII and Art. 44 API.

[6] For the MILF, *see for instance*: Soliman M. Santos, *Jihad and International Humanitarian Law: Three Moro Rebel Groups in the Philippines*, Asia-Pacific Perspectives on International Humanitarian Law, Cambridge University Press, 18 October 2019, p. 374; for Al-Qaeda, *see*: T. S. Thomas, above note 4, p. 87.

interests and demands framed in Islamic terms,[7] but also because it is interconnected with one of the major issues of contemporary conflicts: detention by NSAGs. Indeed, this being one of the least regulated fields of IHL, persons deprived of liberty by a NSAG – including members of the armed forces of a State – may find themselves in a legal vacuum. States' reluctance and unwillingness to regulate this issue, despite being more than aware of the challenges that this lacuna creates, exacerbate an already complex and controversial matter, as it is detention in Non-International Armed Conflicts (NIACs). Consequently, innovative approaches are constantly required in order to guarantee not only basic protective standards, but also a robust set of positive safeguards that every detainee for conflict-related reasons should be entitled to have, regardless of what kind of entity the Detaining Power is. The paper aims to illustrate that for armed groups associated with Islamic beliefs, protection of persons in detention for conflict-related reasons can be achieved – depending on the circumstances of the group under scrutiny – through two avenues: either by directly implementing ILAC, or by leveraging its parallelisms and commonalities with IHL. The latter not only has the potential to result in the acknowledgment of compatibility with the universal framework set forth in IHL, but it may also enable the implementation of a more comprehensive set of rules than those offered in IHL of NIACs.

## II. The principle of humane treatment of POWs under ILAC and IHL: two sides of the same coin

In a world where many armed groups profess adherence only to Islamic Law, there is a growing interest among scholars in exploring the commonalities between this framework and IHL, especially when the latter is not permitted to exert its restrictive – and humanitarian – influence during hostilities. Before analyzing some of these armed groups, it is necessary to conduct a comparison between the rules of ILAC and IHL. This comparison goes beyond a mere scholarly exercise aimed at identifying commonalities between

[7] Isak Svensson, Desirée Nilsson, *Disputes over the Divine: Introducing the Religion and Armed Conflict (RELAC) Data, 1975 to 2015*, Journal of Conflict Resolution, 2018, Vol. 62(5), p. 1127; *See also*: Heba Aly, *Islamic Law and The Rules of War*, The New Humanitarian, 24 April 2014, available at: https://www.thenewhumanitarian.org/2014/04/24/islamic-law-and-rules-war.

the two frameworks, as, on a more practical level, it also seeks to shed light on how certain principles may influence the behaviour of armed actors in contemporary conflicts. Indeed, it aims to contribute to the ongoing discourse that tries to elucidate rules and principles which – in the words of the ICRC – "induce weapon bearers to observe certain limits when engaging in armed violence and to preserve a minimum of humanity even in the heat of the battle".[8] Ultimately, the comparative analysis that follows seeks to highlight how the ILAC principle of humane treatment can offer minimum guarantees of protection for individuals who find themselves detained and in the power of an Islamic non-state armed group.

## 1. Founding rules and principles governing the issue of POWs in ILAC

Historically, there is evidence of different civilizations respecting the principle of humane treatment of prisoners. However, it seems correct to affirm that "until the appearance of Islam, there were no warriors with such a subtle sense of compassion for their captives"[9]. The rules regarding this occurrence developed by Islamic jurists – mostly based on the Qur'an, the Sunnah and Hadiths of the Prophet – show a clear intention to respect the lives and the necessities of prisoners regardless of their national belonging or religious belief. Indeed, according to Islamic sources, once enemy warriors have fallen into the power of the Muslim army, they are entitled to basic guarantees of humanity, as they "cannot be killed, decapitated, nor burned and should be treated with human dignity and without unnecessary suffering."[10]

While the legal basis for taking prisoners lies in the Qur'an (9:5), which allows the apprehension of hostile combatants by stating to "take them

[8] Fiona Terry, Brian McQuinn, *The Roots of Restraint in War*, ICRC, Geneva, December 2008, p. 6.

[9] Senad Ćeman, Amir Mahić, *Principles of Islamic Law of Armed Conflict: Protection of Property, Treatment of Prisoners of War, Providing Refuge and Treatment of Bodies of the Deceased During Hostilities*, in Islamic Law and International Humanitarian Law, Proceedings, ICRC and Faculty of Islamic Studies – University of Sarajevo, Sarajevo, 2000, p. 74.

[10] Matthias Vanhullebusch, *War and Law in the Islamic World*, Brill's Arab and Islamic Laws Series, Leiden, 2015, p. 42.

captives and besiege them",[11] the most important Islamic norms regarding the treatment of captives are associated with the Battle of Badr (624 A.D.) when, after the Muslim army succeeded in capturing seventy prisoners, the Prophet instructed his Companions to treat them fairly,[12] or, as one could argue in IHL terms, humanely. Furthermore, this Battle is also relevant because from this event, Islamic jurists extrapolate the purpose of detention – *i.e.,* the military advantage of preventing prisoners to re-join their army to participate again in hostilities – together with the need for their protection from the fact that the Seventy were hosted in the houses of the Companions or Mosques after capture,[13] which were considered "the safest places in Medina at the time."[14]

## 2. The prohibition of killing and torture

Two of the most relevant provisions concerning prisoners for conflict-related reasons under IHL are the prohibition of killing[15] and torture[16], both of which are also found in Islamic sources.

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[11] Omar Mekky, *Islamic Jihadism and the Laws of War: A Conversation in International and Islamic Law Languages*, OUP, Oxford, 2023, p. 99.

[12] Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Macmillan, New York, 2011, p. 139.

[13] Ahmed Al-Dawoody, *IHL and Islamic Law in Contemporary Armed Conflict, experts' workshop*, ICRC, Geneva, 2008, p. 52.

[14] O. Mekky, above note 11, p. 99.

[15] The prohibition of killing not only is prohibited by the Geneva Conventions and Additional Protocol I and II, but it is also considered a grave breach when it is carried out in International Armed Conflicts and a war crime, covering both IACs and NIACs, under the Rome Statute. *See*: ICRC, Rule 98 – Violence to life, *Customary International Humanitarian Law (CIHL) Database*, Vol. II, Chapter 32, Section C, para. 1.

[16] Under IHL the prohibition of torture, cruel or inhuman treatment is considered a norm of customary law, protecting civilians and persons *hors de combat*. *See*: ICRC, Rule 90 – Torture and Cruel, Inhuman or Degrading Treatment, *Customary International Humanitarian Law (CIHL) Database*, Vol. II, Chapter 32, Section D, para. 1; Further, it is commonly shared view that the prohibition of torture forms part of *jus cogens* norms. *See*: Article 23 Annex (g), *Draft Conclusion on Identification and Legal Consequences of Peremptory Norms of General International Law* (jus cogens), International Law Commission (ILC), A/77/10 § 43, 2022, available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf.

For the prohibition of killing, it seems that not only was there a consensus among the Companions in considering it as forbidden, but the actions of the Prophet also confirm its impermissibility, with the sole exception of POWs found guilty of war crimes.[17] This prohibition, according to the majority of Islamic jurists, is extrapolated from the different possibilities that commanders have while dealing with prisoners. Indeed, the Prophet's precedents suggest that, based on the interest of the Muslims, there are four different events that can unfold: (i) releasing the captives without nothing in return; (ii) exchanging prisoners for money or trading them for Muslim POWs; (iii) enslavement; and (iv) the killing of the prisoners.[18] The latter needs to be contextualized in order to understand why killing *per se* should be considered prohibited. Those that study the *fiqh* base the possibility of ending the life of prisoners on the execution of three individuals[19] shortly after the Battle of Badr and Uhud (625 A.D).[20] However, this happened not because they were captured but because before losing their freedom, they persecuted Muslims and committed war crimes against them.[21] This being the only difference between these three captives and the other sixty-seven who were spared, it seems logical to assume that they were granted this fate because of their previous crimes, and not as a direct result of captivity. Therefore, by interpreting this event, it can be deduced that the Prophet's intention was to consider only the first three options as choices available to the army commander regarding the fate of prisoners of war; while the killing only as the exception to the general rule because of the commission of previous heinous crimes. Consequently, from this reasoning it is possible to extrapolate the prohibition of unjustified killing of POWs.[22]

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[17] T. S. Thomas, above note 4, p. 94.

[18] A. Al-Dawoody, above note 12, p. 137.

[19] The prisoners were: Al-Nadi ibn al-Harith, 'Uqbah ibn Mu'ayt and Abu 'Azzah al-Jumanhi.

[20] Ahmed Al-Dawoody, *Islamic Law and International Humanitarian Law: An introduction to the main principles*, International Review of the Red Cross (IRRC), Vol. 99(3), No. 906, Conflict in Syria, 2017, p. 1012.

[21] Troy S. Thomas, *Prisoners of War in Islam: A Legal Inquiry*, The Muslim World, Vol. 87, No. 1, 1997, p. 49.

[22] Mohamed El Zeidy, Ray Murphy, *Islamic Law on Prisoners of War and its Relationship with International Humanitarian Law*, The Italian Yearbook of International Law, Vol. 14, 2004, p. 67.

The prohibition of torture and other cruel, inhuman and degrading treatment seems to be based on one Hadith of the Prophet who said that "God will torture those who torture people on earth".[23] This makes this imposition absolute and deemed operational even if the potential victim possesses military information, ruling out the use of ill-treatment methods to forcibly extract them.[24] The prohibition also included humiliation, abuses and psychological torture,[25] as, for instance, "prisoners were not to be stripped naked and had to be imprisoned in decent facilities"[26]. Interestingly, an additional guarantee that today is strictly related to this prohibition was acknowledged by Islamic sources as well. Indeed, there is indication that "rape of women in detention is considered as an act of adultery or fornication and Muslim combatants would be liable for such action".[27]

### 3. Management of captives

As regards the management of captives *in concreto*, the main legal basis is likewise the Qur'an, where the righteous are required to give food, in spite of their love for it and even at the cost of fasting, to the indigent, the orphan and the prisoner.[28] This command resulted in the prisoners of the Battle of Badr being given the best food available, eating whenever their captors ate.[29] With due adjustments, it could be argued that this is not so different from the so-

[23] Muhammad Munir, *Debates on the Rights of Prisoners of War in Islamic Law*, Islamic Studies, Vol. 49, No. 4, 2010, p. 486. *See also*: Sadiq Reza, *Torture and Islamic Law*, Chicago Journal of International Law, Vol. 8, No. 1, Art. 4, 2007, p. 41.

[24] Mohamed E. Badar, *Jus in Bello under Islamic International Law*, International Criminal Law Review, No. 13, 2013, p. 618.

[25] Tahar Abbou, *Prisoners of War in International Conventions Versus Islamic Law*, El-Ihyaa Journal, Vol. 20, No. 25, June 2020, p. 1084.

[26] Mohammed Houmine, *Protection of Civilians and Treatment of Prisoners during War are at Stake: A Comparative Study*, Journal of Current Social and Political Issues (2) (1), 31 May 2024, p. 41.

[27] M. Vanhullebusch, above note 10, p. 40.

[28] Qur'an, 76:8.

[29] A. Al-Dawoody, above note 13, p. 52. Similarly, Mutaqin reports that one of the prisoners recounted that "When they ate their morning and evening meals, they gave bread and ate the date themselves following the orders that the apostle had given about us. If anyone had a morsel of bread, they gave it to me". *See:* Zezen Zaenal Mutaqin, *Restraint in the Classical Islamic Law*, Southwestern Journal of International Law, Vol. XXIX:1, 2023, p. 42.

called principle of assimilation that has been used since the Hague Conventions of 1899[30] as a starting point for the regulation of the treatment of POWs under IHL, prescribing that members of this category shall "be treated as regards food, quarters, and clothing, on the same footing as the troops of the Government which has captured them".[31] These actions under Islamic Law are deemed to be carried out solely "for the sake of pleasing God"[32] and not to obtain something in return from the captives, rendering it a compelling and binding duty for all the Muslim community. Moreover, certain Hadiths require sheltering detainees from adverse weather, especially against the heat of the sun,[33] giving them clothes,[34] and curing them in case of illness or diseases.[35] This has been considered as indirectly implying the obligation to release prisoners when the captors could no longer provide for their care. An illustrative example of this is that of Salah Al-Din Al-Ayubi who, after having managed to capture a relevant number of enemies during the Crusades, released them because he did not have enough food and water for their sustainment and this would have probably led to their death.[36] Additional Hadiths provide for the right of POWs to make a will regarding their property and the prohibition of separating members of the same family after capture.[37] The latter is the result of a Hadith originally limited to the general interdiction against separating a mother and her children that was later broadened by jurists to encompass other members of the family.[38] Further, ILAC also "prohibits the use of compelled labor for all captives of

[30] Art. 7 Hague Convention II 1899.

[31] ICRC, *Commentary to Article 26 to the Third Geneva Convention*, 2020, para. 2106.

[32] A. Al-Dawoody, above note 12, p. 140.

[33] Ibrahim Abdullahi, *Rights and Treatment of Prisoners of War Under Islamic International Humanitarian Law: A Legal Analysis*, Archives of Business Research, Vol. 7, N. 10, p. 69.

[34] For instance: "Following the Battle of Badr, prisoners were taken, including Abbas bin Abdul Muttalib who was not wearing a shirt. The Prophet searched for a suitable shirt for him and found one belonging to Abdullah ibn Ubai that fit him. The Prophet then gave his own shirt to Abdullah ibn Ubai as a gesture of gratitude for his help". *See:* M. Houmine, above note 26, p. 40.

[35] T. S. Thomas, above note 21, p. 50.

[36] K. M. Z. Al Zamil, above note 3, p. 171.

[37] T. S. Thomas, above note 4, p. 95.

[38] A. Al-Dawoody, above note 13, p. 53.

war".[39] Finally, there is also evidence showing that Islamic armies allowed their enemies "to visit prisoners of war for the purpose of counting them".[40] If expanded through interpretation, such precedent could be considered as an entry point for the modern rules allowing the Protecting Powers and, subsidiarily, the ICRC[41] to carry out their mandates inside detention facilities.

## 4. Other useful commonalities

Both the founding principles and the provisions to be implemented in practice share many common values with the Geneva Conventions, which in modern warfare are typically recognized as representing the minimum standards from which it is not allowed to deviate during armed conflicts. In particular, the most basic and general safeguard is the principle of humane treatment, which entails the prohibition of using violence and outrages upon personal dignity, killing, torture and other inhuman treatments to those who are not taking an active part in the hostilities, including by reason of detention.[42] In addition to this basic and customary rule,[43] protecting both civilians and persons *hors de combat,*[44] there is a comprehensive set of obligations[45] solely benefitting POWs

[39] Miebaka Nabieubu, *Comparitive Study of Islamic and International Humanitarian Law*, Najaha International Journal of Law and Society, Vol. 2, No. 3, 2023, p. 13.

[40] Karima Bennoune, *As-Salamu 'Alaykum? Humanitarian Law in Islamic Jurisprudence*, Michigan Journal of International Law, Vol. 15, No. 2, 1994, p. 633.

[41] Art. 126 GCIII.

[42] Common Article 3 to the Geneva Conventions.

[43] The customary nature of this principle means that it is equally applicable in both International Armed Conflicts (IACs) and Non-International Armed Conflicts (NIACs). Indeed, even if it was originally limited to NIACs, the International Court of Justice (ICJ) in the famous *Nicaragua Case* recognized that: "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity". *See*: ICJ, *Nicaragua v. United States of America, Case concerning Military and Paramilitary Activities in and against Nicaragua,* Judgment, 27 June 1986, para. 218.

[44] ICRC, Rule 87 – Humane Treatment, *Customary International Humanitarian Law (CIHL) Database*, Vol. II, Chapter 32, Section A.

[45] These rules can be found in Part II and III of the Third Geneva Convention (GCIII), from Article 17 to 121.

that arguably resemble the above-mentioned provisions. Indeed, apart from a generic indication that "[p]risoners of war must at all times be humanely treated",[46] an attentive observer can recognize the same concepts and obligations provided by ILAC concerning the healthcare,[47] food,[48] clothing,[49] and communication with the family.[50]

## III. Assessing the relevance of ILAC today through the principle of humane treatment and its modern use

Given the commonalities between ILAC and IHL as established in the previous discussion, it is now necessary to determine whether ILAC, precisely due to its commonalities with IHL, can be used in practice to provide an answer to protect persons afflicted by armed conflicts, including cases involving detention.

It seems correct to affirm that the application of ILAC is more relevant not necessarily in situations where the general recognized law governing armed conflict is silent – as, in theory, it would be if we were to apply the *lex specialis* principle in the relationship between two sets of law – but rather when certain actors refuse to apply it, because they reject it and not consider themselves to be bound by it. It goes without saying that if ILAC is the only set of norms recognized and applied by the NSAG during hostilities, its relevance is significantly amplified, as it is the only language that can be used. Nowadays, this is notably the case with a certain typology of NSAGs that blatantly deny the application of all branches of International Law, including IHL, claiming instead that their conduct and actions are based on religious foundations and sources.[51] The majority of these NSAGs rely on Islamic Law to regulate their actions and the daily life of those living under their control,

[46] Art. 13 GCIII.
[47] Art. 29-32 GCIII.
[48] Art. 26 GCIII.
[49] Art. 27 GCIII.
[50] Art. 71 GCIII.
[51] Annyssa Bellal, Pascal Bongard, Ezequiel Heffes, *From Words to Deeds: A Study of Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms, Research and Policy Conclusions*, UK Research and Innovation, 2022, p. 29.

including when they manage to capture members of enemy States' armed forces or other fighters.

It is important to emphasize that this is not the only way in which ILAC can play a role in modern conflicts. Indeed, not all the armed groups with an Islamic identity operating today completely reject International Law, as some of them – for instance, the Mouvement National de Libération de l'Azawad (MNLA)[52] and the MILF[53] – use similar, if not, the same, language as this law and, and in certain instances even recognize the binding nature of IHL.[54] As it will be demonstrated, ILAC likewise plays a pivotal role in the case of this typology of groups, since it was only through its formal utilization that commonalities with IHL were recognized, subsequently leading to its application. It seems correct to affirm that without this branch of law, the persons who benefitted from IHL in the conflict in which these groups were operating would not have enjoyed the same treatment. Indeed, as a consequence of such recognition, IHL has been formally applied during the armed conflicts in which the NSAGs belonging to this category were involved, greatly enhancing the protection provided not only to persons in detention for reasons related to the conflict, but also to other categories of people.

[52] The Mouvement National de Libération de l'Azawad, operating in Mali, recognized in Article 21 of its Statute (Statut et Règlement du MNLA) to respect and adopt humanitarian principles, including treating and protecting POWs in accordance with the principles of Islam and IHL until their release. This implicitly considers both frameworks as compatible. *See*: Pascal Bongard, Annyssa Bellal, *From Words to Deeds: A Research Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms: The National Movement for the Liberation of Azawad*, UK Research and Innovation, 2021, p. 13.

[53] The Moro Islamic Liberation Front (MILF), operating in the Philippines, initially made several references to Islamic Law only, but eventually came to recognise that its armed wing, the Bangsamoro Islamic Armed forces (BIAF), was bound by IHL while fighting. *See*: Chris Rush, Annyssa Bellal, Pascal Bongard, Ezequiel Heffes, *From Words to Deeds: A Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms, Moro Islamic Liberation Front/Bangsamoro Islamic Armed Forces*, UK Research and Innovation, 2022, pp. 17-18.

[54] A. Bellal, P. Bongard, E. Heffes, above note 51, p. 29-30.

1. Accommodating and unaccommodating groups to IHL: a categorization.

For the purpose of the paper, NSAGs with an Islamic trait are divided in two distinct categories based on their use of ILAC in relation to IHL. It has been observed that, in the context of armed conflicts, Islamic Law has been used in mainly two different ways, each representing a different category.

Firstly, certain NSAGs completely refuse the applicability of any binding international rule, including IHL. Consequently, Islamic *jus in bello* becomes the only legal reference applicable and the primary source for a protective regime. This category will henceforth be referred to as the "unaccommodating category to IHL". Secondly, these norms have served as a pathway to establish the recognition of the applicability of IHL. Indeed, for the armed groups falling into the second category, although Islamic Law – and ILAC as its relevant branch during armed conflict – was originally identified as the only applicable and binding legal source, it was later acknowledged that IHL was applicable due to its compatibility with the *dicta* of Islamic Law. This has been solely possible due to interpretation and because of the acknowledged similarities with IHL, whose applicability today is mandated to be universal during hostilities. Henceforth, it will be referred to as the "accommodating category to IHL".

Concerning the treatment of prisoners, armed groups belonging to the "accommodating category" often opted to recognize the applicability of comprehensive regulations resembling more those provided for POWs – as intended under IHL – rather than those set forth in IHL of NIACs, when dealing with members of the State's armed forces and other groups they were opposing. This was done despite the conflict being classified as a NIAC, where there is absolutely no obligation to apply such rules under IHL.[55] This may have occurred due to the nature of the conflict in which these groups were involved, where the adoption of terms resembling those of IACs, while not technically correct from a legal point of view, could bring them more

[55] Indeed, Common Article 3 solely requires applying its provisions as a "minimum", implying that while there is no obligation to apply more developed and structured frameworks, doing so is certainly not prohibited. This statement is reinforced by the fact that CA3 also encourages parties to a NIACs to make agreements to adopt all or part of the provisions of the GCs.

recognition, as they often fight for independence. In such cases, the intention is to present itself as a "State" by following the rules that States are required to follow. As a consequence, if the entity perceives itself as a State, it may be more inclined to apply the same rules of IHL regarding conflicts between two or more States, including those for POWs. In spite of the reason why this happened, the implementation of this enhanced protection might not have been possible without the recognition of the similarities between ILAC and IHL. Two positive consequences may derive from this and benefit the group. Firstly, people living under their aegis would enjoy more protection, which potentially facilitates recognition even without imposing themselves with force. Secondly, from the perspective of the group, if this set of rules is implemented in practice and not only formally included in their law, the NSAG could also give the impression of having many of the same capacities of States and thus, capable of applying the more developed rules of IHL of IACs. To represent this point, the role of the MILF and its relationship with ILAC, focusing on their implementation of the principle of humane treatment will be discussed later as an example.

On the other hand, NSAGs with more extremist views, such as the Islamic State Group (ISg) and Al-Qaeda, formally and explicitly reject the applicability of International Law and IHL.[56] More specifically, Al-Qaeda considers that: "Muslim states' acceptance of international legal obligations is evidence of infidelity to Islam",[57] while ISg regards the UN Charter as a "form of disbelief because it entails the acceptance of positive law and placing it on an equal footing with Shari'ah law".[58] Because of this clear rejection of the global order, these two groups are useful to illustrate the relevance of ILAC and its principle of humane treatment today. Indeed, if, as demonstrated before, "the demands for the humanitarian treatment of POWs

[56] A. Bellal, P. Bongard, E. Heffes, above note 51, p. 29.

[57] American University Cairo Research Team, *From Words to Deeds: A Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms, Al-Qaeda*, UK Research and Innovation, 2022, p. 60.

[58] American University Cairo Research Team, *From Words to Deeds: A Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms, The Islamic State Group (ISg)*, UK Research and Innovation, 2022, p. 26.

are found in both contemporary IHL and in the Shari'ah"[59], one would assume that in contemporary times, even NSAGs that claim to solely adhere to Islamic Law would still respect this principle in practice. In order to ascertain if this is true, the practices and the laws enacted by Al-Qaeda will be assessed to see if their behavior is in line with the Islamic *dictum* of humane treatment. The decision to exclusively focus on this NSAG stems from ISg adopting many of Al-Qaeda's formulations regarding Islamic Law matters, including *Jihad* and its related issues.[60] Furthermore, the rise of ISg in 2014 led Al-Qaeda to assume less radical views and to translate them into written rules in order to distance itself from the new-born group and to remain relevant among Jihadist groups.[61] Notably, they sought "to avoid the alienation and antagonization of the Muslim masses"[62] by banning certain practices used by ISg, including those carried out against people deprived of liberty, such as enslavement, summary executions, sexual violence and other ill-treatments.[63]

Before discussing these two categories in greater detail, it is worth mentioning another Islamic NSAG which can be included in the unaccommodating category: Hezbollah. This group – through an analogous but nonetheless different approach from the aforementioned groups of the same category – recognizes certain minimum standards of treatment that captives are entitled to have, by solely referring to the Islamic rules of armed conflict.[64] In fact, by relying on Shiite Islam sources and the specificities of Khamenei's Fatwas, they indirectly ruled out from their laws the killing of

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[59] Omar Yousaf, "*IHL" as "Islamic Humanitarian Law": A comparative Analysis of International Humanitarian Law and Islamic Military Jurisprudence Amidst Changing Historical Contexts*, Florida Journal of International Law, Vol. 24, issue 2, Article 6, 2012, p. 465.

[60] Omar Suleiman, Elmir Akhmetova, *The expanded usul of violence by ISIS, Al-Qaeda, and other similar extremist groups*, Islam and Civilisational Renewal, Vol. 11, No. 1, 2020, p. 63.

[61] *See*: "The document aims primarily to establish a hierarchy of authority between jihadi groups in the region and to protect the image of Jihad from ISIS's efforts to distort it". *See*: Tore Refslund Hamming, *Jihadists' code of conduct in the era of ISIS*, Policy Paper, Middle East Institute, Washington D.C., 2019, p. 4.

[62] American University Cairo Research Team, above note 57, p. 8.

[63] American University Cairo Research Team, above note 58, pp. 53-54.

[64] Hiba Mikhail, Hassan Baalbaky, *From Words to Deeds: A Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms, The Hezbollah - Lebanon,* UK Research and Innovation, 2022, p. 21.

those they consider as POWs, torture or any other humiliating act against this category, without making explicit references to IHL.[65] The analogies in their approach to the principle of humane treatment stem from the complete lack of reference to IHL, which easily allows them to categorize them as members of the "unaccommodating category". However, if compared to other groups in the same category, the differences arise from the fact that, although the prohibition of such acts is rooted in classical Islamic sources, their practical application seems to have been heavily influenced by Khamenei's Fatwas, making their actions highly contextual and dependent on these specific directives. As a result, this armed group will not be covered in detail, as it appears to represent a unicum.

This brief introductory overview sets the stage for the next section, which will examine armed groups, with a focus on those operating in the Asian continent, and their different uses of and approaches to ILAC. The aim is to assess and evaluate the practical relevance of this *corpus juris* in modern conflicts and how it can contribute to improving the protection of the persons deprived of liberty.

## 2. Al-Qaeda as the representative of the "unaccommodating" category

The first category involves NSAGs rejecting the international order and that, as a result of this stance, are labelled as "unaccommodating to IHL" for purposes of this paper. As previously explained, such designation does not stem from an evaluation that IHL lacks similarities with ILAC, but rather because its belonging and origins are not shared by these groups, as they are perceived as originating from their sworn enemies.

A few introductory words about Al-Qaeda and its role today are necessary to understand why they were compelled to regulate their actions through the adoption of a code of conduct. The involvement of Al-Qaeda in the attacks on the World Trade Center at the turn of the millennium, followed by the US-led "war on terror" during the Bush administration, have elevated this group to the status of the most famous of the NSAGs professing

[65] *Ibid,* p. 68.

adherence to Islamic Law. However, it is argued that it is almost an entirely different organization today compared to what it used to be when it reached its "peak of notoriety", as there is evidence that "it is less centralized, less rigorous in its application of Shari'ah, and less popular"[66]. The primary causes behind such change are the intensified counter-terrorism operations they have had to parry, the death of Bin Laden, and the rise of ISg. Despite these, this group persists through re-organization and continues to have many affiliates around the globe, especially in areas where weak governance and general instability have grown over the years.[67] These events necessitated the implementation of innovative strategies to maintain relevance, including the formulation – followed by a sort of "codification" – of the rules governing the conflicts in which the Jihadists are engaged.

Such norms have been included in the "*Al-Qaeda in the Indian Subcontinent (AQIS) Code of Conduct*", considered as one of the most elaborate documents regarding the behavior that all Jihadists should respect while engaged in hostilities.[68] It is notable that despite this Code being issued by the "youngest affiliate"[69] of the NSAG and with a clear and specific geographical limitation in the title, experts consider it as a message from Al-Qaeda Core (AQC) – the original and central group – to all Jihadi fighters.[70] For these reasons, the rules and regulations provided by this Code of Conduct can be considered authoritative and will be relied upon in order to assess Al-Qaeda's compliance with ILAC's rules.

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[66] Alexey M. Vasiliev, Natalia A. Zherlitsyna, *The Evolution of Al-Qaeda: Between Regional Conflicts and a Globalist Perspective*, Herald of the Russian Academy of Sciences, Vol. 92, suppl. 13, 2022, p. 1244.

[67] For a map with the location of the presence of the main affiliated groups, *see*: K. Zimmerman, N. Vincent, *The State of Al-Qaeda and ISIS in 2023*, in Critical Threats, September 11, 2023, available at https://www.criticalthreats.org/analysis/the-state-of-al-qaeda-and-isis-in-2023.

[68] The Soufan Center, *Diminished, But Not Defeated: The Evolution of Al-Qaeda since September 11, 2001*, September 2021, p. 36.

[69] The Soufan Center, *Al-Qaeda in the Indian Subcontinent (AQIS): The Nucleus of Jihad in South Asia*, April 2019, p. 7.

[70] *Ibid.*, p. 23.

In the AQIS' Code of Conduct, Section IX is the most relevant for the topic of this paper, as it concerns "Enemy Captives and Individuals who Surrender"[71]. The most important provision is rule number 2 which offers four alternative options for dealing with a *Kafir*[72] person belonging to an enemy nation at war with the Muslim *Ummah.*[73] According to the rule, the *Amir*[74] can choose between: (i) exchanging the prisoner with Muslim captives; (ii) taking ransom; (iii) releasing the person; or (iv) killing the prisoner.[75] It is fair to consider that those belonging to this category are the same that under IHL would, as a minimum, enjoy the guarantees of Common Article 3 (CA3). Indeed, there are no further indications about the reasons of captivity nor a differentiation between detainees, therefore one could assume that this being the general treatment reserved to detainees, it would also apply to those detained for having participated in hostilities against them. Furthermore, by interpreting the title of the Section literally, one could include both fighters and members of national armed forces, as they are those who generally surrender.

Even if part of this rule appears to be based on certain Islamic sources, the possibility to kill captives is not. Indeed, it is based on the assumption that the Prophet permitted the killing of three captives after the Battles of Badr and Uhud, and thus, the killing must be considered lawful. However, as previously mentioned in the earlier part of this paper, what is missing in this interpretation is that the Prophet's precedents show that those prisoners met

[71] There are six rules in total in Section IX. *See*: AQIS Code of Conduct, June 2017, p. 14.

[72] Kafir means unbeliever. The included non-exhaustive examples in the Rule are the "Hindus, Sikhs, Christians and Jews". *See*: Rule n. 2, Section IX, AQIS Code of Conduct, June 2017, p. 14.

[73] The Muslim Ummah is generally considered to be the Muslim community or the Muslim people.

[74] Rule n. 1 provides that only the Amir (commander) or the Vice-Amir can decide on the cases of enemy captives or surrendering individuals. They must also consult with the Heads of the Shari'ah Committee and the Military Committee. *See*: Rule 1, Section IX, AQIS Code of Conduct, June 2017, p. 14.

[75] In addition, If the person becomes a Muslim, the option of killing him would not be feasible anymore, while exchange would be possible only if the captive agrees and there is no fear that he would become a Kafir again. *See*: Rule 3, Section IX, AQIS Code of Conduct, June 2017, p. 14.

this fate because they committed war crimes,[76] consequently, restricting the possibility of killing captives to this single occurrence.[77] Interestingly, there is no indication about the faculty of enslavement, demonstrating their opposition to this practice and, probably, a distancing from the ISg. Rule number 4 deals with the case of arrested "apostates" who can be either exchanged with Muslim prisoners or money or killed as a punishment. The differentiation with the previous rule, the avoidance of limiting the *ratione personae* applicability to someone "belonging to a nation at war", and the use of the word "arrest" may seem to point to the direction of considering this as the general conduct to maintain in a non-war situation. However, from the word "apostate" and the nature of the three different courses of actions, it appears to be more the conduct to follow when dealing with a hostage rather than that of an arrested individual. Under IHL, hostage-taking is considered customarily prohibited and to be respected in both IACs and NIACs.[78]

Although torture is not mentioned in the Code of Conduct, the Armed Group's critiques to the US and Egypt for using it suggest that they consider it forbidden.[79] However, it was systematically practiced by the group and its affiliates who not only tortured detainees but also denied them food and medical care, flagrantly violating both IHL and ILAC.[80] The Code of Conduct is silent about the daily treatment during detention; therefore – given the group's adherence to Islamic Law – the specific regulations of Islamic *jus in bello* should be presumably applicable.

From the AQIS' Code of Conduct and its rules, it is possible to extrapolate an interesting conclusion regarding the relevance of ILAC today.

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[76] A. Al-Dawoody, above note 12, p. 138.

[77] *Ibid*, p. 137.

[78] *See*: ICRC, Rule 96 – Hostage-Taking, *Customary International Humanitarian Law (CIHL) Database*, Vol. II, Chapter 32, Section I.

[79] American University Cairo Research Team, above note 57, p. 54.

[80] In particular, in the Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, it was proved that Jabhat al-Nusra, one of the affiliated groups of Al-Qaeda, used torture, corporal punishment and inhuman and degrading treatment as regards with both prisoners and civilians. Furthermore, they killed prisoners when it was clear that the Syrian government didn't want to make exchanges with captured members of the group. *See*: American University Cairo Research Team, above note 57, p. 54.

It appears that with the creation of such document, there is a clear intent to at least try to abide to certain less extremist interpretations of Islamic Law, including ILAC and its rules on the treatment of POWs. Even if this was probably done to regain the power and the prominence they lost because of ISg, it is progress as, in theory, it should make it easier to use the language of this law. Specifically, when it comes to prisoners detained for conflict-related reasons, even if there is room for improvement, particularly on the point of the permissibility of killings and hostage-taking, they made an attempt to give clear rules along with a consequent absolute prohibition of certain practices. Therefore, the fact that they decided to use the language of Islamic Law and ILAC when they needed to re-obtain relevance and power means that this set of rules is actual. Theoretically, it could be used to persuade even extremist NSAGs in abiding to the minimum standards of humane treatment during armed conflict – without necessarily making reference to IHL – as this principle is an integral and inherent part of this *corpus juris*.

### 3. The MILF as the representative of the "accommodating" category

The MILF is a Non-State armed group that has been active in the Philippines since the 1980s.[81] This armed group – after decades and many attempts to obtain independence – started a peace process with the government of the Philippines, which culminated in the signing of the so-called "Comprehensive Agreement on the Bangsamoro" in 2014 – a peace treaty later incorporated into national law.[82] However, the transitional process is far from over and the government is still occasionally confronted with skirmishes with different armed groups in the area, including with the MILF and groups that split away from it.[83]

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[81] The group was created when one of the leaders of the Moro National Liberation Front (MNLF) decided to part away from the "mother" organization because of the disagreements with the MNLF's leader at the time. Such disagreements were mainly based on religious grounds. *See*: Datuan Magon, Dominic Earnshaw, *Engaging Ulama in the Promotion of International Humanitarian Law: A Case Study from Mindanao*, Journal of Human Rights Practice, XX, 1-14, 2024, p. 3.

[82] *Ibid*, p. 2.

[83] International Crisis Group, *Southern Philippines: Making Peace Stick in the Bangsamoro*, Asia Report n. 331, 1 May 2023, p. 16.

As pointed out before, the interest in the MILF is related to their innovative use of Islamic Law during their armed struggle against the government of the Philippines. What stands out about this NSAG is that they decided to establish "a Committee of Islamic scholars from both within the MILF and unaffiliated scholars to study relevant IHL provisions and decide whether each precept was compliant with Sharia'ah"[84]. The Committee ended up in affirming that the universal norms set forth in the Geneva Conventions and the Protocols are compatible with the *dicta* of Islamic Law. Following this acknowledgement, they developed and drafted a Code of Conduct for their fighters, named "*General Order Number 2*", which incorporates an original *mélange* of both ILAC and IHL.[85]

Of particular significance within this document is Article 34, titled "Rules of engagement in Islam"[86], which also governs the treatment of "prisoners of war". In the article, paragraph five, which applies to "surrendered enemy combatants", commands "to maintain and observe justice at all times and avoid blind retaliation. Protect them and treat them humanely". The provision clearly refers to the IHL principle of humane treatment which, among others, must be respected in favor of persons *hors de combat*. Paragraph six is relevant as well, as it requires to "be kind at all times towards POWs and captives and to collect and care for wounded combatants". By analyzing the last paragraph, it is possible to clearly notice a mixture of ILAC and IHL. Indeed, as far as Islamic Law is concerned, the main rule clearly relates to the instructions imparted by the Prophet to his Companions shortly after the Battle of Badr where he told them that their captives were to be treated with fairness.[87] Conversely, the influence of IHL is marked by the inclusion of terms such as "prisoners of war" and "combatants". This document clearly serves as a notable demonstration of the potential cooperation between these two legal systems. Indeed, simply by considering that these two bodies of law

[84] D. Magon, D. Earnshaw, above note 81, p. 6.

[85] *Ibid*, pp. 7-8.

[86] *See*: Geneva Call, *Their Words: General Order No 2, Moro Islamic Liberation Front/Bangsamoro Islamic Armed Forces (MILF/BIAF),* available at http://theirwords.org/media/transfer/doc/1_ph_milf_biaf_2006_10-dab1e2f6c0a66ae79efc1ba1f39f6077.pdf.

[87] A. Al-Dawoody, above note 12, p. 139.

are compatible, the MILF created a structured and developed Code of Conduct to be respected by its armed forces in many different situations. Such innovative conceptions led some scholars to affirm that "the MILF has the most conscious, if not the most developed, adherence to both *jihad* and IHL"[88].

Following the recognition of compatibility, two main significant outcomes with the potential to greatly enhance protection during hostilities could arise. The first one relates to compliance with these rules, often cited as one of the most problematic aspects of international law, especially IHL.[89] In this case, it becomes apparent that, as the group is fighting for grievances rooted also in religion rather than solely for independence, considering the rules that fighters must adhere to during the conflict as an expression of the very same religion they are fighting for may bolster the authority of these rules and increase compliance with them. Indeed, failure to comply would not only entail a "human" consequence, such as the punishments outlined in the laws that were violated, but also "divine" consequences.[90]

The second consequence pertains to the treatment of prisoners and involves the utilization of terms such as "prisoners of war" and "combatants" along with the application of a blended framework incorporating ILAC and IHL. This suggests that the rules governing captured members of enemy forces are more likely to align with the comprehensive framework of IHL of IACs rather than of IHL of NIACs. Indeed, under the Geneva Conventions there is no obligation to enforce provisions beyond Common Article 3 during a NIAC, unless the concerned State has ratified Additional Protocol II (APII)

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[88] S. M. Santos, above note 6, p. 382.

[89] For instance: "Lack of compliance with IHL is probably the greatest current challenge to this framework of international rules. A body of law, no matter how robust, cannot fulfil its function if it is not – or is only inadequately – respected on the ground". Helen Durham, *Strengthening Compliance with IHL: Disappointment and Hope*, ICRC Humanitarian Law and Policy Blog, December 2018, available at https://blogs.icrc.org/law-and-policy/2018/12/14/strengthening-compliance-with-ihl-disappointment-and-hope/.

[90] This statement is corroborated by one of the interviews that Magon conducted with a MILF/BIAF commander who affirmed that "failure to strictly follow or violation of these prescribed laws will lead us to hellfire". D. Magon, D. Earnshaw, above note 81, p. 8.

and the conflict meets the requirements outlined in Art. 1 APII.[91] In the case of the MILF, such Protocol is applicable. This is because the Philippines ratified it in 1986, and because – according to the Study From Words to Deeds – "the MILF had an established command structure and controlled a considerable amount of territory, thus falling within the scope of this treaty".[92] Nevertheless, the standards and treatment in practice that the group decided to afford its detainees seem to exceed even the provisions of the second Protocol.

Several examples can be cited to strengthen the assertion regarding the application of a more protective framework compared to the basic guarantees of IHL of NIACs. For instance, there is evidence of the MILF providing food, first aid and medicines to captured soldiers, in accordance with the Qur'an[93] and Art. 5 APII.[94] Further, individuals identified by the group as "POWs" were held in separate facilities from those detained for reasons unrelated to the conflict.[95] Additionally, when women were deprived of liberty, they were accommodated in separate locations and only assisted by other women.[96] Persons detained for non-conflict related reasons included MILF personnel suspected of or punished for certain offences.[97] One could argue that by being detained in the same modalities and camps of captured enemy soldiers, their type of detention represents the quintessence of the principle of assimilation.[98] Another indication of the commitment to respect the principle of humanity is exemplified by the requirement for personnel in charge of interrogation duties to undergo several trainings in order to prevent any mistreatment or torture

[91] Apart from ratification, the other requirements create a high threshold of applicability. These include that it solely applies to conflicts involving a State – never between two armed groups only – and if it takes place in the territory of a High Contracting Party. The latter requirement for some scholars implicitly excludes extraterritorial NIACs.

[92] C. Rush, A. Bellal, P. Bongard, E. Heffes, above note 53, p. 13.

[93] Qur'an, 76:8, above note 28.

[94] C. Rush, A. Bellal, P. Bongard, E. Heffes, above note 53, p. 56.

[95] *Ibid.*

[96] *Ibid,* p. 57.

[97] *Ibid*.

[98] In IACs, Art. 25 GCIII requires that "POWs shall be quartered under conditions as favorable as those for the forces of the Detaining Power who are billeted in the same area".

of the persons in their power.[99] Furthermore, members of the MILF leadership actively shared information with the opposing government regarding the identity of their captives and engaged in negotiations for their release.[100] Finally, it seems that they put in place a system of regulations to be adhered to within the camps with disciplinary measures, including confinement, in case of transgressions.[101] Although not strictly connected to the conflict, the MILF created a voluntary drug rehabilitation program in response to the escalating issue of drug addiction, which was affecting not only the civilian population residing in their territory, but also members within their ranks. This is pertinent in this context because, while primarily benefiting civilians, it has been noted that a percentage of armed elements were also subjected to this treatment. More importantly, insights from the program's promotion shed light on the overall detention conditions experienced by individuals within MILF's camps.[102] For instance, it is documented that mosques were present within these camps, and the cells were reported to measure 20 x 40 meters with a capacity of accommodating seven persons each.[103] Given that these were the same camps utilized by the MILF for detaining individuals involved in conflicts, it is reasonable to assume that these conditions also applied to those considered as prisoners of war by the group.

While it is noted that certain actions mentioned align with CA3, APII and customary law, not all the measures implemented are explicitly outlined in these sets of rules. For instance, there is no indication about the separation between persons detained for conflict and criminal reasons, regulations about the behavior to follow during detention and punitive measures in case of non-respect, or obligations concerning the sharing of information to the enemy about persons detained in order to facilitate release. Furthermore, it cannot be assumed that these norms are consistently upheld, as despite their

[99] C. Rush, A. Bellal, P. Bongard, E. Heffes, above note 53, p. 56.
[100] *Ibid,* p. 56.
[101] *Ibid,* p. 57.
[102] Carolyn O. Arguillas, *Rehabilitating Moro drug dependents: "Islamization" as a cure*, MindaNews, available at https://mindanews.com/top-stories/2019/02/rehabilitating-moro-drug-dependents-islamization-as-cure/.
[103] *Ibid*.

applicability, certain NSAGs may lack the motivation or resources to adhere to these provisions. The latter possibility is explicitly recognized by Art. 5 APII, which stipulates that NSAGs are expected to adhere to some of its provisions only "within the limits of their capabilities".[104]

However, what is clear is that all these rules share a "twin" provision in the Third Geneva Convention, which was specifically designed to safeguard the rights of POWs and is typically applied in interstate conflicts. This aspect leads to the conclusion that the MILF endeavored to formally establish a more expansive framework than what is generally foreseen by the law applicable to a situation of NIAC, such as the one they were engaged in. This action is further supported by CA3, which encourages the parties of a NIAC to bring into force all or part of the other provisions of the Geneva Conventions.[105]

Apart from the most basic guarantees of humane treatment of CA3 and its supplementary provisions found in APII, particularly Articles 4 and 5, it is noteworthy to highlight some of the corresponding norms – normally found in the Third Geneva Convention and not in IHL of NIACs – that they have implemented. The first relevant rule is the one regarding the separation between those considered POWs by the group and other persons detained for non-conflict related reasons. IHL of NIACs is silent on the matter, as it aims to refrain from legitimizing NSAGs in any capacity,[106] and because in IHL, POWs' rules and regulations only apply in international conflicts. Another illustrative example is the commitment of the MILF to provide the government of the Philippines with the generalities of the members of the armed forces that they detained. Yet again, the provision of reference is in the GCIII and not in IHL of NIACs.[107] Similarly, a system of rules governing behavior within the detention facility, including confinement as a punitive

[104] Article 5(2) APII.

[105] Common Article 3(2).

[106] For instance, Common Article 3 explicitly affirms that the application of its provisions shall not affect the legal status of the Parties to the conflict.

[107] In this case, it is possible to find commonalities with Art. 122 GCIII which requires Belligerent Parties to create an official Bureau for POWs who are in their power. The purpose of this Bureau is to forward information to the other Party about the persons fallen into their power and that are detained.

measure, can be traced back to the GCIII, particularly in Article 89, where an exhaustive list of potential disciplinary sanctions is outlined.[108]

The only reason behind the implementation of this "enhanced" and mixed framework was the decision of the MILF to create the Committee in order to evaluate the compatibility of IHL with ILAC. By simply adhering to a standard causal link criterion, it is possible to affirm that without the previous applicability of Islamic Law, detainees would have benefited from less provisions and, definitely less protection.[109] The protection formally extended to individuals affected by the hostilities, particularly those deprived of liberty in a NIAC and by a NSAG, is significant. Indeed, being this one of the least regulated areas of IHL, they could have decided not to recognize any compatibility or to provide prisoners solely with the basic guarantees of CA3 and APII. Conversely, they decided to pursue a path centered on protection, and they did so by actively incorporating IHL and ILAC in their laws. In doing so, they not only succeeded in establishing a system that did not jeopardize their very own existence or provoke rejection from those living under their control – as it happened with ISg – but they also managed to establish a more protective framework than the one usually applicable in NIACs. Realistically, it is unlikely that States will extend recognition or consideration to their adversaries solely based on this achievement. Nonetheless, it stands as a positive indication that could potentially inspire similar actions by like-minded groups in the future. Ultimately, the armed forces of the belligerent State are the primary beneficiaries of these decisions, as they are the ones facing the risk of detention during the conflict, and they are unlikely to oppose receiving additional guarantees beyond what is typically expected. This could also indirectly influence potential peace agreements, as a prior commitment to afford a certain level of protection to detained members of the armed forces might be perceived favorably,

[108] Art. 89 GCIII includes the following measures: a fine, discontinuance of privileges, fatigue duties of maximum two hours and confinement.

[109] It is arguable that the driving factor behind MILF's decision to undergo the process of verifying compatibility with IHL and its subsequent recognition was probably strictly embedded in their political struggle for independence and their desire not to lose legitimacy, as it is often the case with armed groups fighting for independence. However, the underlying reason for this decision is irrelevant in this context, as what matters is the protection afforded in practice.

potentially reducing tensions, typically exacerbated by prisoner releases and associated delays.

## IV. Conclusion

The rules of Islamic Law show that this body of law can easily contribute to the discussion concerning the treatment of persons deprived of liberty for conflict-related reasons. Indeed, it is evident that if the same founding principles were applied today, mindful of modifications in their implementation according to contemporary developments, they could prove to be as beneficial as the application of the more modern standards. Considering this assumption as the starting point, a twofold but interrelated outcome may unfold.

Firstly, the rules provided by ILAC could be implemented by NSAGs that only apply Islamic Law and deny the applicability of IHL because they perceive it as a Western product. Consequently, this could ensure some degree of protection also to those that cannot be reached by the safeguards of IHL. Law is just a language and during armed conflicts what matters is the treatment given in practice and the consequent application of minimum guarantees, thus, as long as the safeguards are the same, it does not matter if these are formally granted under the aegis of ILAC or IHL. However, certain NSAGs, such as ISg, would still be excluded, as they rely on minoritarian, and sometimes, distorted interpretations of these rules. Finding a solution that induces them to meet minimum standards of humanity remains an open challenge. Nevertheless, using the language of Islamic Law could make it easier to find a shared solution.

Secondly, it has been demonstrated that Islamic Law can also play a less direct role and nevertheless be beneficial, as shown by the case of the MILF. By analyzing their detention practices and the role played by ILAC in the recognition of the applicability of IHL, it is clear that this framework was essential in enhancing the protection provided to the persons living in the territories controlled by the NSAG. Overall, the detention-framework set forth in their Code of Conduct resulting from a creative combination of IHL

and ILAC was even more protective than the one solely included in the rules of IHL typically governing their situation.

Finally, from a theoretical and more general perspective, recognizing the relevance of ILAC, by referring to it or, even, by considering it as an additional source in international tribunals, may play a role in convincing those that are skeptical of the universality of international law. Indeed, it seems legitimate to recognize that if the same core principles have been enunciated, re-affirmed and implemented by different actors in equally different cultures, contexts and ages, it can be assumed that either there has been some sort of cross-fertilization or that they can be considered universally shared.

# China and Humanitarian Law: Evolution, Contemporary Influence and Prospects of Traditional Ethics in Modern-day Practice

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The practice of IHL cannot be separated from countries' recognition of its traditional ethics. Finding sufficient support for the connotation of IHL from ethics is conducive to further improving its compliance and implementation. In promoting the global acceptance and implementation of humanitarian law, it is necessary to fully consider these differences in ethical value systems, and seek consensus and compromise to ensure that humanitarian law can play its due role in protecting people. China has a long tradition of humanitarian ethics. This paper discusses the composition of traditional Chinese humanitarian ethics and the background of the formation of the law of war in Chinese history from several special historical periods, and examines its evolution. The traditional war ethics have encouraged contemporary China to embrace the international humanitarian law system and its connotation and principles with an open mind. This paper will analyze the historical evolution of Chinese humanitarian law ethics, examine the impact of ethics on the practice of IHL in China, explore the influence of Chinese ethics on the international community, and assess the application of IHL in China in conjunction with traditional Chinese ethics.

***Keywords*:** humanitarian law, traditional ethics, China, consensus

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In today's world, the establishment and implementation of international humanitarian law are crucial for maintaining international stability. All nations need to move toward improving their legal systems, advance their understanding and application of international humanitarian regulations, and actively engage in multilateral cooperation to jointly promote the realization of global objectives for the rule of law in warfare. [1]

Different countries, however, possess diverse value systems, which stem from the mainstream concepts formed due to various factors such as historical development, social backgrounds, and cultural contexts. Throughout different eras and stages of development, varying moral perspectives have led to the formation of each nation's traditional ethics.[2] It is imperative that one nation does not impose its own value system onto another, as equality of values among nations is essential for equal rights and obligations, as well as peaceful coexistence and equal communication. [3]Exploring traditional ethics concerning war is conducive to understanding the value system of a nation. Mutual understanding, adaptation, and coordination among nations and ethnicities in ethical moral perspectives provide a condition for lasting peaceful coexistence, which is also the pursuit of our study on traditional humanitarian ethics in China.

In September 2023, during a meeting between the president of the International Committee of the Red Cross (ICRC) Ms. Mirjana Spoljaric Egger and Chinese President Xi Jinping, it was emphasized that humanitarianism constitutes the greatest consensus among different civilizations. He remarked that the precepts of traditional Chinese culture, such as "[t]he benevolent loves others" and "[d]o not do to others what you don't want others to do to you", resonate with the purposes of the International Red Cross and Red Crescent Movement, and China is willing

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[11] International Committee of the Red Cross, *Bringing IHL home: Guidelines on the National Implementation of International Humanitarian Law*, 2021, available at: https://www.icrc.org/zh/publication/4532-bringing-ihl-home-guidelines-national-implementation-international-humanitarian-law(all internet references were accessed on September 2024).

[2] Arnold Toynbee, *A Study of History*, Shanghai People's Publishing House, Shanghai, 2000, pp. 73-91. Translated by Liu Beicheng and Guo Xiaolin.

[3] United Nations Charter, Chapter I, Arts. 1 & 2, available at: https://www.un.org/en/about-us/un-charter/full-text.

to further collaborate with the ICRC to make significant contributions to the cause of peace and progress for mankind.

Humanism provides ethical support and value orientation for international humanitarian law, and international humanitarian law is the concrete embodiment and guarantee of humanitarian principles on the legal level. It is argued that the practice of international humanitarian law cannot be separated from each country's cultural and ethical identification with it. Finding support for the essence of international humanitarian law within ethics can further improve its compliance and implementation. Currently, academic research on international humanitarian law in China focuses on empirical studies of the rules themselves, without enough attention paid to integrating the rules and systems of international humanitarian law with Chinese traditional humanitarian ethics. This paper aims to analyze the historical evolution of Chinese humanitarian ethics, expound on the impact of ethics on the practice of international humanitarian law in China, examine the influence of Chinese ethics on the international arena, and look to the future application and prospects of international humanitarian law as it intersects with traditional humanitarian ethics in China.

This paper discusses the composition of traditional humanitarian ethics in China against the background of the formation of warfare law in Chinese history, and analyzes the evolution of such ethics from the following perspectives: classic theories represented by Confucianism, which emerged during the Pre-Qin period and have had a profound and enduring impact on subsequent generations; ethical principles in the reformation of Chinese humanitarianism during the formation of modern international humanitarian law; ethical principles influenced by Marxist thought in the period of socialist revolution and construction of the Chinese Communist Party starting from Mao Zedong's era; and the international humanitarian law theory characterized by "building a community with a shared future for mankind" in contemporary China.

## 1. Emergence and Historical Evolution of Ethics in Ancient Chinese Warfare Law

Warfare law in China originated during the Zhou Dynasty and gradually matured in the Western Zhou and the Spring and Autumn periods.[4] During that time, not only was the legitimacy of the use of force addressed; rudimentary principles also began to emerge in specific combat actions, such as the "principle of distinction" (distinguishing between combatants and civilians), principle of humanity (regarding prisoners of war and civilians), and the principle of good faith, which are required by modern law of armed conflict (See section 1.2. for details). Various theories of warfare law, including moral requirements of "benevolence" and "righteousness" advanced by Confucianism,[5] were proposed by ancient Chinese theorists and still show much relevance today.[6] Throughout the course of Chinese history, a mainstream ethical ideology was formed on the basis of Confucianism and Daoism, permeating every aspect of life: political, military and social affairs,

[4] The Western Zhou Dynasty (C. 11th century-771 B.C.) and the Spring and Autumn periods (771 to 476 B.C.), which are important periods and dynasties in Chinese history.

[5] See Confucianism, Xunzi, Discussing Military Strategy and Tactics.

Chen Xiao, one of Xunzi's students, asked Xunzi: "When you discuss the use of troops, you often take benevolence and justice as the fundamental. The benevolent love, the righteous follow the reason, if this is the case, then why use the army? The reason why everyone uses troops is to compete!

Xunzi replied, "This is not what you understand. The benevolent love, and because they love, they hate others to harm them; The righteous follow the truth, and because they follow the truth, they hate others to mess with it. The use of troops is to prohibit violence and eliminate harm, not to compete. Therefore, the army of humanity, where they stay will be comprehensively governed, and where they pass through will be educated and influenced, just like the timely rain falling, no one is unhappy.

Translation available at: https://www.rujiazg.com/article/22631. (all internet references were accessed in September 2024).

[6] Chinese President Xi Jinping delivered an important speech at the College of Europe in Bruges, Belgium, on April 1, 2024. He mentioned China is a country with a long history of civilization. Among the ancient civilizations in the world, the Chinese civilization is one that has continued uninterrupted and developed over the past 5,000 years. More than 2,000 years ago, China experienced a flourishing era of the various schools of thought, and many of the ideas they proposed, such as loyalty, righteousness, propriety, benevolence, kindness, are still deeply influencing the lives of Chinese people today. Chinese people have their own unique value system when it comes to viewing the world, society, and life. "Xi Jingping's Speech at the College of Europe in Bruges (Full Text)", *Beijing Review,* 2 April 2014, available at: http://www.beijingreview.com.cn/zt/txt/2014-04/02/content_611228.htm.

and people's livelihood.[7] The Confucian ethics of "benevolence" and "righteousness" not only applied to interpersonal relations and moral cultivation in the general field of life, but also played an important role in moral restraint and evaluation in the special field of war. By emphasizing the moral restraint in war and the reconstruction of benevolent government after the war, the Confucian ethics of benevolence and love injected profound moral connotation and humanistic spirit into the ancient law of war theory (See section 1.2. for details).

### 1.1. Background on Formation of Early Thought of Warfare Law

During the early periods of the Xia, Shang, and Zhou Dynasties (approx. from 2070 B.C. to 256 B.C.), there was no clear distinction between military strikes and criminal sanctions. Punishments were believed to have originated from campaigns against foreign tribes, and military conquest was generally regarded as the harshest punishment.[8] Subsequently, with the differentiation of social classes and the establishment of states, the externality of military strikes was gradually distinguished from the internality of legal sanctions.[9] At this time, there were only provisions for the conduct of *jus ad bellum*, and there was no understanding of the lawful conduct of the *jus in bello*. It was not until the period between the late Western Zhou dynasty and the end of the Warring States period that rules and theories akin to today's international humanitarian law were formed, bringing certain restraints to acts of war. (See section 1.2. for details)

Three factors contributed to the foundations of the earliest Chinese warfare law. First, the formation of independent political entities - during the Xia and Shang Dynasties, political entities including vassal states and feudal states based on the system of enfeoffment were formed in China.[10] The Zhou

[7] Sun Lin, "Comparison of Confucian and Taoist Social Governance Thoughts and Analysis of Modern Value", *Advances in Philosophy*, Vol. 13, No. 8, 2024.
[8] Han Guopan, *A Study of Ancient Chinese Legal History*, People's Publishing House Press, Beijing, 1993, pp. 12-18.
[9] Xiong Mei, "The Past, Present, and Future of Pre-Qin Warfare Law Research", *Journal of Xi'an Politics Institute of PLA*, No. 3, 2011.
[10] Xiao Gongqin, "A New Theory on the Origin of Chinese States - From a Loose Federation to a Centralized State", *Literature, History, and Philosophy*, No. 8, 2016.

Dynasty officially established a state system during the period from approx. 1046 B.C. to 256 B.C. Second, the formation of patriarchal ideology and the ritual system. The patriarchal system, whereby the state divided rights, powers, and obligations formally, ultimately established a hierarchical social relationship. In the Zhou dynasty, the patriarchal system was essentially formed through the implementation of the enfeoffment system among nobles.[11] If a war occurred, it could disrupt the order established by the patriarchal system, leading to turmoil and panic. Therefore, people came to hope that war could be regulated.[12] To maintain the stability of the patriarchal system, a set of guidelines on handling social relationships among nobles became necessary.[13] Thus, an entire ritual system, the equivalent to the law in the Zhou Dynasty, was devised. Third, shared cultural concepts. Cultural concepts are the ideological factors for the establishment of social systems, and the foundation of law formation. Law essentially signifies a vision of order shared by a certain group. The emergence of warfare law reflected the rational appeal of relatively independent political entities within a certain regional scope, which was supported by converging cultural ethics.[14]

With independent political entities established and unified cultural concepts formed, the conception of just wars, legitimate rights to wage war, and rules of engagement flourished as people started to consider warfare from the perspective of patriarchal system and ritualism. These understandings were applied to ancient Chinese military practices, leading to numerous rules established for constraining one's own actions and judging the actions of the enemy during war. This laid the groundwork for the early development of ancient laws of war in China.

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[11] Chao Fulin, *Social Changes in the Xia, Shang and Western Zhou Dynasties*, Beijing Normal University Press, Beijing, 1996, p. 266.

[12] See The Rites of Zhou, Chunguan, Zongbo. "With Military Salute to the State" can be interpreted as the use of military expedition to punish the vassal state's acts of unceremonious rites and violations. Translation available at: https://ctext.org/rites-of-zhou/chun-guan-zong-bo/ens.

[13] Chen Hui, Zhao Hongbo, & Bai Lichao, "Rites and Music System and Military Salute in the Western Zhou Dynasty", *Journal of Northwest University (Philosophy and Social Sciences Edition)*, Vol. 52, No. 1, 2022.

[14] Ji Na, "Tracing the Origin of Ancient Chinese Laws of War", *Research on Chinese Military History*, No. 5, 2021.

### 1.2. The mature and peak period of ancient thought of warfare law

The Western Zhou Dynasty and the subsequent Spring and Autumn Period and Warring States Period (approx. from 1046 B.C. to 221 B.C.) witnessed the gradual maturation of traditional warfare law. During this era, relatively sophisticated norms governing warfare within military etiquette (i.e. the system of military rules and regulations) emerged, which not only involved the legality of the use of force, but also specific combat actions. These traditional wartime ethics, formed in ancient times, have motivated contemporary China to embrace the system, customs, and principles of international humanitarian law in a proactive manner.[15]

Firstly, in terms of the notion of peace, ancient China regarded the world as "under heaven", with China positioned at its center and the sovereign as the highest authority.[16] Peace was considered a natural state, and war should not occur.[17] China, as a symbol of civilization, should bear the responsibility of maintaining peace and disseminating Chinese culture to achieve a harmonious world order.[18] In the writings of renowned ancient Chinese philosophers such as Confucius, Mencius, and Xunzi, they discussed the concept of peace and interpreted war as the last resort to maintain peace and order under heaven.[19] They believed that resorting to military means to maintain order was unnecessary.[20] The pursuit of peace should not involve

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[15] Hu Peng, "On the Communication of International Humanitarian Law in China", *Social Sciences of Beijing*, No. 6, 2015.

[16] See the Book of Poetry, Minor Odes of the Kingdom, Decade of Bei Shan.

"Under the wide heaven, all is the king's land. Within the sea-boundaries of the land, all are the king's servants."

Translation available at: https://ctext.org/book-of-poetry/decade-of-bei-shan/ens.

[17] John K. Fairbank, "Varieties of the Chinese Military Experience ", in Frank A. Kierman and John K. Fairbank (eds), *Chinese Ways in Warfare,* Harvard University Press, Cambridge Mass, 1974, p. 7.

[18] Sheng Hong, "Civilization under Heaven -- On the International Political Principles of Confucianism", *Literature, History and Philosophy*, No. 5, 2013.

[19] See Confucianism, Mengzi, Gong Sun Chou I. Mencius said,

"When one by force subdues men, they do not submit to him in heart. They submit, because their strength is not adequate to resist. When one subdues men by virtue, in their hearts' core they are pleased, and sincerely submit."

Translation available at: https://ctext.org/mengzi/gong-sun-chou-i/ens.

[20] See Confucianism, Xunzi, State System.

warfare as a means. Instead, peace should be achieved through civilizing uncivilized regions, thereby disseminating civilization.[21] The goal was not necessarily the annihilation or conquest of enemies through force but rather influencing them through Chinese cultural values, with violence seen as a last resort.[22]

Secondly, regarding the understanding of just cause for war (legitimate reasons for initiating war), the Xia and Shang periods marked the nascent stage of traditional Chinese warfare law.[23] During that time, warfare primarily involved conflicts with foreign tribes, driven by the pursuit of victory.[24] While specific regulations governing conduct in warfare had not yet been established, notions of just cause for war began to emerge. The earliest codified norms regarding warfare in China can be found in the Shih Chi and Book 8 of Mohism, which emphasized that warfare must possess the legitimacy of "acting on behalf of Heaven"[25] and should be based on the will of the people.[26] During the Zhou Dynasty, it was believed that only under

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"If the doctrine of benevolence and justice is supported by irresistible majesty, then it can be won without fighting, won without attacking, and the whole world can be conquered without a single soldier, this is a prince who knows the way of calling himself a king."
Translation available at: https://www.jianshu.com/p/da31a4407dde.

[21] See Confucianism, The Analects, Ji Shi.
"If remoter people are not submissive, all the influences of civil culture and virtue are to be cultivated to attract them to be so."
Translation available at: https://ctext.org/analects/ji-shi/ens.

[22] Alastair I. Johnston, *Cultural Realism: Strategic Culture and Grand Strategy in Chinese History*, Princeton University Press, Princeton, 1995, p. 66.

[23] Zhu Xiaohong, "The Evolution of the Law of War in Pre-Qin Dynasty and its Dynamics", *Journal of Xi 'an Political Science University*, No. 12, 2011.

[24] Zhao Boxiong, "On the Structural Characteristics of three Generations of States", *Journal of Hebei Normal School (Social Science Edition)*, No. 4, 1997.

[25] See Mohism, Mozi, Book 8, On Ghosts III.
"Before the battle, Xia Qi swore to the combatants: The Prince of Hu violated the five elements and disused the three calendars. Heaven decreed to exterminate his life!"
Translation available at: https://ctext.org/mozi/book-8/ens.
See Sima Qian, Records of the Historian, Annals of Yin.
"I have indeed heard the words of you all, but the Xia ruler is an offender, and, as I fear the Supreme god, I dare not but punish him. Now, as the Xia ruler has committed many crimes. We should carry out the punishment decreed by Heaven."
Translation available at: https://ctext.org/shiji/yin-ben-ji/ens.

[26] See Shang Shu, Speech of Tang.

specific circumstances could the Son of Heaven (the emperor Zhou) declare war.[27] Justifications for war could be summarized as punishment for the violation of laws, disruption of social order, or contravention of moral principles by fiefs.[28] In the subsequent Spring and Autumn Period and Warring States Period, a group of prominent theorists reinforced the concept of just cause for war in warfare ethics based on the principles of the Zhou rituals. The representatives of Confucianism, such as Confucius and Mencius, argued that only higher political entities could wage just wars,[29] and wars initiated by morally superior individuals against usurpers, tyrants, or aggressors were deemed just.[30] However, while the Son of Heaven held supreme political authority, the highest political position could not guarantee his moral integrity. If a ruler was incompetent, oppressive, and harmed the populace, other political entities were justified in waging war against him,[31] and the conquest and overthrow of his feudal states and rebel armies were seen as launching just wars.[32] Moreover, in a highly influential military

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"Quoting Xia's own subjects: 'Our prince does not compassionate us, but (is calling us) away from our husbandry to attack and punish Xia.' The king of Xia in every way exhausts the strength of his people, and exercises oppression in the cities of Xia. His multitudes are become entirely indifferent (to his service), and feel no bond of union'(to him). The Xia Jie possessed this evil virtue, so Shang Tang decided to punish him."

Translation available at: https://ctext.org/shang-shu/speech-of-tang/ens.

[27] See The Rites of Zhou, Xiaguan Sima.

"Stipulated the types of grounds for war, those who overpower the weak and invade the small with the great; Killing the virtuous and the people; Tyrannical at home and bullying neighboring countries abroad; The land is barren and the people are scattered; Relying on the precarious terrain to disobey; Innocent killing of relatives; Banished or killed his king; Violating the king's orders, flouting the laws and regulations of the state, etc."

Translation available at: http://ewenyan.com/articles/zl/4/2.html.

[28] Xu Yuangul, *National language solution*, Zhonghua Book Company press, Beijing, 2002, p. 67.

[29] See Confucianism, Mengzi, Jin Xin II.

"'Correction' is when the supreme authority punishes its subjects by force of arms. Hostile States do not correct one another."

Translation available at: https://ctext.org/mengzi/jin-xin-ii/ens.

[30] Zuo Takayama, "Just War and the Justice of War: Reflections on the ethics of war", *Research in Ethics*, No. 6, 2005.

[31] See Confucianism, The Analects, Ji Shi.

"When good government prevails in the empire, ceremonies, music, and punitive military expeditions proceed from the son of Heaven. When bad government prevails in the empire, ceremonies, music, and punitive military expeditions proceed from the princes."

Translation available at: https://ctext.org/analects/ji-shi/ens.

[32] See Confucianism, Mengzi, Liang Hui Wang II.

treatise of the time, it was believed that defensive warfare constituted a just war as the purpose of using force was to defend the nation.[33] Similarly, renowned theorists of the same period advocated for joint military efforts among nations to rescue smaller states under aggression.[34]

Thirdly, concerning attitudes towards warfare justice, the Zhou Dynasty established the earliest regulations regarding warfare justice in China. Specific provisions were made regarding the timing of battles to minimize harm to civilians, avoiding conflicts during times of farming, famine, epidemic outbreaks, or extreme weather conditions.[35] In terms of combat tactics, one must uphold good faith and integrity. When engaging in combat, one must confront the enemy head-on and only attack after the opponent had arrayed their forces and beaten the drums.[36] Humanitarian protection was extended to enemy personnel who abandoned the fight, with restrictions on pursuing fleeing enemies beyond a hundred meters, sparing incapacitated enemy soldiers, and aiding wounded or sick adversaries.[37] Furthermore, distinctions

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"The king said, 'May a minister then put his sovereign to death?' Mencius said, 'He who outrages the benevolence proper to his nature, is called a robber; he who outrages righteousness, is called a ruffian. The robber and ruffian we call a mere fellow. I have heard of the cutting off of the fellow Zhou, but I have not heard of the putting a sovereign to death, in his case.'"

Translation available at: https://ctext.org/mengzi/liang-hui-wang-ii/ens.

[33] See School of the Military, Wei Liao Zi.

"Military is used to defeat strong enemies and defend the country."

Translation available at: https://ctext.org/wei-liao-zi/bing-ling-shang/ens.

[34] See Mohism, Mozi, Book 5, Condemnation of Offensive War III.

"When some large state attacks some smaller one he would join in the rescue."

Translation available at: https://ctext.org/mozi/condemnation-of-offensive-war-iii/ens.

[35] See Si Ma Fa, Benevolence Oriented.

"The principle of war is: do not violate the farming season, do not raise troops to fight when disease is prevalent, in order to protect one's own people; We do not attack an enemy country during a time of mourning or famine, in order to protect its people. Neither in winter nor summer, in order to show love for both sides."Translation available at: https://www.gushiji.org/guwen/z2745.

[36] See Si Ma Fa, Benevolence Oriented.

"Wait for the enemy to complete their formation before attacking; this demonstrates good faith."Translation available at: https://www.gushiji.org/guwen/z2745.

[37] See Si Ma Fa, Benevolence Oriented.

must be made between combatants and innocents, with prohibitions against harming the elderly and children; if encountered, they must be safely escorted back home. Regarding the treatment of the defeated enemies, able-bodied individuals who did not resist could not be treated as enemies, and looting civilian property was prohibited. It was also required to protect religious buildings and forests.[38]

These regulations, which closely resemble contemporary international humanitarian law, laid the foundation for principles such as the "principle of distinction" (distinguishing between combatants and civilians), the "principle of humanity" (regarding both prisoners of war and civilians), and the "principle of good faith".[39] They were further emphasized during the Spring and Autumn Period and Warring States Period through the discourse of philosophers and theorists. Confucian thought underscored that violence in war was a means to restore order and harm to innocent civilians should be minimized.[40] Warfare should not inflict harm upon innocent civilians,[41] and prisoners of war should be treated humanely, with no killing or mistreatment allowed. After capturing a city, the living environment of residents should be

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"In order to demonstrate comity, we should not exceed 100 paces in pursuit of the fleeing enemy and 90 li in pursuit of the retreating enemy. To show compassion, we should refrain from killing enemies who are out of combat and instead offer aid to the wounded."
Translation available at: https://www.gushiji.org/guwen/z2745.

[38] See Si Ma Fa, Benevolence Oriented.
"When entering certain areas of the country, it is prohibited to desecrate sacred sites, hunt, destroy water conservation projects, burn down houses and buildings, cut down trees, or take livestock, food and utensils without permission. Show respect towards the elderly and children by escorting them home without causing harm. Even young people should not be treated as enemies unless they resist. For wounded enemies, provide medical treatment before releasing them."Translation available at: https://www.gushiji.org/guwen/z2745.

[39] See Customary International Humanitarian Law, Volume I (Rules),
available at: https://ihl-databases.icrc.org/en/customary-ihl/v1.

[40] Karen Turner, "War, Panishment, and the Law of Nature in Early Chinese Concepts of the State", *Harvard Journal of Asiatic Studies*, vol. 53, 1993.

[41] See Confucianism, Xunzi, Strategics.
"Those who fight and kill do not fight and kill the people, but fight and kill those who disturb the people."
Translation available at: http://www.ziyexing.com/files-5/xunzi/xunzi_15.htm.

protected;[42] acts of harm, plunder, and rape against innocents should be condemned. [43]

Confucian thought also embodies the unity of just cause for waging war and warfare justice. War, according to Confucianism, is waged for the purpose of "punishing the guilty and benefiting the people". Confucianism emphasizes the importance of upholding "benevolence and righteousness" during combat, believing that "those who are benevolent are invincible". It aims to rally people under the banner of "benevolence and righteousness", as those who embody these qualities can win the hearts of the people, thus ensuring victory in war.[44] Confucianism advocates for governance through benevolent rule rather than tyranny, suggesting that people will willingly obey a ruler who governs with benevolence, rendering the use of violence unnecessary.[45] Confucianism opposes the notion of using any means to achieve victory and rejects a utilitarian approach to warfare, advocating instead for the building of morality and the attainment of lasting peace through moral and cultural means. The reflections on warfare by Confucian philosophers represent ancient Chinese sages' endeavor to regulate warfare based on moral principles, highlighting the enduring significance of moral ethics in the development of humanitarian law today.[46] It emphasizes that war should be

[42] See School of the Military, Liu Tao, Hu Tao, Lue Di.
"After capturing a city, refrain from burning the grain in its storehouses, destroying the houses of its people, cutting down trees in graves or jungles near temples, killing surrendering enemy soldiers, and mistreating captured enemy personnel. Show kindheartedness and justice towards the enemy population."Translation available at: https://www.gushiji.org/guwen/z7698.
[43] See School of the Military, Wei Liao Zi.
"To kill a man's father and brother, to plunder his property, and to enslave his children are the acts of robbers."
Translation available at: https://www.gushiji.org/guwen/z577.
[44] See Confucianism, Mengzi, Liang Hui Wang I.
"The love and protection of the people; with this there is no power which can prevent a ruler from attaining to it."
Translation available at: https://ctext.org/mengzi/liang-hui-wang-i/ens.
[45] Liu Shaojun, "The Issue of City Slaughter in Ancient Chinese War", *Narada Academic Forum (Journal of Humanities and Social Sciences)*, No. 1, 2008.
[46] Xiong Mei, "On Confucius's Understanding of the Legality of War", *Journal of Xi'an University of Political Science*, No. 4, 2010.

waged for just and moral purposes, in accordance with moral norms and humanitarian principles, and with peace as the ultimate goal.

This is very similar to the Just War Theory. The Just War Theory provides an important ethical basis for humanitarian intervention and has had a profound impact on contemporary international humanitarian law. Although the contemporary international humanitarian law does not directly judge the *jus ad bellum*, it requires that the acts of war must conform to the humanitarian principle, which reflects the concern of the just war theory on the morality of war to a certain extent. Similarly, Confucianism, as China's traditional ethical thought, laid the foundation for China to accept modern international humanitarian law in the future.

The concepts of warfare law that developed during the Xia, Shang, Zhou Dynasties, Spring and Autumn, and Warring States periods have had a lasting impact on China's warfare practices for over two millennia. These concepts, as ideological frameworks and knowledge systems, have served as the ethical foundation that continues to influence contemporary perspectives.[47] Many of the principles advocated during that time coincide with the fundamental rules of international humanitarian law today, demonstrating a theoretical foresight. Especially since the Qin Dynasty, successive rulers have praised and applied Confucianism as the mainstream ideology of society. Therefore, the humanitarian ethics of ancient China are still imperceptibly shaping China's contemporary concepts of international humanitarian law.

## 2. Continuation and Change of Humanitarian Law Discourse in Modern and Contemporary China

As previously discussed, ancient Chinese warfare law originated from the Zhou Dynasty and exerted a lasting influence on subsequent eras, particularly the flourishing periods of the Spring and Autumn and Warring States. Although its application diminished in later centuries and faced ideological

[47] Wu Haiwen. "The Ethical Thought of Confucian 'Benevolence' and its Modern Value", *Academic Forum*, No. 4, 2005.

disputes, an ethical system was still established under the impact of ancient Chinese warfare law and Confucian thought. [48]

This ancient law of war theory, based on Confucianism traditional ethics, also faced many challenges and developments in the subsequent dynasty changes. For example, the military thought developed in the late Spring and Autumn Period had many different ideas, which also had an impact on later generations. For example, the "Art of War" written by Sun Tzu had the idea that profit was the core driving force of military actions. It did not emphasize the just of the purpose of the war, and believed that war should be launched only when it is beneficial to the national interests.[49] Although the "Art of War" emphasized a utilitarian stance, it did not exclude moral considerations. Sun Tzu advocated respecting life and reducing casualties in war.[50] To some extent, it is similar to emphasizing the distinction between "*jus ad bellum*" and "*jus in bello*". However, it also advocates the theory of "using deception in warfare".[51] This military theory was widely advocated in the Warring States Period, and a number of succeeding rulers also mainly adopted the military theory. However, in the Han Dynasty, the rulers adopted the policy of "Ban from Hundred Philosophers, Venerate Confucianism" to maintain the feudal

[48] Zhao Lujie, "A Probe into the Military Legal System Construction in Ancient China", *Military History*, No. 5, 2015.

[49] See School of the Military, Sun Tzu, The Art of War, The Attack by Fire.
"Move not unless you see an advantage; use not your troops unless there is something to be gained."

[50] See School of the Military, Sun Tzu, The Art of War, Attack by Stratagem.
"Therefore the skillful leader subdues the enemy's troops without any fighting; he captures their cities without laying siege to them. Do not interfere with an army that is returning home. When you surround an army, leave an outlet free. Do not press a desperate foe too hard. Such is the art of warfare."

[51] See School of the Military, Sun Tzu, The Art of War, Laying Plans.
"All warfare is based on deception. Hence, when able to attack, we must seem unable; when using our forces, we must seem inactive; when we are near, we must make the enemy believe we are far away; when far away, we must make him believe we are near. Hold out baits to entice the enemy. Feign disorder, and crush him. If he is secure at all points, be prepared for him. If he is in superior strength, evade him. If your opponent is of choleric temper, seek to irritate him. Pretend to be weak, that he may grow arrogant. If he is taking his ease, give him no rest. If his forces are united, separate them. Attack him where he is unprepared, appear where you are not expected. These military devices, leading to victory, must not be divulged beforehand."

unified rule.[52] This laid the foundation for Confucianism thought to become the orthodox ethical thought of Chinese feudalism.[53]

However, the Opium War in 1840 shattered the closed-door stance of Qing Dynasty, leading to successive defeats and challenging the existing concepts of warfare law.[54] Consequently, intellectuals of the late Qing Dynasty began studying modern European warfare law (See section 2.1. for details). During the Republic of China era, in response to the looming threat of World War II, scholars of Chinese international law conducted research and debates based on relevant international conventions, aiming to hold Japan accountable for its wartime actions promptly and effectively (See section 2.2. for details). In modern times, pioneering proletarian revolutionaries and military strategists such as Mao Zedong and Deng Xiaoping made significant contributions to the enrichment and development of Marxist military ethics, laying a foundation for China's correct understanding of war and peace.[55] With the progress and development of the times, the contemporary leader President Xi Jinping has put forward the theory of "building a community with a shared future for mankind" and dialectical views on war and peace, which reveal the laws governing national defense, military building, military preparedness, and the guidance of warfare in the new era, enriching and developing the dialectical thinking of the Party's military theory.[56]

[52] Lan Yongwei, "Analysis on the Characteristics of Sun Tzu's Art of War", *Chinese Social Sciences*, No. 3, 1987.
[53] Ge Zhiyi, "Ban from Hundred Philosophers", *Venerate Confucianism, Historiography*, No. 3, 1994.
[54] Cui Zhihai, "Reflections on the reasons for the Qing's Defeat in the Opium War", *Journal of Tsinghua University (Philosophy and Social Sciences)*, No. 2, 2024.
[55] Zhang Changling, "A Comparison of Contemporary Chinese and American Concepts of War and Ethics", *Military History Research*, No. 3, 1998.
[56] Xiao Dongsong, "The Major Innovation and Development of the Party's Military Dialectics Thought", *People's Daily*, 9 November 2016, available at: https://www.rmzxb.com.cn/c/2016-11-09/1132309.shtml.

### 2.1. Warfare Law in the Late Qing Period: Shift Based on the Law of Nations

Under the impact of the Opium War of 1840, the Qing government and the literati class began embracing modern Western concepts of warfare law, such as sovereignty, equality, and formal rationality. Traditional hierarchical, centralist, and absolutist beliefs gradually gave way.[57] However, elements of traditional warfare law, such as benevolence, righteousness, and propriety, representing notions of fairness, justice, and peace, were still incorporated into the interpretation of the Law of Nations.[58] Thus, traditional Chinese ethical principles of warfare law were not entirely abandoned, but underwent a partial transformation in the traditional knowledge system of warfare law.[59] The Qing government's study of the Law of Nations aimed to use it as a tool for war negotiations, and to achieve the principle of "learning from the West to serve the Chinese" and "adopting Western expertise to compete with the West", which did not entirely replace the ethical underpinnings of traditional warfare law. In addition, the development of military forces among the warlord cliques in modern China and challenges to imperial warfare capabilities also contributed to changes in traditional warfare law.

The translation of the Law of Nations during the Qing government was key, and both the military and civilians were required to study it to prevent violations.[60] This approach also facilitated the dissemination of modern Western warfare law in China. The content of the Law of Nations regarding

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[57] Zhang Shimin, *Law, Resources, and Spatial Construction: China, 1644-1945 (Volume on Military Warfare)*, Guangdong People's Press, Guangdong, 2012, pp. 219-220.

[58] The Law of Nations is a work of international law, originally titled Elements of International Law, by Henry Wheaton, an American diplomat and international law scholar. Originally published in 1836 in London and Philadelphia, the book has been translated into many languages, including Chinese and Japanese, and has had a profound impact on the modern system of international law. Under the supervision of the American missionary W.A.P. Martin, the book was translated into Chinese and published in 1864 under the title of "The Public Law of the Nations" by the Imperial Peking Tungwen College. The translation process was supported by the Qing Government.

[59] Feng Zhengzheng, "From 'All-under-heaven' to 'the World': the Ancient-to-Modern Transformation of the Law of War in Late Qing Dynasty", *Global Law Review*, No. 5, 2021.

[60] Qi Zhaoxi: "Diary of Traveling in America", in Zhong Shuhe et al. (eds), *Notes on the Spread of Western Learning to the East, Diary of Traveling in America, Notes on Traveling in France, Guide to Traveling in Scotland*, Yuelu Publishing House press, 1985, p. 265.

rules of engagement, including the initiation of war, rights during conflict, wartime neutrality, and peace treaties, laid a foundation for China at that time to understand the sovereignty, equality, and rationality inherent in Western warfare law, and also had a positive impact on other East Asian countries' adoption of Western warfare law.[61]

### 2.2. Debates based on the Kellogg-Briand Pact during the Republic of China period

The Kellogg-Briand Pact, passed in 1929, was concluded under the global pressure of people opposing imperialist wars and yearning for peace after World War I, with the participation of 63 countries including China. Its formal repudiation of the legitimacy of war also provided assurance and a vision for reducing international conflicts. It declared the abandonment of war as a means to pursue national policies and stood as the most crucial treaty at that time for restraining the right to wage war. Moreover, it served as a significant legal basis for the prosecution of major war criminals (crimes against peace) of Germany and Japan in post-World War II trials, becoming an international precedent inherited by subsequent international documents like the United Nations Charter, advancing the process of declaring aggressive war as illegal.

Following the *Pact*, while researchers focused on resolving peace crises and finding means to avoid war, some Chinese scholars proposed research into the intermediate states between peace and war,[62] advocating for diplomatic negotiations to settle disputes, reserving war as a last resort.[63] During this period, scholars from various countries focused on aspects such as restrictions on warfare methods, international humanitarian protection, and war sanctions.[64] The theories formed were based on the negation of the

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[61] Feng Zhengzheng, "From 'All-under-heaven' to 'the World': the Ancient-to-Modern Transformation of the Law of War in Late Qing Dynasty", *Global Law Review*, No. 5, 2021.

[62] Liu Chang, Study on Use of Force under International Law by Scholars of Republic of China, *Hebei Law Science*, No. 9, 2014.

[63] Cai Kecheng, *International Law in Emergency Times*, China Book Company Press, Beijing, 1937, p. 1.

[64] Zhang Yan, Zhu Yanping, "Justice and Legality: An International Law Perspective on World War II", *Seeker*, No. 10, 2015.

legitimacy of initiating war, which was also an inevitable trend shaped by China's imperative need for self-preservation.[65]

It is worth noting that during this same period, Chinese scholars engaged in theoretical discussions regarding the legitimacy of exercising the right to self-defense, contextualized against the backdrop of the Japanese invasion of China, during which Japan violated international conventions but claimed its aggression against China as self-defense and non-belligerent.[66] The *Kellogg-Briand Pact* restricted the right to wage war except in self-defense, but it did not provide a precise definition of "self-defense", creating a risk of potential abuse of this right. Chinese scholars proposed theoretical viewpoints on this issue. Some argued that the right to self-defense should only be invoked in response to an immediate and irreparable harm to a sovereign state, as a measure of last resort, and should be exercised judiciously to avoid unlawful actions.[67] They emphasized that self-defense requires the precondition of absolute necessity, and the exercise of the right to self-defense is limited to circumstances of absolute necessity.[68] To distinguish from acts of self-help, so-called self-defense warfare should be defensive actions taken by a state to eliminate imminent and unlawful threats.[69]

During the Republic of China era, the influence of Western civilization and the practical needs of Chinese society ignited a fervor for the study of international law. Many young intellectuals went abroad to acquire advanced knowledge of international law, seeking ways for national liberation and salvation. The study of international humanitarian law reached a high level during the Republic of China era.[70] This phase laid a solid foundation for the

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[65] L. Chang, above note 62.

[66] Sakutaro *Tachi, Theory of International Law in Current Situation*, Japan Review Press, Tokyo, 1934, pp. 17- 21.

[67] Xu Yuntan, "The right to self-defense", *Foreign Affairs Monthly Bulletin*, Vol.3, No. 2, 1933, pp. 14-45.

[68] Zhou Pengsheng, *New Developments in public International Law*, The Commercial Press, Shanghai, 1934, pp. 276-278.

[69] Wei Chu, "Dispute between China and Japan and War in International Law and Treaties", *Law Series*, Vol. 11, No. 13, 1934.

[70] Wang Guiqin, "Research on international law during the Republic of China", *Journal of the East China University of Political Science and Law*, No. 7, 2004.

subsequent development of international humanitarian law in China, serving as a link between past achievements and future progress. China also continued to engage in international affairs and further strengthened its exchanges with the international community, which also promoted the dissemination and acceptance of international humanitarian law in China.

### 2.3. Development of China's International Humanitarian Concepts Under the Guidance of Socialist Ideology

The Marxist theory of warfare believes that the nature of war is the fundamental basis on which attitudes towards war are established, and that judgment of the nature of war is a very complex issue. Lenin believed that there are just and unjust wars, progressive wars and reactionary wars, wars waged by advanced or backward classes, and wars used to consolidate or overthrow class oppression.[71] Since the times of Mao Zedong, the Communist Party of China has advocated the "Theory of Revolutionary Peace", aiming to eliminate war through just war (a war to end all wars). Leaders represented by Deng Xiaoping and Jiang Zemin regard the opposition to hegemonism and power politics (considered the root cause of war), and the pursuit of gradually establishing a new international political order, as necessary conditions for achieving universal and lasting peace. Mao Zedong, Deng Xiaoping, and other senior proletarian revolutionaries and military strategists have made significant contributions to the enrichment and development of Marxist ethical thoughts on war.[72]

In terms of the origins of war, Mao Zedong believed that war arises with the emergence of property and class, serving as the special continuation of politics. When political contradictions develop to an impasse that cannot be resolved by other means, armed struggle is eventually adopted to achieve political objectives.[73] Deng Xiaoping developed Mao Zedong's thoughts on warfare and believed that contemporary world wars are inseparable from

[71] See *The Complete Works of Lenin*, Vol. 29, People's Publishing House, Beijing, 1956, p. 307.
[72] C. Zhang, above note 55.
[73] *Mao Zedong Selected Works,* Vol. 1, People's Publishing House, Beijing, 1991, p. 174.

hegemonism, and that the direct cause of war is the conflict of interests between hegemonic countries and those that are not.[74]

In terms of the justice of war, Mao Zedong believed that one should oppose all wars that hinder social development and progress.[75] Wars that impede progress are unjust while the just wars that promote progress should not be opposed. Just wars are manifested in several aspects. First, just wars are a means to maintain peace, using justice to eliminate injustice and revolution to eradicate counter-revolution.[76] Second, just wars can propel historical progress, and revolutionary wars can wipe out old social systems that hinder the progress of productive forces.[77] Third, just wars can improve morality. Mao Zedong believed that just wars can extinguish the enemy's poisonous flames, cleanse one's own impurities, and advance the moral character of the people and the military.[78] Furthermore, he advocated firmly adhering to the principle of "not invading others unless invaded", opposing any form of aggression, and considering any form of military intervention in the internal affairs or ideology of sovereign countries as unjust.[79]

In the new era[80], then-General Secretary Xi Jinping put forward the concept of "strengthening the military", making original contributions to the Marxist-guided theory of warfare.[81] First, he explicitly proposed the basic function of national strength, particularly in the military aspect and in

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[74] *Deng Xiaoping Selected Works,* Vol. 3, People's Publishing House, Beijing, 2008, pp. 126-129.
[75] M. Zedong, above note 73, pp. 170-174.
[76] *Ibid* para, pp. 170-174.
[77] *Ibid* para, pp. 170-174.
[78] "China's First Atomic Bomb Exploded successfully", *People's Daily*, October 17, 1964.
[79] *Mao Zedong Selected Works*, Vol. 2, People's Publishing House, Beijing, 1991, p. 590.
[80] Xi Jinping delivered a report to the opening of the 19th National Congress of the Communist Party of China (CPC) on October 18, 2017. "Socialism with Chinese characteristics has entered a new era. The CPC has given shape to the Thought on Socialism with Chinese Characteristics for a New Era, a long-term guide to action that the Party must adhere to and develop. The Thought builds on and further enriches Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, the Theory of Three Represents, and the Scientific Outlook on Development. It represents the latest achievement in adapting Marxism to the Chinese context." Available at:
http://www.chinatoday.com.cn/english/spc/2017-10/18/content_748785.htm#
[81] People's Liberation Army Daily, "The original contribution of Xi Jinping's thought on strong military development", *Ministry of National Defense of the People's Republic of China,* available at: http://www.mod.gov.cn/gfbw/jmsd/4842332.html.

safeguarding national security and international justice, regarding the capability to employ strength as a fundamental support.[82] Second, he developed a pioneering military strategy of active defense, advocating the military strategic policy of the new era characterized by "initiative and proactiveness".[83] He upheld that strategy is based on defense, the essence of which is proactive adherence to justice and the application of countering unjust wars through just wars. Third, he put forward the principle of "not believing in or fearing evil, not causing or fearing trouble, and being prepared to defend against aggression and to counterattack when provoked".[84] This essentially reveals a clear attitude of adhering to just wars, opposing unjust wars, employing war to eliminate war, and defending peace.[85]

In terms of justice, Xi Jinping acknowledges the historical laws recognized by Marxism that justice will prevail, peace will prevail, and the people will prevail,[86] which are in line with the moral law of traditional Chinese ethics emphasizing that "the righteous will receive help, the unrighteous will receive little help".[87] He points out that "[t]hroughout the world history, it will ultimately fail to rely on military force for external aggression and expansion. This is the law of history."[88] He also gives a positive response to the development of contemporary international humanitarian law. In a speech delivered in the Palace of Nations in Geneva in 2017, he pointed out that the "spirit of international humanitarianism established by the Geneva Conventions more than 150 years ago" has become

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[82] Have a profound understanding and grasp of the "ten clear statements", *People's Daily,* available at: http://opinion.people.com.cn/n1/2022/0426/c1003-32408657.html.
[83] Ibid para.
[84] "Speech at the Celebration of the 95th Anniversary of the Founding of the Communist Party of China from Xi Jinping", *Xinhua News Agency,* 1 July 2016, available at: http://www.xinhuanet.com/politics/2016-07/01/c_1119150660.htm.
[85] Chen Dongheng, "Xi Jinping Thought on Strengthening the Military: Enriched and Developed Concept of War of Marxism", *Military History*, No. 1, 2023.
[86] *Xi Jinping: The Governance of China*, Vol. 2, Foreign Languages Press, Beijing, 2017, p. 447.
[87] See Confucianism, Mengzi, Gong Sun Chou II.
"He who finds the proper course has many to assist him. He who loses the proper course has few to assist him."
[88] *Xi Jinping: The Governance of China*, Vol. 1, Foreign Languages Press, Beijing,2014, p. 248.

one of the "recognized principles", and "these principles should be the basic guidelines for building a community with a shared future for mankind."[89]

Thus it can be argued that the humanitarian ethics in contemporary China are based on Marxism, the fundamental guiding thought, while influenced by the concepts of just war in traditional Chinese ethics of warfare law.

## 3. Practice and Development of International Humanitarian Law in Contemporary China under the Background of Traditional Ethics

The outlook on war under traditional ethics prompts contemporary Chinese to embrace the system, spirit, and principles of international humanitarian law with an open mindset, and consider compliance with international humanitarian law as a necessity, which guides China's practice of international humanitarian law on multiple levels.[90] China's Permanent Representative to the UN, Zhang Jun, said in a speech to the UN in 2019 that "China appreciates the ICRC for adhering to the fundamental principles of neutrality, impartiality, and independence, and for its long-standing contribution to the widespread dissemination and effective implementation of the Geneva Conventions and their Additional Protocols."[91] Traditional ethics, combined with the characteristic theories formed by modern China in the development of international humanitarian law, still have practical significance for the implementation and development of China's warfare law theories today.

### 3.1. China's Active Participation in Relevant International Conventions and Legislative Processes

[89] Xinhua News Agency, "President Xi Jinping's Speech at the United Nations Headquarters in Geneva (Full Text), *CPPCC Network,* 19 January 2017, available at: https://www.rmzxb.com.cn/c/2017-01-19/1294301.shtml.
[90] Liang Zhuo, "Ancient Chinese Humanitarianism and its Impacts on Contemporary China's Conception of International Humanitarian Law", *Journal of Mudanjiang College of Education*, No. 6, 2020.
[91] People's Daily Online - International Channel, "Chinese delegate Calls for Implementation of International Humanitarian Law", *People's Daily,* 14 August 2019, available at: http://world.people.com.cn/n1/2019/0814/c1002-31293655.html.

Since China's accession to the First Geneva Convention of 1864 in 1904, it has joined the majority of international humanitarian law treaties and agreements. The current Geneva Conventions include the four basic treaties on international humanitarian law re-signed in Geneva in August 1949: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Geneva Convention relative to the Treatment of Prisoners of War, and the Geneva Convention relative to the Protection of Civilian Persons in Time of War. In 1956, the 50th Session of the Standing Committee of the National People's Congress of China approved these four conventions. In 1978, two Additional Protocols to the four Geneva Conventions came into effect, and China officially joined in 1983. For a long time, among the five permanent members of the United Nations Security Council, China was the earliest and only country to have ratified all four Geneva Conventions and two Additional Protocols. Since these conventions serve as fundamental documents of the law of armed conflicts, they have been highly praised by the international community,[92] including commendation from the former president of the ICRC, Somaruga.[93] Furthermore, China continuously joins other important conventions on armed conflict law.[94]

[92] Institute of Armed Conflict, Xi'an Political Science University, "Research and Practice of Armed Conflict Law in China in the 30 Years of Reform and Opening Up", *Journal of Xi 'an Political Science University*, No. 6, 2008.

[93] Cornelio S., "The Additional Protocols to the Geneva Conventions in search of Universality, *International Review of the Red Cross*, Vol. 69, 1987.

[94] Among them: ratification of the Convention on Certain Conventional Weapons in 1982; accession to the Convention on the Prevention and Punishment of the Crime of Genocide, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, and the two Additional Protocols to the Geneva Conventions in 1983; accession to the Biological and Toxin Weapons Convention in 1984; ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Second and Third Additional Protocols to the South Pacific Nuclear-Weapon-Free Zone Treaty in 1988; ratification of the Seabed Arms Control Treaty in 1991; accession to the Treaty on the Non-Proliferation of Nuclear Weapons in 1992; ratification of the Chemical Weapons Convention in 1997; ratification of the Second and Fourth Protocols to the Convention on Certain Conventional Weapons as amended in 1998; ratification of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict in 2007, etc.

According to statistics, before the reform and opening up[95], China ratified and joined one armed conflict law convention about every three and a half years on average.[96] In the 30 years since the reform and opening up, China has averaged joining one armed conflict law convention in less than one and a half years. This reflects China's full affirmation of the principles and legal system of international humanitarian law.

### 3.2. Active Domestic Legislation in China to Align with International Humanitarian Law Conventions

Firstly, the preamble of the Constitution of China explicitly emphasizes China's positive attitude towards the international order by advocating the "Five Principles of Peaceful Coexistence"[97], which signifies China's commitment to the path of peaceful development and the promotion of building a community with a shared future for mankind. It also articulates China's steadfast opposition to imperialism, hegemonism, and colonialism, the nation's support for oppressed nations and developing countries in their just struggle to fight for and safeguard national independence and develop their national economies, and the efforts to strive for world peace and the progress of humanity. Thus, the Constitution, the fundamental law, expresses contemporary China's philosophy regarding war and peace.

Although the Constitution does not stipulate the domestic validity of international treaties, specific laws have been enacted to ensure the

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[95] Reform and opening-up refer to the series of economic and social reform policies implemented by China since 1978. It is an important historical milestone in China's opening up to the outside world.

[96] "Treaty Status", *Ministry of Foreign Affairs,* available at: https://www.mfa.gov.cn/web/ziliao_674904/tytj_674911/tyfg_674913/index.shtml.

[97] The Preamble to the Constitution of the People's Republic of China stipulates,

"[T]he future of China is closely bound up with the future of the world. China pursues an independent foreign policy, observes the five principles of mutual respect for sovereignty and territorial integrity, mutual nonaggression, mutual noninterference in internal affairs, equality and mutual benefit, and peaceful coexistence, keeps to a path of peaceful development, follows a mutually beneficial strategy of opening up, works to develop diplomatic relations and economic and cultural exchanges with other countries, and promotes the building of a human community with a shared future."

applicability of China's obligations under relevant international treaties on armed conflicts to which China is committed. Article 67 of the National Defense Law of the People's Republic of China, promulgated and implemented in 1997, explicitly states that "The People's Republic of China shall abide by relevant treaties and agreements concluded with foreign countries, or to which it has acceded or accepted, in its external military relations."[98] As a basic law governing national defense and military building, it serves as the fundamental legal basis for China to fulfill its obligations under ratified international conventions.

Secondly, for the prosecution of war crimes, China implements them through existing criminal legislation. Chinese Criminal Law specifies acts that violate the four Geneva Conventions and two Additional Protocols as crimes. In the Articles 446 and 448 of the Criminal Law, specific provisions regarding war crimes stipulate that military personnel who, during military operations, commit acts such as harming innocent civilians in areas of military action, looting their property, and physically abusing, punishing, or insulting enemy captives who no longer resist, shall be punished in serious cases. Moreover, other criminal violations of international humanitarian law can be convicted, sentenced and punished under various provisions of China's Criminal Law, including intentional homicide, intentional injury, rape, intentional destruction of property, intentional damage to cultural relics and historic sites, and destruction of environmental resources protection.[99]

Thirdly, in terms of weapon control, China has developed a comprehensive legal system covering various fields including nuclear, biological, chemical, and missile technologies to prevent proliferation. To implement the provisions of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) domestically, after China's accession to the NPT, the State Council issued the Regulations of the People's Republic of China on the Control of Nuclear Export in September 1997. In 1988, the Chinese government signed the Agreement on the Implementation of Safeguards in China with the International Atomic Energy Agency (IAEA), voluntarily

[98] National Defense Law of the People's Republic of China, Article 67.
[99] Tian Longhai, Chang Xuan, "On the Perfection of Domestic Legislation on Punishing War Crimes", *Journal of Xi'an University of Political Science*, No. 10, 2006.

placing its civilian nuclear facilities under IAEA safeguards. In 1998, the Chinese government also signed the Additional Protocol on Strengthening Safeguards with the IAEA. On March 28, 2002, the Chinese government officially notified the IAEA that China had completed all domestic legal procedures for the entry into force of the Additional Protocol, which came into effect on that day. China was the first of the five nuclear-weapon states to complete the aforementioned procedures, fully demonstrating China's effective implementation of strengthening the safeguards system and its proactive and responsible attitude towards fulfilling non-proliferation obligations.[100] In addition, in response to various arms control treaties to which China has acceded, China has enacted various laws and regulations through domestic legislation, including the Regulations on the Management of Controlled Chemicals of the People's Republic of China, Lists of Controlled Chemicals, Implementing Measures for the Regulations on the Management of Controlled Chemicals of the People's Republic of China, Regulations on the Export Management of Military Items of the People's Republic of China, Regulations on the Export Control of Missiles and Related Items and Technologies of the People's Republic of China, Regulations on the Control of the Export of Dual-Use Biological Items and Related Equipment and Technologies of the People's Republic of China, Regulations on the Control of Export of Chemicals and Related Equipment and Technologies, Interim Measures for the Administration of Licenses for the Export of Sensitive Items and Technologies, Supplementary Protocol on Combating Illicit Manufacturing and Trafficking of Firearms, Their Parts, and Ammunition, etc.

### 3.3. China's Implementation of International Humanitarian Law in International Armed Conflicts

Just as ancient Chinese military ethics emphasized the protection of "innocents" (civilians and prisoners of war) in wartime, China's longstanding military culture has also influenced contemporary practices, responding to the objectives of international humanitarian law. The Chinese People's Liberation Army (formerly known as the Eighth Route Army and the New

[100] Above note 91.

Fourth Army in different historical periods) has experienced international armed conflicts such as the War of Resistance Against Japanese Aggression, the War to Resist US Aggression and Aid North Korea, the Sino-Indian Border Self-Defense Counterattack War, and the Sino-Vietnamese Self-Defense Counterattack War. During the period of the War of Resistance Against Japanese Aggression, an era before the founding of the People's Republic of China, China's treatment of Japanese prisoners of war not only fully complied with the requirements and rules of international humanitarian law but, in some ways, were more favorable to prisoners than international humanitarian law.[101] For example, China developed policies to provide preferential treatment to Japanese prisoners, improved their living conditions,[102] established Japanese worker and peasant schools, supported prisoners in forming anti-war alliances,[103] and implemented the humanitarian repatriation of Japanese civilian internees.[104]

In 1956, after the founding of the People's Republic of China, the Special Military Court of the Supreme People's Court of China conducted trials against Japanese war criminals for their crimes committed during the war of aggression against China in accordance with the *Decision on the Handling of the Criminals in Custody from the Japanese War of Aggression against China*. As noted by Mei Ruao, a Chinese international law expert and former judge of the International Military Tribunal for the Far East, "[S]uch trial procedures fully comply with international norms and legal principles, which are imbued with humanitarian spirit while meeting the demands of legal justice. Such lenient treatment reflects the great magnanimity and profound humanitarian spirit of the Chinese people. Only the victorious Chinese people could have the courage to undertake such an unprecedented action."[105]

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[101] Meng Fanming, "On the Practice of International Humanitarian Law in China," Ph.D. dissertation, China University of Political Science and Law, March 2011.

[102] "The benevolent division of the Japanese prisoners of war: Japan soldiers are not the real enemies of our army", *China News,* 16 August 2010, available at: https://www.chinanews.com.cn/cul/2010/08-16/2470504.shtml.

[103] Zhao Anbo, "From Prisoner of War to Anti-Aggression Fighter--Recalling the Yan'an Japanese Workers and Peasants School", *Scientific and Technological Essays*, No. 10, 1995.

[104] Liu Guowu, "Repatriation of Japanese Prisoners and Overseas Chinese in Postwar China", *Seeker*, No. 5, 1999.

[105] *People's Daily*, 23 June 23 1956.

In the subsequent wars after the founding of the People's Republic of China, China strictly adhered to the rules of international humanitarian law regarding the treatment of prisoners of war, and in certain aspects, could be considered as an exemplar of international humanitarian law. For instance, during the war to resist US aggression and aid North Korea, China implemented the policy of "lenient treatment of prisoners";[106] and after the border conflicts with India, it adopted a policy of repatriating all Indian prisoners.[107] After the Sino-Indian War, the Chinese military voluntarily returned a large number of captured weapons, vehicles, and military supplies to India, setting a precedent worldwide for a victorious army to voluntarily cease fire, withdraw, return captured materials, and repatriate prisoners.[108]

### 3.4. Reflection on Relevance of Traditional Ethics of Chinese Humanitarian Law

Humanitarian law, as a value consensus, indeed exists in different forms of acceptance in practice. These differences stem from various factors, such as ethical value systems, religion, history and experience, politics and economics, legal systems, etc., and have a profound impact on the implementation effect, international cooperation, and the development of humanitarian law itself. Therefore, in promoting the global acceptance and implementation of humanitarian law, it is necessary to fully consider these differences and seek consensus and compromise to ensure that humanitarian law can play its due role in protecting people.

The law of war is a common reaction to the horrors of warfare. The importance lies in how to connect the values in humanitarian law with the traditional values and ethics of the state itself. But our ultimate goal has

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[106] *Political Work of the Chinese People's Liberation Army in the War of Resistance Against the United States and Aid Korea*, People's Liberation Army of China Publishing House press, 1985, p. 139.
[107] "Statement by Spokesman of the Ministry of National Defense on the Completion of the Release and Repatriation of All the Indian Military Prisoners", *Bulletin of the State Council of the People's Republic of China*, No. 7, 1963, p. 137, available at: https://www.gov.cn/gongbao/shuju/1963/gwyb196307.pdf.
[108] Wang Zhongxing, "The Sino-Indian Border Conflict in the 1960s and the Self-defense Counterattack of Chinese Border Forces", *Contemporary Chinese History Research*, No. 5, 1997.

always been to accept international humanitarian law as a common norm. The goal of traditional ethics corresponds to the values that are understood today as "humanitarian".

As discussed, China has a long-standing traditional culture of humanitarian ethics dating back to ancient times. The traditional Chinese approach to warfare emphasizes the morally guided concepts of "just purpose", "just war" and "the army of benevolence and righteousness"[109], which are rooted in traditional Chinese ethics. With the modernization of warfare law, countries have gradually accepted a global war governance mechanism that emphasizes the "just means" of warfare. After the introduction of international humanitarian law into China, China has consistently emphasized the implementation and compliance with international humanitarian law in the armed conflicts it has experienced, and has continuously joined various related conventions, and taken many representative actions (See Sections 3.2 and 3.3 for details).

After experiencing two World Wars and numerous regional conflicts, nations have reached an unprecedented consensus on the value of warfare governance. However, with the advancement of science and technology and the evolution of the forms of warfare, information-driven and intelligence-based wars continue to emerge, posing challenges to the theoretical framework of modern warfare law. It is worth contemplating whether, by disregarding moral assessments of the purpose of war and only seeking to regulate wartime conduct to realize humanitarian values, one can genuinely mitigate the perils of warfare. No human behavior can be presumed inherently immoral. Can social philosophy, without referring to ultimate goals, lead the way? Can people's conduct be shaped by norms alone?

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[109] See Confucianism, Mengzi, Liang Hui Wang II.
"Mencius replied, 'I have heard of one who with seventy li exercised all the functions of government throughout the kingdom. That was Tang. I have never heard of a prince with a thousand li standing in fear of others. Thus, the people looked to him, as we look in a time of great drought to the clouds and rainbows. The frequenters of the markets stopped not. The husbandmen made no change in their operations. While he punished their rulers, he consoled the people. His progress was like the falling of opportune rain, and the people were delighted. It is said again in the Book of History, 'We have waited for our prince long; the prince's coming will be our reviving!'"

Although the codified IHL is related to the provisions of *jus in bello*, the ethics of the law should have a wider extension, and the ethics of the law can be complementary to the written law. The implementation of IHL is closely related to the achievement of peace. As in the "75th Anniversary of Geneva Conventions reaffirms relevance, calls for States to recommit" campaign, Jurg Bürri, Swiss Ambassador to China, said: "If we look around the world today, 75 years later, we note that we are still far from achieving the goal of ending the pains of armed conflict. However, this should not lead us to accept war as inevitable. We should still condemn war as a means prohibited by the UN Charter. And even more importantly, it should not make us give up on the commitment to 'humanize war' and lessen the misery it causes."[110]

People's reverence for the law stems not only from its standards of behavior but also from the acknowledgment of the moral and ethical values behind it. We should endow contemporary significance to the traditional Chinese ethical values of "benevolence, righteousness, and propriety". The ancient ethical framework of warfare law, guided by "righteousness of purpose", based on moral values, and founded over thousands of years ago, may bring some insights into contemporary international humanitarian law.

[110] "75th Anniversary of Geneva Conventions reaffirms relevance, calls for States to recommit", *International Committee of the Red Cross,* 14 August 2024, available at: https://www.icrc.org/en/article/75th-anniversary-geneva-conventions-reaffirms-relevance-calls-states-recommit.

# Modern Interpretations of International Humanitarian Law's Martens Clause: Opening the Door to Strategies to Better Protect the Environment and Indigenous Peoples During Armed Conflict

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International humanitarian law falls short in protecting the environment and vulnerable persons, namely Indigenous Peoples, during armed conflicts under the Geneva Conventions. Indigenous Peoples disproportionately experience the impacts given their connection to ancestral lands including in Myanmar and Colombia. However, modern interpretations of the field's Martens clause used to "other" Indigenous Peoples, can per "the principles of humanity", open the door to Indigenous knowledge and international environmental law, international human rights law and international criminal law principles. The result being a holistic, less colonial and anthropocentric international humanitarian law better protecting the environment and Indigenous Peoples during armed conflicts.

***Keywords*:** Coordination of international humanitarian law; the Martens clause, modern interpretations; better protection of the environment and vulnerable persons; Indigenous Peoples; protected zones; peace parks;

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Shontelle has a strong interest in legal issues related to the environment, climate change, human rights and modern conflicts. Shontelle is interested in the interconnections between these areas and finding ways forward that can better protect the environment and Indigenous Peoples during armed conflicts. Shontelle sees the value of intersectional anti-racist, indigenous and postcolonial theories of justice, as essential in addressing underlying colonial biases in international humanitarian law, to make room for Indigenous Peoples and their distinct ways of operating in the world which are intrinsically tied to ancestral lands.

Salween Peace Park; Special Jurisdiction of Peace; integration of international environmental law, international human rights law and international criminal law principles with international humanitarian law; decoloniality.

## I. Introduction

International humanitarian law is falling short in protecting the environment and vulnerable populations, particularly Indigenous Peoples who disproportionately experience armed conflicts' impacts given their connection to the land.[1] The general understanding is "gaps and opportunities" exist in international humanitarian law to do better for these groups,[2] particularly given only two provisions in Articles 35(3) and 55(1) of Additional Protocol I 1977 to the Geneva Conventions[3] protect the environment during international armed conflicts.[4] No direct provisions upholding the environment or Indigenous interests exist in common Article 3 and Additional Protocol II 1977 to the Geneva Conventions,[5] applicable to non-international armed conflicts which are the most common form of warfare today.[6]

This Article therefore argues international humanitarian law can better protect these groups via its Martens clause,[7] to open the door to apply

[1] Michael Bothe et al., "International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities", *International Review of the Red Cross*, Vol. 92, No. 879, 2010.
[2] *Ibid,* p. 569.
[3] Protocol Additional 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 1977 to the Geneva Conventions).
[4] M. Bothe, above note 1, pp. 575–9.
[5] Protocol 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 7 December 1978) (Additional Protocol II 1977 to the Geneva Conventions); M. Bothe, above note 1.
[6] Bruno Demeyere et al., "The Updated ICRC Commentary on the Second Geneva Convention: Demystifying the Law of Armed Conflict at Sea", *International Review of the Red Cross*, Vol. 98, No. 902, p. 407.
[7] Convention Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 187 CTS 227 (18 October 1907),

principles and legal avenues from international environmental law, international human rights law and international criminal law.[8] This coordinated approach is needed given international humanitarian law's colonial and anthropocentric origins have regarded the protection of European civilian life as most important.[9] The Article recognises the Martens clause was originally applied to exclude Indigenous Peoples from its universal protection,[10] therefore constituting an "othering" process in which such persons have been ignored and viewed as separate from the field's ambit.[11] However, modern intersectional interpretations of its "principles of humanity" and "dictates of public conscience", applying perspectives from anti-racist, indigenous and postcolonial theories of justice, offer a key means to garner a fuller understanding of how international humanitarian law has operated to perpetuate injustices against the environment and Indigenous Peoples.[12] These intersectional interpretations, which pay attention to those often relegated to the edge of international humanitarian law, can provide visibility and tackle the nuances of colonialism, patriarchy, racism and whiteness that shaped international humanitarian law's beginnings,[13] the

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preambular para. 8 (Hague Convention IV or Martens clause); see also Additional Protocol I 1977 to the Geneva Conventions, above note 3, Art. 1(2) and Additional Protocol II 1977 to the Geneva Conventions, above n 5, preambular para. 4 (Martens clause).

[8] Marja Lehto, "Overcoming the Disconnect: Environmental Protection and Armed Conflicts", *Blog of the International Committee of the Red Cross,* 27 May 2021, available at: https://blogs.icrc.org/law-and-policy/2021/05/27/overcoming-disconnect-environmental-protection-armed-conflicts/ (all internet references were accessed on 27 March 2024); Raphaël van Steenberghe, "International Environmental Law as a Means for Enhancing the Protection of the Environment in Warfare: A Critical Assessment of Scholarly Theoretical Frameworks", *International Review of the Red Cross*, 2023.

[9] *Ibid.*

[10] Martens clause, above note 7.

[11] Frédéric Mégret, "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Law's 'Other'", in Anne Orford (ed.), *International Law and Its Others*, Cambridge University Press, 2006, p. 265.

[12] Martens clause, above note 7; Benjamin Sovacool et al., "Pluralizing Energy Justice: Incorporating Feminist, Anti-Racist, Indigenous and Postcolonial Perspectives", *Energy Research & Social Science*, Vol. 1, 2023, pp. 6–7; Dieter Fleck, "The Martens Clause and Environmental Protection in Relation to Armed Conflicts", *Goettingen Journal of International Law*, Vol. 10, No. 1, 2020; Antonio Cassese, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?", *European Journal of International Law*, Vol. 11, No. 1, 2000.

[13] B. Sovacool, above note 12, p. 5.

result being a holistic, less anthropocentric and colonial international humanitarian law that better protects Indigenous Peoples and the environment in armed conflicts.

Part II begins with a critical analysis on the environment "as a 'silent victim'" of armed conflict, given the environment is valued for its strategic importance during armed conflicts, but the consequent effects from warfare are often irremediable and completely overlooked.[14] This Part also explores the colonialism of armed conflicts, providing examples from Myanmar and Colombia, where Indigenous Peoples disproportionately experienced its impacts given their connection to ancestral lands, and contrary to rights to self-determination. Part III explores how international humanitarian law has insufficient legal provisions in protecting the environment and Indigenous Peoples, and how its Martens clause (via modern intersectional perspectives) can open the field to other areas of law to better protect these groups.[15] Part IV looks forward, analysing how the International Law Commission Draft Principles on the Protection of the Environment in Armed Conflict designating protected zones,[16] and the International Committee of the Red Cross Revised Guidelines providing heightened environmental protection, can assist.[17] This Part also analyses developments in international environmental law (for instance, the precautionary principle), international human rights law (the right to a clean, healthy and sustainable environment

[14] Vincent Chapaux, Frédéric Mégret and Usha Natarajan, *The Routledge Handbook of International Law and Anthropocentrism,* Routledge, Oxon, 2023, p. 137; Filfteia Repez and Mirela Atanasiu, "The Environment – A "Silent Victim" of Armed Conflicts", *Relationes Internationales*, Vol. 12, No. 2, 2019, p. 123 and 127; Ricardo Pereira, Britta Sjöstedt and Torsten Krause, *The Environment and Indigenous People in the Context of the Armed Conflict and the Peacebuilding Process in Colombia: Implications for the Special Jurisdiction for Peace and International Criminal Justice*, German-Colombian Peace Institute and Centre for the Study of Latin American Criminal Law and Criminal Procedure Policy Brief, April 2021, p. 6.

[15] Martens clause, above note 7; M. Bothe, above note 1, pp. 575–9.

[16] International Law Commission, Draft Principles on Protection of the Environment in Relation to Armed Conflicts, UN Doc. A/74/10, 9 August 2022.

[17] International Committee of the Red Cross, Guidelines on the Protection of the Natural Environment in Armed Conflict, 25 September 2020 (International Committee of the Red Cross Revised Guidelines).

including ecocentric and anthropocentric elements)[18] and international criminal law (i.e. increased avenues for environmental prosecution), as well as political avenues, which can help coordinate international humanitarian law to better protect the environment and Indigenous Peoples during armed conflict.[19]

## II. Setting the Scene: A Critical Background Analysis of the Disproportionate Impacts the Environment and Indigenous Peoples Experience During Armed Conflicts

The intention of this section is to provide background analysis on how the environment has long been "a silent victim" of armed conflict (section A),[20] including the disproportionate impacts on Indigenous Peoples given their connection to the land and the colonial power imbalances that exist (section B). This is in the context that these two groups have long been overlooked in international humanitarian law, owing to its colonial origins, and are still today, meaning that increased protection and inclusion of both groups is still very much needed.

### A. The Environmental Impacts of Armed Conflict Underscore the Need for Increased Protection

The environment has long suffered from armed conflict, remaining "a silent casualty" of modern warfare, with the consequences affecting its health and civilian populations' wellbeing, thereby underscoring the need for increased environmental protection.[21] International humanitarian law recognises "under the principle of distinction…the environment is a civilian object" deserving of protection[22] from indiscriminate attacks until used for military

[18] UNGA Res. 76/300, 28 July 2022 (The Human Right to a Clean, Healthy and Sustainable Environment); UN HRC Res. 48/13, 8 October 2021 (The Human Right to a Clean, Healthy and Sustainable Environment);
[19] M. Lehto, above note 8.
[20] V. Chapaux, F. Repez and R. Pereira, above note 14.
[21] *Ibid*; International Committee of the Red Cross Revised Guidelines, above note 17, p. 4.
[22] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Arts. 48 and 52; Tara Smith, *The Prohibition of Environmental Damage During the Conflict of Hostilities in Non-International Armed Conflict*, PhD Thesis, University of Galway, 2013, p. 88.

objectives.[23] Military objectives per Article 52(2) Additional Protocol I 1977 to the Geneva Conventions are "*those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage*".[24] An example of targeting the environment as a military objective includes the US' deployment of Agent Orange during the Vietnam War to defoliate trees opposition forces were hiding within.[25] The devastating environmental and local health impacts (including higher cancer incidence amongst veterans and birth defects in subsequent generations) illustrate the need for the environment's protection, alongside protecting civilian lives.[26]

Many instances exist where the environment has suffered disproportionately in breach of international humanitarian law principles of necessity,[27] proportionality[28] and precautions in and against the effects of attacks,[29] reinforcing the need for environmental protection.[30] Necessity recognises military actions must serve a military purpose designed "to weaken the enemy" and "achieve their surrender",[31] with proportionality prohibiting actions causing "'collateral damage'…excessive in relation to the anticipated

[23] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Art. 51(4).
[24] *Ibid,* Art. 52(2) (emphasis added).
[25] Eliana Cusato, "From Ecocide to Voluntary Remediation Projects: Legal Responses to 'Environmental Warfare'", *Melbourne Journal of International Law*, Vol. 19, No. 2, 2018; Rigmor Argren, "The Obligation to Prevent Environmental Harm in Relation to Armed Conflict", *International Review of the Red Cross* Vol. 105, No. 924, 2023, p. 1209.
[26] Pamela King, *The Use of Agent Orange in the Vietnam Ware and its Effects on the Vietnamese People*, Master's Thesis, Georgetown University, 2010, p. 24.
[27] Hague Convention IV, above note 7, Art. 23(g); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, 12 August 1949 (entered into force 21 October 1950), Art. 53 (Geneva Convention IV); US Military Tribunal Nuremberg, *United States v List*, Case No 11 TWC 757, Trial Judgment, 19 February 1948, pp. 1253–5.
[28] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Art. 51(5)(b).
[29] *Ibid,* Arts. 57–8.
[30] Emily Crawford and Alison Pert, *International Humanitarian Law*, Oxford University Press, 4th ed, Cambridge, 2021, pp. 43–51.
[31] *Ibid,* p. 46.

direct military advantage".[32] Precautions in attack is focused on "all feasible precautions in the choice of means and methods of attack" to avoid/minimise incidental loss, injury and damage to civilians and civilian objects, with precautions against the effects of attacks focused on "other necessary precautions to protect the civilian population, individual civilians and civilian objects…against the dangers resulting from military operations".[33] Despite these principles, experts argue Iraq's "dumping of up to four million barrels of crude oil into the Persian Gulf" preventing US forces landing on the Kuwait beach during the 1990–91 Gulf War was disproportionate.[34] Other violations include Russia's targeting of civilian water infrastructure and nuclear facilities during the Russia-Ukraine conflict,[35] prohibited in international humanitarian law,[36] and in breach of precautions in attack.[37]

Accordingly, the environment remains "a silent victim" of armed conflict with international humanitarian law protection being insufficient.[38] While international humanitarian law principles protect the environment as a civilian object,[39] States justify collateral environmental damage as necessary

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[32] United Nations Environment Programme, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, 30 October 2009, p. 13.

[33] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Arts. 57–8.

[34] *Ibid*; Steven Freeland, *Addressing the Intentional Destruction of the Environment During Warfare Under the Rome Statute of the International Criminal Court*, PhD Thesis, Maastrict University, 2015, pp. 20–1; Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, Cambridge University Press, 4th ed, Cambridge, 2022, pp. 176 and 191.

[35] Mark Hibbs, "What Comes After Russia's Attack on a Ukrainian Nuclear Power Station?", *Carnegie Endowment for International Peace*, 17 March 2022, available at: https://carnegieendowment.org/2022/03/17/what-comes-after-russia-s-attack-on-ukrainian-nuclear-power-station-pub-86667; "The Multiple Impacts of War", *Nature Sustainability*, Vol. 6, No. 5, 2023, p. 479; Aaron Dumont, "A 'Clear' War Crime Against the Environment? The Destruction of the Nova Kakhovka Dam", *Völkerrechtsblog: International Law & Legal Thought*, 28 July 2023, available at: https://voelkerrechtsblog.org/a-clear-war-crime-against-the-environment/.

[36] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Art. 56(1); Additional Protocol II 1977 to the Geneva Conventions, above note 5, Art. 15.

[37] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Arts. 54 and 57–8.

[38] V. Chapaux, F. Repez and R. Pereira, above note 14.

[39] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Art. 52; Matthew Gillett, 'Criminalizing Reprisals Against the Natural Environment' *International Review of the Red Cross*, 2023, p. 2.

and proportionate to its military objective.[40] The precautionary principle of international environmental law (see Part IV) can help militaries understand their environmental obligations under these international humanitarian law principles.[41] International humanitarian law protection is justifiably focussed on civilians. However, international humanitarian law needs to further environmental protection per se, or from Indigenous perspectives, as a brother/sister protected in their own right.[42] This holistic understanding could better protect the environment, which is essential as Indigenous Peoples disproportionately experience armed conflict given their connection to ancestral lands.[43]

### B. The Colonialism of Armed Conflicts: Indigenous Peoples Disproportionately Experience the Impacts Given Their Inherent Connection to the Land

Indigenous Peoples' connection to the land sees them disproportionately experience armed conflict, impacting their identities as self-determining peoples to reinforce colonial inequities.[44] Influential scholar Mégret underscores the colonial genesis of international humanitarian law (discussed further in Part III) in which although the field seemingly provided protection for all civilian life, Indigenous Peoples and non-European peoples were excluded from such protection, therefore constituting an "othering" process

[40] Hague Convention IV, above note 7, Art 23(g); Additional Protocol I 1977 to the Geneva Conventions, above note 3, Art. 51(5)(b); Ilias Plakokefalos, "Reparation for Environmental Damage in *Jus Post Bellum:* The Problem of Shared Responsibility", in Carsten Stahn, Jens Iverson and Jennifer Easterday (eds.), *Environmental Protection and Transitions from Conflict to Peace*, Oxford University Press, Oxford, 2017, p. 260.

[41] Karen Hulme, "Using International Environmental Law to Enhance Biodiversity and Nature Conservation During Armed Conflict", *Journal of International Criminal Justice*, Vol. 20, No. 5, 2022, p. 1162.

[42] Brian Burkhart, *Indigenizing Philosophy Through the Land: A Trickster Methodology for Decolonizing Environmental Ethics and Indigenous Futures*, Michigan State University Press, Michigan, 2019, p. 69; Winona La Duke, *All Our Relations: Native Struggles for Land and Life*, South End Press, Chicago, 1999, pp. 167–196.

[43] *Ibid;* Anne Dienelt, *Armed Conflicts and the Environment: Complementing the Laws of Armed Conflict with Human Rights Law and International Environmental Law*, Springer, 2022, p. 15.

[44] *State of the World's Indigenous Peoples,* Press Release, 14 January 2010.

that reinforced their supposed inferiority to European peoples.[45] Given the continued lack of protection for Indigenous Peoples during armed conflicts, including their special/inherent relationship with ancestral lands as "fundamental" to "their collective physical and cultural survival as peoples",[46] and "specific way of being, seeing and acting in the world", this colonialism exists in international humanitarian law and needs to be addressed.[47]

In this respect, international human rights law which applies alongside international humanitarian law could provide an essential mechanism (discussed in Part IV) to uphold Indigenous Peoples' connection to their lands, cultures and self-determination as distinct peoples during armed conflicts.[48] The United Nations Declaration on the Rights of Indigenous Peoples recognises Indigenous Peoples' right to self-determination and internal autonomy.[49] It is the overarching right to which other rights relate, including protection of Indigenous lands, resources and conservation.[50] The United Nations Declaration on the Rights of Indigenous Peoples prohibits Indigenous Peoples' forced displacement,[51] with no military activities to occur on their lands "unless justified by a relevant public interest or" where

[45] F. Mégret, above note 11.

[46] International Law Commission, Report of the International Law Commission, UN Doc. A/74/10, 29 April–7 June and 8 July–9 August 2019) 225; Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Case Series C No. 79, Judgment, 31 August 2001, pp. 24–5; Kealeboga Bojosi, "The African Commission Working Group of Experts on the Rights of Indigenous Communities/Populations: Some Reflections on its Works So Far", in Solomon Dersso (ed.), *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa*, Pretoria University Law Press, Cape Town, 2010, p. 126.

[47] Inter-American Court of Human Rights, *Río Negro Massacres v Guatemala*, Case Series C No. 250, Judgment, 4 September 2012), footnote 266 on p. 67, para. 177 referring to Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v Paraguay*, Case Series C No. 125, Judgment, 17 June 2005, p. 76, para. 135.

[48] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*; United Nations Human Rights Office of the High Commissioner, *International Legal Protection of Human Rights in Armed Conflict,* Working Paper No HR/PUB/11/01, 2011.

[49] *United Nations Declaration on the Rights of Indigenous Peoples,* UNGA Res. 61/ 295, 2 October 2007.

[50] *Ibid,* Arts. 8, 10, 25–30 and 32.

[51] *Ibid,* Art. 10.

requested or consented by Indigenous Peoples.[52] Similarly, the International Covenant on Civil and Political Rights,[53] and International Covenant on Economic and Social Rights[54] which recognise the right to life[55] and right of minorities to culture,[56] further Indigenous rights to counter colonial inequities armed conflicts perpetuate.

However, armed conflicts still violate Indigenous rights to ancestral lands, life, and self-determination, "othering" such persons by failing to consider their lands worthy of protection, or often, by dehumanising Indigenous Peoples.[57] For instance, during Myanmar and Colombia's non-international armed conflict, Indigenous Peoples' experienced marginalisation given their biodiverse lands were targeted for resources.[58] In Myanmar, the military overthrew the elected civilian government in 2021, returning the country to an authoritarian State which has experienced conflicts since its independence in 1948.[59] The military continued its resource extraction including seizing lands of Indigenous Peoples living in rural areas at the country's borders who seek self-determination,[60] and also engaging in deforestation, mining and wildlife trade to impact Indigenous rights to life, privacy, health and culture, including access to water, food and housing to reinforce inequities.[61]

The military's grabbing of resources such as "timber, jade, and rare earth minerals" during a protracted non-international armed conflict has also

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[52] *Ibid,* Art. 30(1).

[53] International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976).

[54] International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 16 December 1966 (entered into force 3 January 1976).

[55] International Covenant on Civil and Political Rights, above note 53, Art. 6.

[56] International Covenant on Economic, Social and Cultural Rights, above note 54, Art. 27.

[57] F. Mégret, above note 11.

[58] Jonathon Liljeblad, *Intersections of Ecocide, Indigenous Struggle, & Pro-Democracy Conflict: Implications of Post-Coup Myanmar for Ecocide Discourses*, UCLA School of Law Symposium Paper, 2023, pp. 2–3 and R. Pereira, above note 14, p. 3.

[59] J. Liljeblad, above note 58, pp. 2 and 8.

[60] *Ibid,* pp. 2–3 and 8.

[61] *Ibid,* p. 10.

increased the vulnerabilities of Myanmar's Indigenous Peoples to the triple planetary crisis of climate change, pollution and biodiversity loss which international humanitarian law must consider.[62] Given Myanmar's Indigenous population "have served as custodians of the environment for centuries", resource extraction disproportionately impacts and erodes their way of life.[63] It also increases their vulnerability to further conflict, given environmental degradation from armed conflicts and the impacts from the triple planetary crisis of climate change, pollution and biodiversity loss, often furthers such conflicts, therefore underscoring the interconnected and colonial nature of these issues which international humanitarian law needs to address.[64]

Similarly, Colombia has experienced decades of conflict, with its civil war commencing in 1964 resulting in Indigenous Peoples' marginalisation from their lands to underscore the colonialism of armed conflict and the need for Indigenous Peoples' further protection in international humanitarian law.[65] Prior to the Government's 2016 "peace agreement with the Revolutionary Armed Forces of Colombia – People's Army" (FARC-EP),[66] more than three million people were displaced.[67] Its Constitutional Court recognised thirty-four Indigenous groups were at risk with Nukak Maku being close to extinction.[68] The non-international armed conflict involved violence between the State and guerrillas, between the guerrillas themselves (i.e.,

[62] "Military Coup Has Exacerbated Already Severe Climate Risks in Myanmar: UN Experts", *United Nations Human Rights Office of the High Commissioner*, 27 November 2023, available at: https://www.ohchr.org/en/press-releases/2023/11/military-coup-has-exacerbated-already-severe-climate-risks-myanmar-un.

[63] *Ibid.*

[64] Geneva Academy, *Environmental Human Rights as a Tool in Early Warning and Conflict Prevention: The Role of the Human Rights Council*, Research Brief, 29 January 2024.

[65] Chris Kraul, "The Battles Began in 1964: Here's a Look at Colombia's War with the FARC Rebels", *Los Angeles Times*, 30 August 2016, available at: https://www.latimes.com/world/mexico-americas/la-fg-colombia-farc-explainer-snap-story.html.

[66] *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*, Colombia–FARC-EP (24 November 2016); R. Pereira, above note 14, p. 3.

[67] United Nations High Commissioner for Refugees, *'To Lose Our Land is to Lose Ourself': Indigenous People and Forced Displacement in Colombia*, Policy Brief, 4 March 2010, p. 2.

[68] *Ibid.*

FARC-EP and the National Liberation Army (ELN)) and targeting of civilians.[69] Indigenous Peoples experienced brutal violence, including inhumane killing and burning of children, elders and community members engaging in social protest of ancestral lands.[70]

Resource extraction in Colombia also saw Indigenous Peoples experience disproportionate violations of the human right to the enjoyment of the highest attainable standard of physical and mental health,[71] the right to life,[72] and not to be subject to torture or cruel, inhuman and degrading treatment,[73] including clear violations of international humanitarian law and international criminal law.[74] For instance, guerrillas used Indigenous lands for illegal coca plantations to produce cocaine which the state sought to eradicate "via aerial fumigation with glyphosate herbicide" but which resulted in further "environmental degradation of native ecosystems and non-coca crops".[75] Gold mining also resulted in mercury pollution of rivers, such as the Amazon, and contaminated fish which is the staple food of Colombia's Indigenous Peoples.[76] The targeting of oil infrastructure saw "more than 3 million barrels of crude oil seeping into Colombian soils and rivers",[77] with the resulting environmental destruction eroding Indigenous cultural ways of life, constituting genocide and, some contend, ecocide (but the latter is yet to be recognised as a crime in international criminal law).[78] Colombia's Indigenous Peoples, particularly children, were recruited into illegal armed groups contrary to their rights, including autonomy and self-determination, highlighting the need for their protection in international humanitarian law.[79]

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[69] R. Pereira, above note 14, p. 4.

[70] David Goyes et al., "Genocide and Ecocide In Four Colombian Indigenous Communities: The Erosion of a Way of Life and Memory", *British Journal of Criminology*, Vol. 61, 2021, pp. 971–4.

[71] International Covenant on Economic, Social and Cultural Rights, above note 54, Art. 12.

[72] International Covenant on Civil and Political Rights, above note 53, Art. 6.

[73] *Ibid,* Art. 7.

[74] R. Pereira, above note 14.

[75] *Ibid* p. 4.

[76] *Ibid.*

[77] *Ibid.*

[78] *Ibid,* p. 3.

[79] *Ibid,* p. 4.

Consequently, if international humanitarian law is to better protect Indigenous Peoples, it must recognise armed conflict and its environmental degradation disproportionately impacts Indigenous Peoples, furthering colonial harms given their connection to the land. To rectify the situation, international humanitarian law should be interpreted "in light of" international human rights law,[80] given recent decisions recognise these bodies are "fused", including applying international environmental law principles.[81] This approach can uphold Indigenous self-determining rights, including the right to a clean, healthy and sustainable environment, which is important given the interconnected impacts of armed conflict and the triple planetary crisis, to better protect Indigenous Peoples and the environment during modern conflicts.[82]

## III. The Inadequacy and Opportunities in International Humanitarian Law to Better Protect the Environment and Indigenous Peoples

Before providing pathways forward, this Part analyses how international humanitarian law has long fallen short in protecting the environment and Indigenous Peoples. The first section analyses conventions available in international humanitarian law to illustrate few provisions explicitly protect the environment and Indigenous Peoples (section A).[83] The second section exposes international humanitarian law's core problem – that is, it has "othered" and excluded Indigenous Peoples and the environment from its protection via the Martens clause on the standard of "humanity" which upheld European notions of civilisation and who was deserving of protection.[84] Still, modern interpretations of the Martens clause can open the door to international environmental law, international human rights law, international criminal law and Indigenous knowledge to coordinate

[80] R. Steenberghe, above note 8, p. 15.
[81] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v Kunarac*, Case Nos IT-96-23-T and IT-96-23/1-T, Judgment (Trial Chamber II), 22 February 2001); K. Hulme, above note 40, p. 1162.
[82] R. Pereira, above note 14, p. 14.
[83] M. Bothe, above note 1, pp. 570 and 575–9.
[84] Martens clause, above note 7; F. Mégret, above note 11, pp.1–3.

international humanitarian law, and to better protect Indigenous Peoples and the environment during armed conflicts (section B).[85]

A. Few International Humanitarian Law Conventions Protect the Environment and Indigenous Peoples' Interests[86]

As noted in Part II, many armed conflicts result in environmental destruction, but unfortunately few conventions in international humanitarian law provide protection for the environment or Indigenous Peoples' interests.[87] Following the Vietnam War, the Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques of 1976 (ENMOD) was adopted.[88] The US military used the environmental modification technique of cloud-seeding during Operation Popeye to increase rainfall during the monsoon season in Vietnam "to destabilise the enemy" and help it "to win the war".[89] ENMOD has consequently prohibited "environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party".[90] While the alternative requirement of "widespread, long-lasting *or* severe", imposes a lower standard of harm, ENMOD proscribes "the environment [being turned] into a 'weapon'".[91] ENMOD therefore prohibits techniques provoking

[85] Martens clause, above note 7; D. Fleck and A. Cassese, above note 12; M. Lehto, above note 8.
[86] M. Bothe, above note 1, pp. 570–5.
[87] *Ibid.*
[88] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1108 UNTS 151, 10 December 1976 (entered into force 5 October 1978) (ENMOD).
[89] "274. Memorandum From the Deputy Under Secretary of State for Political Affairs (Kohler) to Secretary of State Rusk", *Office of the Historian: United States of America Department of State*, available at: https://history.state.gov/historicaldocuments/frus1964-68v28/d274; Eleanor Cummins, "With Operation Popeye, the U.S. Government Made Weather an Instrument of War", *Popular Science*, 20 March 2018, available at: https://www.popsci.com/operation-popeye-government-weather-vietnam-war/.
[90] ENMOD, above note 88, Art. 1.
[91] *Ibid; Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, above note 31, p. 12; A. Dienelt, above note 43, p. 150.

earthquakes and tsunamis, providing the environment some protection, but not explicit protection per se.[92]

In contrast, Additional Protocol I 1977 to the Geneva Conventions contains two environmental provisions (applicable during international armed conflicts), but with limited utility to protect the environment and Indigenous lands given its high threshold of harm.[93] Under Article 35(3) "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment" are prohibited.[94] Article 55(1) details "[c]are shall be taken in warfare to protect the natural environment" from this level of damage, proscribing "methods or means of warfare which are intended or may be expected to cause" environmental damage "prejudic[ing] the health or survival of the population".[95] Only Article 35(3) protects the environment per se, with Article 55(1) incorporating anthropocentric concerns, and the triple cumulative standard "of widespread, long-term and severe damage" in Article 35(3), imposing "a threshold of harm" too high to meet in conventional warfare.[96] The environment and lands to which Indigenous identities are tied therefore remain under-protected in international humanitarian law.

Similarly, the Convention on Prohibitions or Restrictions on the Use of Certain Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects and its Protocol III of 1980, provides insufficient protection of the environment and Indigenous Peoples as it imposes the same standard of harm.[97] The Convention's preamble proscribes "methods or means of warfare…intended, or may be expected to cause widespread, long-

[92] ENMOD, above note 88.
[93] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Arts. 35(3) and 55(1).
[94] *Ibid,* Art. 35(3).
[95] *Ibid,* Art. 55(1); R. Argren, above note 25, p. 7; Michael Schmitt, *Essays on Law and War at the Fault Lines*, Springer, The Hague, 2012, p. 375.
[96]Additional Protocol I 1977 to the Geneva Conventions, above note 3; *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, above note 31, p. 11; M. Bothe, above note 1, pp. 575–6; R. Argren, above note 25, p. 7.
[97] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1342 UNTS 137, 10 October 1980 (entered into force 2 December 1983).

term and severe damage to the natural environment".[98] An amendment extends this Convention to apply to non-international armed conflicts, with Article 2(4) Protocol III of 1980 prohibiting incendiary weapon use against forests or plants (except where they constitute military objectives).[99] However, the cumulative threshold means it falls short of providing adequate environmental protection during armed conflicts.[100]

Accordingly, international humanitarian law conventions provide limited protection of the environment and Indigenous Peoples' interests. No direct environmental protections exist in Additional Protocol II 1977 to the Geneva Conventions, applicable during non-international armed conflicts, the most common form of warfare which impacts Indigenous Peoples disproportionately.[101] While customary international humanitarian law furthers principles of distinction, proportionality, and precautions in and against the effects of attacks, greater protection of these groups is needed.[102] This limited protection of the environment could be attributed to the late attention provided in international environmental law to recognise the causal link between humans and environmental degradation as recognised in the Stockholm Declaration.[103] Regardless, what is clear is that international

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[98] *Ibid* preambular para. 4.

[99] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, above note 97; *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, above note 32, p. 12.

[100] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, above note 97; *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, above note 32, p. 12; M. Bothe, above note 1, pp. 575–6.

[101] Additional Protocol II 1977 to the Geneva Conventions, above note 5.

[102] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005) pp. 3–74, rules 1–24.

[103] UNGA Res. 2994 (XXVII), 15 December 1972 (Stockholm Declaration). For instance, Art. 4 of the Stockholm Declaration declared "5 June as World Environment Day and urges Governments and organizations in the United Nations system to undertake on that day every year world-wide activities reaffirming their concern for the preservation and enhancement of the environment, with a view to deepening environmental awareness and to pursuing the determination expressed at the Conference".

humanitarian law's colonial origins has, via its Martens Clause on the standard of "humanity", excluded Indigenous Peoples from its protection.[104] As discussed in the next section, modern interpretations of the clause can open the door to international environmental law, international human rights law and international criminal law to better protect the environment and Indigenous Peoples in armed conflicts.[105]

B. International Humanitarian Law's Core Problem: Its Colonial Origins Has "Othered" Indigenous Peoples but Modern Interpretations of the Martens Clause Could Open the Door to Better Protect Indigenous Peoples and the Environment

International humanitarian law's core problem is its colonial origins with the field having, via its Martens Clause on the standard of "humanity", originally applied to exclude Indigenous Peoples from protection.[106] As Mégret notes, while international humanitarian law is to protect "all individuals in armed conflict", its constitution "othered" Indigenous Peoples justifying colonial violence against the "barbarian savage".[107] The Martens clause, which appeared in the Hague Convention of 1907, and the Geneva Conventions' Additional Protocols,[108] implicitly included all humanity, but was applied to exclude Indigenous Peoples deemed not part of civilised society.[109] Its inclusive and exclusive nature is as follows:[110]

> [u]ntil a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result

[104] Martens clause, above note 7.
[105] D. Fleck and A. Cassese, above note 12; M. Lehto, above note 8.
[106] Martens clause, above note 7.
[107] F. Mégret, above note 11, pp. 2–5, 17 and 29.
[108] Martens clause, above note 7.
[109] F. Mégret, above note 11, pp. 14–21.
[110] *Ibid;* A. Cassese, above note 12, p. 188.

> from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[111]

These "laws of humanity" and "dictates of the public conscience" were Eurocentric and justified colonial warfare against "inferior" non-European persons,[112] rendering invisible injustices perpetrated against Indigenous Peoples.[113] Even though international humanitarian law arose near the end of the nineteenth century, when European colonial powers instigated the "Scramble for Africa", carving up and dominating the continent, "the laws of humanity" did not apply.[114] These conflicts were different to wars between European States, given tribes were deemed to have no laws of war and would resort to brutal violence.[115] Inhumane weapons such as dum dum bullets (infected with smallpox) were permitted, even if unlawful during European wars.[116] Similarly, France and Italy's "extreme violence" in Algeria, Madagascar and Morocco was "permissible", as was Germany's horrific massacre of the African Herero.[117] International humanitarian law in its early years furthered the colonial project, with its harms casting a "dark" forgotten shadow of the injustices Indigenous Peoples experienced.[118]

Still, modern anti-racist, postcolonial and indigenous interpretations of the Martens clause present opportunities to open the door to better protect Indigenous Peoples and the environment through a less colonial and more "universal" application of "the principle of humanity".[119] For instance, anti-racist theories of justice focus on challenging "dominant notions of justice"

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[111] Martens clause of the Hague Convention IV, above n 7.
[112] Martens clause, above note 7.
[113] F. Mégret, above note 11.
[114] *Ibid,* p. 4; Martens clause of the Hague Convention IV, above note 7; Samuel Hartridge, *The Rule of Law in War: Can There Be A Rule of law Regulating the Use of Lethal Force in International Armed Conflicts, Should There be Such a Rule of Law, and to What Extent is There One?*, PhD Thesis, UNSW Sydney, 2022, p. 129.
[115] F. Mégret, above note 11, pp. 3–11.
[116] *Ibid,* p. 11.
[117] *Ibid,* pp. 11–12 and 19–20.
[118] *Ibid,* pp. 5 and 22.
[119] Martens clause, above note 7; D. Fleck and A. Cassese, above note 12; B. Sovacool, above note 12, p. 5.

that reinstate rather than delegitimate "extant knowledge and power regimes, including legacies of discrimination".[120] Similarly, indigenous theories of justice "challenge the historical and contemporary institutions" using their power to oppress Indigenous Peoples.[121] Finally, postcolonial theories of justice "seeks to understand who is being heard or silenced, whose experiences are acknowledged, who is capable of producing knowledge, and whose knowledge is excluded".[122] Both indigenous and postcolonial theories have a strong focus on upholding human rights to end systems of oppression with indigenous justice focused on restoring Indigenous traditional knowledge, self-determination and Indigenous-led governance including to their ancestral lands which international humanitarian law has failed to adequately protect.[123]

Consequently, principles from international humanitarian law such as distinction,[124] proportionality[125] and precautions in and against the effects of attacks[126] are important in determining to what extent military operations can occur,[127] but they can be extended via modern understandings of the Martens' clause "principle of humanity" to more fully protect the environment and Indigenous Peoples.[128] For instance, anti-racist interpretations of "the principle of humanity" in the Martens clause proscribes "inflicting unnecessary suffering, injury and destruction", illustrating that modern international humanitarian law recognises violence per racial understanding of who is and is not superior, is never justified.[129] Instead, universally

[120] Sovacool, above note 12, at p. 3.
[121] *Ibid.*
[122] *Ibid,* p. 4.
[123] *Ibid,* p. 5.
[124] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Arts. 48 and 52.
[125] *Ibid,* Art. 51(5)(b).
[126] *Ibid,* Arts. 57–8.
[127] Hague Convention IV, above not 7, Art. 23(g); Geneva Convention IV, above note 27, Art. 53.
[128] Martens clause, above note 7.
[129] *Ibid*; *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, above note 32, p. 13; International Committee of the Red Cross Revised Guidelines, above note 17, pp. 56–7, paras. 125–128.

upholding international humanitarian law's core tenet of protecting civilian life and objects from harm is the way forward.[130]

Similarly, postcolonial interpretations of "the principle of humanity" in the Martens clause can broaden the field's application to include considerations from international environmental law, international human rights law and international criminal law, to protect the environment and Indigenous Peoples' rights.[131] It is now accepted the Martens' clause focus on upholding humanity's interests and "the public conscience",[132] encompasses environmental considerations, including for future generations.[133] A postcolonial approach to the Martens Clause can also help to fill gaps and promote customary international humanitarian law and new treaties to protect Indigenous Peoples and the environment.[134]

In this respect, the International Committee of the Red Cross study of 2005, "Customary International Humanitarian Law", illustrates how international humanitarian law is becoming receptive to environmental concepts outside its own field to better protect the environment and Indigenous interests. Rule 44 imposes standards of "due regard" and "feasible precautions" (variations of international humanitarian law principles) to protect the natural environment from "incidental damage" during military operations.[135] Its final sentence details: "[l]ack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions."[136] Rule 44 applies the international environmental law precautionary principle to international humanitarian law's duty to take precautions, which was "revolution[ary]" given limited state practice existed, with the International Committee of the Red Cross drawing on the Nuclear Weapons Advisory

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[130] *Ibid.*

[131] Martens clause, above note 7; B. Sovacool, above note 12, p. 5.

[132] *Ibid.*

[133] *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, above note 31, p. 13; International Committee of the Red Cross Revised Guidelines, above note 17, pp. 79–80, rule 16.

[134] *Ibid;* Martens clause, above note 7.

[135] J.M. Henckaerts and L. Doswald-Beck, above note 102, pp. 147–151, rule 44.

[136] *Ibid.*

Opinion of the International Court of Justice confirming environmental considerations are relevant in armed conflicts.[137] While the Nuclear Weapons Advisory Opinion condemns the "destructive power of nuclear weapons [which] cannot be contained in either space or time,"[138] it furthers colonial power, permitting nuclear weapons in an instance of extreme self-defence where "its very survival would be at stake".[139]

Despite this, modern postcolonial/indigenous theories of what is "humanity" and the Martens' clause "dictates of the public conscience"[140] has seen progress via the development of the Treaty on the Prohibition of Nuclear Weapons 2017 (TPNW) to better protect the environment and Indigenous Peoples.[141] The TPNW (albeit having no signatures from nuclear States or States possessing nuclear weapons), applies the Nuclear Weapons Advisory Opinion to prohibit nuclear weapons' use, testing and manufacture outright.[142] It also provides environmental remediation and victim assistance provisions to recognise that Indigenous Peoples disproportionately experienced nuclear weapons activities owing to US, UK and French testing in ancestral lands in the Pacific region such as at the Marshall Islands, French Polynesia/Te Ao Maohi, Kiribati and Maralinga and Emu Field.[143] This recognition alongside environmental remediation and victim assistance provisions provides visibility to the environment and Indigenous Peoples to acknowledge that the harm experienced is not only historical, but one that continues to impact the environment and Indigenous Peoples today.[144]

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[137] *Ibid*; M. Bothe, above note 1, p. 575; International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, paras. 30–1 (*Nuclear Weapons Advisory Opinion*).

[138] *Ibid,* p. 21, para. 35.

[139] *Ibid,* p. 41, para. 97.

[140] Martens clause, above note 7.

[141] Treaty on the Prohibition of Nuclear Weapons, 57 ILM 347, 7 July 2017 (entered into force 22 January 2021).

[142] *Ibid*, Art. 1; *Nuclear Weapons Advisory Opinion*, above note 137.

[143] "Pacific Nuclear Test Archive", *Pace University,* available at: https://disarmament.blogs.pace.edu/nuclear-test-archive/#:~:text=IPPNW%20report.,bombings%20in%20Hiroshima%20and%20Nagasaki.

[144] Treaty on the Prohibition of Nuclear Weapons, above note 141, preambular para. 7 and Art. 6.

In sum, although international humanitarian law has few environmental provisions protecting the environment and Indigenous Peoples, its Martens clause provides a mechanism to open the door to other fields such as international environmental law, international human rights law, international criminal law, and Indigenous knowledge.[145] The application of principles and human rights from these areas can create an integrated approach to international humanitarian law, that is holistic and less colonial/anthropocentric in its application given it actively seeks to include, and better protect, both the environment and Indigenous Peoples during armed conflict.[146] The following section analyses developments in these bodies of law and the inclusion of Indigenous knowledge in international humanitarian law to achieve this end.

## IV. Looking Forward

This Part looks to potential avenues for international humanitarian law to better protect the environment and Indigenous Peoples during armed conflict per the Marten's clause "dictates of the public conscience" and "humanity".[147] It begins with an analysis of the International Committee of the Red Cross Revised Guidelines[148] and the International Law Commission Draft Principles on the Protection of the Environment in Armed Conflict, [149] given these international documents further interpret existing international humanitarian laws that parties are to follow during armed conflict, and as they are becoming increasingly receptive to environmental and indigenous interests. It then looks further to avenues in international environmental law and international human rights law, including the right to a clean, healthy and sustainable environment to further coordinate international humanitarian law. It also considers the need for increased international criminal law prosecution of crimes committed against the environment and

[145] Martens clause, above note 7; D. Fleck and A. Cassese, above note 12; M. Lehto, above note 8.
[146] M. Lehto, above note 8.
[147] *Ibid;* Martens clause, above note 7.
[148] International Committee of the Red Cross Revised Guidelines, above note 17.
[149] International Law Commission, Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above n 16.

Indigenous Peoples, if the field is to move from its colonial origins to better protect the environment and Indigenous Peoples during armed conflicts.

### A. The International Committee of the Red Cross Revised Guidelines and the International Law Commission Draft Principles on the Protection of the Environment in Armed Conflict

The International Committee of the Red Cross Revised Guidelines provide an important source to create a holistic and less colonial international humanitarian law that includes and protects the environment and Indigenous Peoples during armed conflict.[150] Firstly, the International Committee of the Red Cross recognises "the Martens clause to be of a customary nature",[151] detailing where gaps in treaty law exist, States cannot argue what is not explicitly prohibited, is permitted.[152] This interpretation is important given technological developments have changed warfare with scientific advances increasing our knowledge and ability to protect the environment.[153] This protection is especially important in a time of the triple planetary crisis where the effects of climate change exacerbate the underlying vulnerabilities of populations, including from armed conflict, and where the science of the Intergovernmental Panel on Climate Change demonstrates the necessity and urgency for such protection.[154] Secondly, the International Committee of the Red Cross Guidelines makes important strides given they interpret the "principles of humanity and the dictates of public conscience" as requiring

[150] International Committee of the Red Cross Revised Guidelines, above note 17.

[151] Martens clause, above note 7.

[152] International Committee of the Red Cross Revised Guidelines, above note 17, p. 79, rule 16, referring to *Nuclear Weapons Advisory Opinion*, above note 137.

[153] International Committee of the Red Cross Revised Guidelines, above note 17, p. 79, para. 200.

[154] For instance, the Intergovernmental Panel on Climate Change, *AR6 Synthesis Report: Climate Change 2023*, Geneva, p. 68 finds "in the near term (2021 – 2040), the 1.5°C global warming level is very *likely* to be exceeded under the very high GHG emissions scenario (SSP5-8.5)", meaning that deep-cuts in greenhouse gas emissions are needed. It also finds at pp. 5 – 7 that climate change is already impacting ecosystems extensively and the "adverse impacts from human-caused climate change will continue to intensify". For a summary of the report's ten key findings, see Sophie Boehm and Clea Schumer, "2023 IPCC Report on Climate Change", *World Resources Institute,* 20 March 2023, available at: https://www.wri.org/insights/2023-ipcc-ar6-synthesis-report-climate-change-findings.

environmental protection not just to ensure humanity's survival, but given its value "in and of itself".[155] This approach aligns with Indigenous understandings of non-human beings' personhood as being connected to the land to protect both groups during armed conflict.[156]

The International Committee of the Red Cross Revised Guidelines also provide some holistic understandings of protecting the environment from "widespread, long-term and severe" harm in Articles 35(3) and 55(1) of Additional Protocol I 1977 to the Geneva Conventions,[157] to further its protection, albeit retaining the cumulative triple threshold.[158] While the International Committee of the Red Cross applies traditional influences of the Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques of 1976,[159] whereby "widespread" applies to large areas of at least several hundred square kilometres, it is realistic in the meaning of "long-term".[160] The International Committee of the Red Cross recognises that biotoxins in plants, animals and humans persist for many years with technological developments in assessing damage, allowing harms which did not meet "the 'long-term' test" of decades of harm, to do so today.[161] On "severe", the International Committee of the Red Cross reinforces Article 35(3) as ecocentric, prohibiting "serious or significant disruption" to ecosystems,[162] with Article 55(1) deeming damage to population "health or survival" "a factor" in assessing damage with the environment's interdependency seeing harm extend to many of its components.[163]

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[155] *Ibid,* pp. 79–80, para 201; Martens clause, above note 7.
[156] B. Burkhart and W. La Duke, above note 42.
[157] Additional Protocol I 1977 to the Geneva Conventions, above note 3.
[158] International Committee of the Red Cross Revised Guidelines, above note 17, pp. 29–39, rule 2.
[159] ENMOD, above note 88.
[160] International Committee of the Red Cross Revised Guidelines, above note 17, p. 31, para. 52.
[161] *Ibid,* pp. 34–5, paras. 61–6.
[162] *Ibid,* p. 36, paras. 67–8.
[163] *Ibid,* pp. 36–7, paras. 69–71; Additional Protocol I 1977 to the Geneva Conventions, above note 3.

The International Committee of the Red Cross Revised Guidelines therefore reinforce the holistic interconnections between humans and the environment to further its protection,[164] which is crucial given the enjoyment of the right to a safe, clean, healthy and sustainable environment is "depend[ent] on a healthy biosphere".[165] The right's "substantive elements" focus on providing "a safe climate, clean air, clean water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems".[166] These elements are underscored by other important international treaties such as the United Nations Framework Convention on Climate Change[167] where States are "to prevent dangerous anthropogenic interference with the climate system",[168] and the Paris Agreement which aims "to limit the [global average] temperature increase to 1.5°C above pre-industrial levels".[169] The International Red Cross Revised Guidelines therefore furthers the focus of the right to a safe, clean, healthy and sustainable environment in bridging anthropocentric and ecocentric approaches to preventing environmental degradation, with the right recognising that "[n]ature's contributions to people are immense and irreplaceable", all-encompassing and interrelated.[170] This focus is crucial given it challenges the Western anthropocentric perspective in which humans are separate from nature and the most important in the hierarchy of living beings,[171] to create a

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[164] *Ibid.*

[165] Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, David R. Boyd: Human Rights Depend on a Healthy Biosphere, UN Doc. A/75/161, 15 July 2020, p. 2.

[166] David Boyd, Report of the Special Rapporteur on the Issue of Huaaman Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc. A/74/161, 15 July 2019, p. 13, para. 43; Right to a Healthy Environment: Good Practices, UN Doc A/HRC/43/53, 30 December 2019, pp. 8–18.

[167] United Nations Framework Convention on Climate Change, 1771 UNTS 107, 9 May 1992 (entered into force 21 March 1994).

[168] Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, above note 166.

[169] Paris Agreement to the United Nations Framework on Climate Change, TIAS No. 16-1104, 12 December 2015 (entered into force 4 November 2016), Art. 2(1)(a).

[170] Human Rights Depend on a Healthy Biosphere, above note 165, p. 4, para. 3.

[171] Suzanne Hindmarch and Sean Hillier, "Reimagining Global Health from Decolonisation to Indigenization'", *Global Public Health*, Vol. 18, No. 1, 2023, pp. 4–6.

more holistic and decolonial application of international humanitarian law, and to reframe our own relationship with the environment, as deserving protection.

Similarly, the International Law Commission's Draft Principles on the Protection of the Environment in Armed Conflict, which applies during international armed conflicts and non-international armed conflicts, can help international humanitarian law to better protect the environment and Indigenous Peoples during armed conflict, given its specific provisions on designating protected zones (Principle 4) and protection of Indigenous Peoples' lands (Principle 5).[172] Protected zones in international humanitarian law are demilitarised zones in which parties to a conflict cannot use such zones for military purposes,[173] and are often known as "safe havens", "buffer zones" or "protected areas" given they protect civilians not taking part in hostilities.[174] Principle 4 extends this concept by recognising "States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones." Protected zones have similarities to the international environmental law concept of protected areas as "a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives".[175] Principle 18 continues the protection during armed conflict where the protected zone contains no military objectives.[176] Principle 5 is broader recognising in armed conflicts "States, international organizations and other relevant actors shall take appropriate measures…to protect the environment of the lands and territories

[172] Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16; M. Lehto, above n 8.

[173] K. Hulme, above note 41, pp. 1168–71; "Demilitarized Zones", *ICRC*, Webpage, available at: https://casebook.icrc.org/a_to_z/glossary/demilitarized-zones#:~:text=A%20"demilitarized%20zone"%20is%20an,or%20during%20an%20armed%20conflict.

[174] Emanuela-Chiara Gillard, *Enhancing the Security of Civilians in Conflict: Notifications, Evacuations, Humanitarian Corridors, Suspensions of Hostilities and Other Humanitarian Arrangements*, Research Paper, April 2024, pp. 46–7.

[175] Convention on Biological Diversity, 1760 UNTS 69, 5 June 1992, (entered into force 29 December 1993), Art. 2.

[176] Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16.

that indigenous peoples inhabit or traditionally use," detailing effective consultations with Indigenous institutions is needed to progress remedial measures.[177] Cooperation with Indigenous Peoples, including in creating protected zones is crucial, and per the elements of free, prior and informed consent of the United Nations Declaration on the Rights of Indigenous Peoples, can further Indigenous rights during armed conflicts to their lands and self-determination.[178]

Protected zones could therefore enable international humanitarian law to further Indigenous self-determination and better protect the environment during armed conflicts, if implemented correctly. This focus is crucial given the direct link between the ancestral lands of Indigenous Peoples and the enjoyment of their human rights which these lands provide, including rights to food and water,[179] privacy[180] and cultural rights.[181] Indigenous peoples may be sceptical of Principle 4 of the Draft Principles on the Protection of the Environment in Armed Conflict,[182] given colonial powers used protected areas like national parks to evict Indigenous Peoples from their lands for "conservation".[183] However, the Indigenous Karen created the Salween Peace Park, during Myanmar's non-international armed conflict, to further rights to self-determination and conservation of ancestral lands.[184] Given Indigenous

[177] *Ibid.*

[178] *United Nations Declaration on the Rights of Indigenous Peoples*, above note 49, Arts. 10–11, 19 and 28.

[179] International Covenant on Economic, Social and Cultural Rights, above note 54, Arts. 11–12.

[180] *United Nations Declaration on the Rights of Indigenous Peoples*, above note 49, Art. 12; International Covenant on Civil and Political Rights, above note 53, Art. 17.

[181] *United Nations Declaration on the Rights of Indigenous Peoples*, above note 49, Arts. 3, 5, 8, 11–12, 14–16, 31, 36; International Covenant on Economic, Social and Cultural Rights, above note 53, Arts. 1, 3, 6 and 15.

[182] Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16.

[183] Stan Stevens, *Indigenous Peoples, National Parks, and Protected Areas: A New Paradigm Linking Conservation, Culture and Rights*, University of Arizona Press, Tuscon, 2014) pp. 3–12; Victoria Tauli-Corpuz, Rights of Indigenous Peoples, UNGA Res. 71/229, 29 July 2016, p. 15, para. 39.

[184] Andrew Paul, Robin Roth and Saw Twa, "Conservation for Self-Determination: Salween Peace Park as an Indigenous Karen Conservation Initiative", *AlterNative*, Vol. 19, No. 2, 2023.

lands constitute eighty percent of the world's biodiversity, with Indigenous Peoples having traditional knowledge to ensure it flourishes, including during wartime, environmental conservation must occur in conjunction with Indigenous Peoples, with protected zones providing this possibility.[185]

The Salween Peace Park provides a helpful example to international humanitarian law on how such areas can enable Indigenous resistance to defend their lands, further environmental protection and self-determining rights during a brutal non-international armed conflict.[186] The Salween Peace Park provides visibility of the Karen's plight to revive traditional practices and achieve self-determination.[187] Its Charter contains provisions on governance including representation from the Karen National Union, civil society organisations and community representatives, with provisions protecting the environment, cultural heritage and conservation.[188] The intention is to uphold the Karen's traditional land institution of kaw, a governance system where communities practise subsistence agriculture, create rice paddies, hunt, gather and rotate through ancestral lands.[189] While the Karen experience rights violations, the Salween Peace Park provides active means to assert Indigenous autonomy, creating a vision of peace to protect the land and Karen ways of life.[190]

Accordingly, the International Committee of the Red Cross Revised Guidelines[191] and the International Law Commission Draft Principles on the

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[185] "International Day for Biological Diversity 2023: From Agreement to Action – Building Back Biodiversity Through Inclusive Conservation", *International Union for Conservation of Nature*, Webpage, available at: https://www.iucn.org/story/202305/international-day-biological-diversity-2023-agreement-action-building-back; Claudia Sobrevila, *The Role of Indigenous Peoples in Biodiversity Conservation: The Natural but Often Forgotten Partners*, Report, World Bank, May 2008, p. xii.

[186] A. Paul, above note 184.

[187] *Ibid,* p. 272.

[188] *Ibid,* pp. 276–8.

[189] *Ibid,* p. 274.

[190] Carloyn Cowan, 'Award-Winning, Indigenous Peace Park Dragged into Fierce Conflict in Myanmar', *Mongabay*, 15 May 2023, available at: https://news.mongabay.com/2023/05/award-winning-indigenous-peace-park-dragged-into-fierce-conflict-in-myanmar/.

[191] International Committee of the Red Cross Revised Guidelines, above note 17.

Protection of the Environment in Armed Conflict incorporate international environmental law principles into international humanitarian law to protect the environment and Indigenous Peoples in armed conflicts.[192] However, the mechanisms are limited, with international humanitarian law's "principles of humanity" and "dictates of public conscience" as expressed in the Martens clause requiring coordination.[193] The following section analyses how interpreting international humanitarian law "in light of" international environmental law and international human rights law principles creates coherency to further protect the environment and Indigenous Peoples.[194]

### B. Interpreting International Humanitarian Law "in Light of" International Environmental Law and International Human Rights Law Concepts

Alongside the international humanitarian law documents discussed in the previous section, international humanitarian law needs to be further interpreted "in light of" international environmental and international human rights law to better protect the environment and Indigenous interests.[195] For instance, international environmental law's precautionary principle and conventions can delineate an understanding of the term "environment" which remains undefined in international humanitarian law.[196] It can also increase the standard of care in protecting the environment under international humanitarian law principles and Additional Protocol I 1977 to the Geneva Conventions,[197] and further coordinate designated protected zones under the International Law Commission Draft Principles on the Protection of the

[192] Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16.

[193] Martens clause, above note 7; M. Lehto, above note 8.

[194] R. Steenberghe, above note 8, pp. 15 and 22; K. Hulme, above note 41, pp. 1158 and 1161–71.

[195] *Ibid*; Michael Bothe, "The Ethics, Principles and Objectives of Protection of the Environment in Times of Armed Conflict", in Rosemary Rayfuse (ed), *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict*, Brill, Leiden, 2014, pp. 91 and 102–7, paras 3.2–3.3; Eliana Cusato, *The Ecology of War and Peace: Marginalising Slow and Structural Violence in International Law*, Cambridge University Press, Cambridge, 2021, pp. 91–2.

[196] K. Hulme, above note 41, pp. 1163–5.

[197] *Ibid* 1165–67; Additional Protocol I 1977 to the Geneva Conventions, above note 3, Art. 55.

Environment in Armed Conflict.[198] Similarly, other international environmental law/international human rights law influences such as the right to a clean, healthy and sustainable environment (recognised by the Human Rights Council and General Assembly),[199] and the doctrine of non-State armed groups as "guardians of the environment" further international humanitarian law protections of the environment and Indigenous lands.[200]

Starting with international humanitarian law's lack of a definition on the environment, international environmental law treaties can help delineate the term and apply a holistic understanding to uphold the environment's biodiversity and Indigenous understandings of the world.[201] Additional Protocol I 1977 to the Geneva Conventions per "Article 55 requires care to be taken in warfare to protect the natural environment",[202] but with no definition and with negotiating States preferring a "division of the 'natural environment' from the 'human environment'".[203] While the Draft Principles on the Protection of the Environment in Armed Conflict uses the term "environment", no definition exists.[204] The Convention on Biological Diversity 1992[205] could further this term to maintain biodiversity "within species, between species and of ecosystems".[206] Given this approach includes diverse conceptions of nature, wildlife, and habitats, and Indigenous understandings of connections between humans and non-humans, it creates

[198] Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16, principles 4 and 18.
[199] HRC Res. 19/10, 19 April 2012 (Human Rights and the Environment) and UNGA Res. A/76/L.75, 26 July 2022 (The Human Right to a Clean, Healthy and Sustainable Environment).
[200] Thibaud de La Bourdonnaye, "Greener Insurgencies? Engaging Non-State Armed Groups for the Protection of the Natural Environment During Non-International Armed Conflicts", *International Review of the Red Cross*, Vol. 102, No. 914, 2020, p. 584.
[201] K. Hulme, above note 41, pp. 1163–5.
[202] Additional Protocol I 1977 to the Geneva Conventions, above note 3; Bing Bing Jia, "'Protected Property' and Its Protection in International Humanitarian Law", *Leiden Journal of International Law*, Vol. 15, No. 1, 2002, p. 142.
[203] K. Hulme, above note 41, pp. 1163–5.
[204] Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16.
[205] Convention on Biological Diversity, above note 175.
[206] K. Hulme, above note 41, 1163–4.

a less colonial international humanitarian law to further protect the environment and Indigenous Peoples interests.[207]

Furthermore, the precautionary principle from international environmental law helps international humanitarian law increase the standard of care in protecting the environment under Article 55 of Additional Protocol I 1977 to the Geneva Conventions and international humanitarian law principles, to protect the environment and Indigenous lands.[208] The precautionary principle in the Convention on Biological Diversity 1992,[209] World Heritage Convention 1972[210] and Ramsar Convention on Wetlands 1975[211] protects world biodiversity by underscoring uncertainty in resulting "damage should not bar or delay environmental protection measures".[212] Its application to Article 55,[213] and international humanitarian law principles of necessity and precautions in attack, means militaries must understand the effects of their weapons on ecosystems, including social and cultural impacts to Indigenous territories present in the field of military operations.[214] Further training, including cultural programmes on Indigenous Peoples' rights, and provisions for environmental impact assessments for militaries in estimating the impacts of their attacks, raise the bar to inform military personnel of the value of protecting the environment and Indigenous Peoples' territories.[215] Military personnel are likely to weigh these considerations more greatly against the necessity and proportionality of attacks, and may demarcate areas protecting the environment and Indigenous lands.[216]

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[207] *Ibid.*

[208] Additional Protocol I 1977 to the Geneva Conventions, above note 3.

[209] Convention on Biological Diversity, above note 175.

[210] Convention Concerning the Protection of the World Cultural and Natural Heritage, 11 ILM 1358, 16 November 1972, (entered into force 17 December 1975) (World Heritage Convention 1972).

[211] Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 996 UNTS 245, 2 February 1971 (entered into force 21 December 1975).

[212] Rio Declaration on Environment and Development 31 ILM 874, 1992, principle 15; K. Hulme, above note 41, p. 1168.

[213] Additional Protocol I 1977 to the Geneva Conventions, above note 3.

[214] K. Hulme, above note 41, 1165–7.

[215] *Ibid.*

[216] *Ibid,* pp. 1165–7 and 1190.

Similarly, the precautionary principle along with international environmental law and international human rights law conventions can reinforce the International Law Commission Draft Principles on the Protection of the Environment in Armed Conflict designating protected zones to protect the environment and Indigenous territories during armed conflicts.[217] The Special Rapporteur Marja Lehto, in analysing the "Protection of the Environment in Relation to Armed Conflicts" (holding this mandate from 2017 – 2022) clarified,[218] there must be "an express agreement on the designation of an area as protected from attack during armed conflict",[219] raising the question of pre-conflict designation.[220] However, many international environmental law conventions designate protected areas, such as the World Heritage Convention regime's on cultural and natural heritage, which could serve as a "starting point".[221] While several World Heritage sites were designated without consulting Indigenous Peoples,[222] if done per the elements of free, prior and informed consent of the United Nations Declaration on the Rights of Indigenous Peoples, these areas and associated buffer zones could further Indigenous land and self-determination rights during armed conflicts.[223] For instance, the Thawthi Taw-Oo Indigenous Park was recently created by an Indigenous Karen sub-group in Taw-Oo District, north of the Salween Peace Park, to protect their traditional cultures.[224] The precautionary principle of international environmental law

[217] *Ibid,* pp. 1168–71; Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16, principles 4 and 18.

[218] "Interview with Marja Lehto," *IRRC*, December 2023, available at: https://international-review.icrc.org/articles/interview-with-marja-lehto-924#:~:text=She%20was%20a%20member%20of,of%20Humanitarian%20Law%20since%202019..

[219] International Law Commission, *Third Report on Protection of the Environment in Relation to Armed Conflicts, by Marja Lehto, Special* Rapporteur, A/CN.4/750, 16 March 2022, 68.

[220] K. Hulme, above note 41, p. 1170.

[221] *Ibid*, pp. 1168–71; World Heritage Convention, above note 210.

[222] Ana Vrdoljak, "Indigenous Peoples, World Heritage, and Human Rights", *International Journal of Cultural Property*, Vol. 25, No. 3, 2018.

[223] United Nations Declaration on the Rights of Indigenous Peoples, above note 49, Arts. 10–11, 19 and 28; K. Hulme, above note 41, pp. 1168–71.

[224] "Thawthi Taw-Oo Indigenous Park", *UNESCO*, webpage, available at: https://www.unesco.org/en/articles/thawthi-taw-oo-indigenous-park-

could increase coordination between Indigenous Peoples and States where protected zones cross borders or regions to conduct assessments protecting endangered species, and prevent the militarisation of such areas including conflicts occurring in Indigenous lands.[225]

The right to a clean, healthy and sustainable environment[226] can also push international humanitarian law forward to protect the environment and Indigenous Peoples during conflicts.[227] On the right to a clean, healthy and sustainable environment, the United Nations General Assembly, Human Rights Council and Inter-American Court of Human Rights advisory opinion[228] (alongside other bodies)[229] recognise the right "as fundamental to

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[225] K. Hulme, above n 41, 1168–71.

[226] HRC Res. 19/10, 19 April 2012 (Human Rights and the Environment) and UNGA Res. A/76/L.75, 26 July 2022 (The Human Right to a Clean, Healthy and Sustainable Environment), above note 196; Sara Ceolin, *The Right to Land of Indigenous Peoples in Latin-America: Collectivity, Culture and Territory*, Master's Thesis, Università Ca' Foscari Venezia, 2019/20, p. 78.

[227] T. De La Bourdonnaye, above note 200.

[228] UNGA Res. 76/300 and UNHRC Res. 48/13, above note 18; Inter-American Court of Human Rights, *The Environment and Human Rights*, Case No. Series A No 23, Advisory Opinion, 15 November 2017.

[229] See for instance, the African Charter on Human and Peoples' Rights of 1981, (1982) 21 ILM 58, 27 June 1981 (entered into force 21 October 1986), Art. 24 recognises: "All peoples shall have the right to a general satisfactory environment favourable to their development"; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, OAS Treaty Series No. 69, 17 November 1988 (entered into force 16 November 1999) (Protocol of San Salvador), Art. 11(1) also recognises: "Everyone shall have the right to live in a healthy environment and to have access to basic public services"; Arab Charter on Human Rights of 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893, 2005 (entered into force 15 March 2008), Art. 38 indirectly recognises "a right to a safe environment" within "the right to an adequate standard of living"; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 2161 UNTS 447, 25 June 1998 (entered into force 30 October 2001) (Aarhus Convention), Art. 1 notes: "In order to contribute to the operation of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation

human existence", including to future generations.[230] As mentioned, the right encompasses a spectrum of rights including rights to "a safe climate, clean air, clean water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems".[231] The Inter-American Court of Human Rights advisory opinion recognises its holistic and interrelated nature noting "the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas".[232] The advisory opinion also recognises States have a duty "to exercise due diligence" "to prevent significant harm or damage to the environment, within or outside their territory", heightening environmental protection standards if applied to

in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention"; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, C.N.195.2018, 4 March 2018 (entered into force 22 April 2021) (Escazú Agreement), Art. 4(1): "Each Party shall guarantee the right of every person to live in a healthy environment …"; ASEAN Human Rights Declaration (19 November 2012), Art. 28 recognises: "Every person has the right to an adequate standard of living for himself or herself and his or her family including: f. The right to a safe, clean and sustainable environment."

[230] Inter-American Court of Human Rights, *The Environment and Human Rights*, above note 228, p. 26, para. 59; Maria Tigre, "International Recognition of the Right to a Healthy Environment: What is the Added Value for Latin America and the Caribbean?", *American Society of International Law*, Vol. 117, 2023, p. 185.

[231] David Boyd, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, above note 166; Right to a Healthy Environment: Good Practices, above note 166. The right to a safe, clean, healthy and sustainable environment is discussed in various reports of Special Rapporteurs. For instance, see Reports of the Special Rapporteur David R. Boyd: Human Rights Depend on a Healthy Biosphere, above note 165; Healthy and Sustainable Food: Reducing the Environmental Impacts of Food Systems on Human Rights, UN Doc A/76/179, 19 July 2021; Human Rights and the Global Water Crisis: Water Scarcity and Water-Related Disasters, UN Doc A/HRC/46/28, 19 January 2021; The Right to a Clean, Healthy and Sustainable Environment: Non-Toxic Environment, UN Doc A/HRC/49/53, 12 January 2022. See also the Report of Special Rapporteur John H. Knox, Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc A/HRC/40/55, 8 January 2019.

[232] Inter-American Court of Human Rights, *The Environment and Human Rights*, above note 228, p. 28, para. 62.

international humanitarian law, including Indigenous Peoples' connection to ancestral lands.[233]

Finally, the doctrine of non-State armed groups as "guardians of the environment" can further the protection of the environment and Indigenous Peoples during non-international armed conflicts, the most common form of warfare today.[234] The doctrine sees non-State armed groups' engagement to include environmental policies in military manuals, and based on their territorial control, assume environmental obligations to increase the visibility of environmental protection and respect Indigenous Peoples' ways of life.[235] The doctrine is important given "at least forty percent of all [NIACs] over the last sixty years have a link to natural resources",[236] with non-state actors contributing to the degradation of the natural environment, including Indigenous Peoples' lands. Recent developments include the National Liberation Army of Colombia including "a qualified provision" in their Code of War where "acts of sabotage shall, *as far as possible*, avoid causing environmental damage."[237] While other non-State armed groups have taken it to be their duty to protect the environment for future generations, highlighting the importance of the engagement of non-State armed groups with international environmental principles, if protection of the environment and Indigenous lands is to occur.[238]

Accordingly, alongside international humanitarian law developments in the International Committee of the Red Cross Revised Guidelines[239] and the International Law Commission Draft Principles on the Protection of the

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[233] Inter-American Court of Human Rights, *The Environment and Human Rights*, above note 228, pp. 52–6, paras. 128–140, referring in footnote 187 to *Trail Smelter (United States v Canada)*, Case No. 3 RIAA 1905, Judgment, 1938.

[234] T. De La Bourdonnaye, above note 200.

[235] *Ibid,* p. 584.

[236] *Ibid,* p. 582; United Nations Environment Programme, *Protecting the environment During Armed Conflict*, above note 32, p. 10.

[237] T. De La Bourdonnaye, above note 200, p. 585.

[238] *Ibid.*

[239] International Committee of the Red Cross Revised Guidelines, above note 17.

Environment in Armed Conflict,[240] interpreting international humanitarian law "in light of" international environmental law and international human rights law can coordinate the field to better protect Indigenous Peoples and the environment during armed conflicts.[241] However, given only one provision of the Rome Statute of the International Criminal Court provides that "widespread, long-term and severe damage to the natural environment" in international armed conflicts constitutes a war crime,[242] further prosecution avenues are equally important. This is to deter future international humanitarian law violations and create a less colonial/anthropocentric vision of the law, which per the Martens' clause "dictates of public conscience" and "humanity", achieves justice for the environment and Indigenous Peoples.[243]

### C. Furthering International Criminal Law Prosecution Avenues for Offending Against the Environment and Indigenous Peoples

Increased avenues for prosecution of offending against the environment and Indigenous Peoples could, per "the dictates of public conscience", help international humanitarian law overcome its colonial anthropocentric origins to better protect these groups during armed conflicts by deterring future offending.[244] The Rome Statute of the International Criminal Court provides one explicit environmental crime – prosecuting environmental harm as a war crime under Article 8(2)(b)(iv) where the harm reaches the triple cumulative threshold of harm.[245] However, this provision is difficult to meet and no environmental prosecutions have occurred,[246] with only two cases having

[240] Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16.
[241] R. Steenberghe, above note 8, p. 22; K. Hulme, above note 41, pp. 1158 and 1161–71.
[242] Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998, (entered into force 1 July 2002), Art. 8(2)(b)(iv).
[243] Martens clause, above note 7.
[244] *Ibid.*
[245] Rome Statute of the International Criminal Court, above note 242; Ammar Bustami and Marie-Christine Hecken, "Perspectives for a New International Crime Against the Environment: International Criminal Responsibility for Environmental Degradation Under the Rome Statute", *Goettingen Journal of International Law*, Vol. 1, 2021, p. 163.
[246] Payal Patel, "Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper Expand the Court's Mandate to Prosecuting Environmental Crimes?", *Loyola University Chicago International Law Review*, Vol. 14, No. 2, 2016.

prioritised environmental harm under provisions prohibiting pillage and land grabbing as a crime against humanity.[247] While the 2016 Policy Paper of the International Criminal Court sees the court begin to prioritise environmental crimes,[248] it will be onerous without decolonising the Rome Statute's application to prosecute and deter future environmental offending in armed conflicts.[249]

Other important avenues for increasing prosecution against Indigenous Peoples and the environment to achieve a less colonial application of the law includes recognising ecocide is a form of genocide under art 6 Rome Statute of the International Criminal Court.[250] Ecocide is yet to be recognised in international criminal law. However, the crime of genocide applies in peacetime, and during international armed conflicts and non-international armed conflicts, which is important given the Article 8(2)(b)(iv) war crime avenue is "only applicable in international armed conflicts".[251] Genocide though has "the specific" "intent to destroy, in whole or in part, a national, ethnical, racial or religious group", making it challenging to apply to environmental crimes.[252] Some scholars call for recognition of the destruction of animals, lands and ecosystems as constituting an additional "act" of genocide, given Indigenous Peoples' intrinsic connection to the land.[253] Rights to a healthy environment and rights of nature could form "the basis" for prosecuting the crime, given the destruction of the environment, and the related displacement and killing of Indigenous Peoples from their ancestral

[247] A. Bustami and M.C. Hecken, above note 245, pp. 149–50; Rome Statute of the International Criminal Court, above note 242, Arts. 7, 8(2)(b)(xvi) and 8(2)(e)(v).

[248] International Criminal Court, *Policy Paper on Case Selection and Prioritisation*, Paper, 15 September 2016.

[249] Rome Statute of the International Criminal Court, above n 242.

[250] *Ibid.*

[251] *Ibid*; Matthew Gillett, "Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict" in Carsten Stahn, Jens Iverson and Jennifer Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace*, Oxford University Press, Oxford, 2017, p. 221.

[252] *Rome Statute of the International Criminal Court*, above note 240, Art 6; *Prosecutor v Blagojević*, International Criminal Tribunal for the Former Yugoslavia, Case No IT-02-60-T, Judgment (Trial Chamber I), 5 April 2004), pp. 241–2, paras. 655–6.

[253] Martin Crook and Damien Short, "Developmentalism and the Genocide-Ecocide Nexus", *Journal of Genocide Research*, Vol. 23, No. 2, 2021, p. 162.

lands during armed conflict,[254] while some push the definition even further to stress ecocide without any human destruction is genocide, but States are unlikely to accept this position.[255]

Still, crimes against humanity prosecutions could provide another way forward to achieve justice for Indigenous Peoples and the environment to deter future offending, given it is applicable during non-international armed conflicts, international armed conflicts and in peacetime.[256] Article 7 recognises crimes against humanity are "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[257] The crime includes the commission of acts such as extermination, murder, forcible transfer and, per Article 7(1)(k), "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[258] The requirement the perpetrator only needs to have knowledge of the "systematic attack" – as seems likely in Colombia's non-international armed conflict – could see prosecutions given the physical, mental and spiritual harm to Indigenous Peoples, including killings, forced displacement and degradation of ancestral lands.[259] This environmental approach to crimes against humanity approach can provide better protection to the environment, illustrating that "mass harms" inflicted on humans through "directly produced" harm to the environment can be prosecuted.[260] This approach creates a more holistic

[254] R. Pereira, above note 14, p. 14.

[255] Lauren Eichler, "Ecocide is Genocide: Decolonizing the Definition of Genocide", 14(2) *Genocide Studies and Prevention: An International Journal*, Vol. 14, No. 2, 2020; Douglas Irvin-Erickson, *Raphael Lemkin and the Concept of Genocide*, University of Pennsylvania Press, Philadelphia, 2017); Legge Brooman, "Reflecting on 25 Years of Teaching Animal Law: Is it Time for an International Crime of Animal Ecocide?", *Liverpool Law Review*, Vol. 41, No. 2, 2020; Tim Lindgren, "Ecocide, Genocide and the Disregard of Alternative Life-Systems", *International Journal of Human Rights*, Vol. 22, No. 4, 2018.

[256] Rome Statute of the International Criminal Court, above note 242, Art. 7.

[257] *Ibid.*

[258] *Ibid.*

[259] A. Dumont, above note 35; R. Pereira, above note 14, pp. 14–16.

[260] Darryl Robinson, "ICL and Environmental Protection Symposium: Environmental Crimes Against Humanity", *Opinio Juris*, 2 June 2020, available at: http://opiniojuris.org/2020/06/02/icl-and-environmental-protection-symposium-environmental-crimes-against-humanity/.

understanding of the interconnected relationship between the environment and human populations, including Indigenous Peoples, and likely would change behaviours to prevent violations of international humanitarian law.

Indeed, academics argue the environmental crimes against humanity approach can provide justice to the environment and more vulnerable populations, such as Indigenous Peoples, without stretching the credulity of international criminal law.[261] Focusing on the commission of "other inhumane acts" in Article 7(1)(k), an example of exploiting natural resources – for instance, mining to fund military activities during an armed conflict, and which poisons the air with high levels of toxic metals to engulf a human village or city – would clearly "caus[e] great suffering, or serious injury to body or to mental or physical health".[262] While it would be more difficult to meet the Article 7(1)(k) element of being "of a similar character" to other prohibited acts listed in Article 7(1) (which are focused on "direct physical harms" such as extermination), the result of poisoning people and causing severe health problems or deaths is likely "of a similar character".[263] The intent element would be met as it covers "both direct intent (purpose) and indirect intent, ie. knowing that the harm is a substantially certain consequence of one's conduct".[264] However, while the attack is to be directed against a civilian population, there is no need to have a "special intent" or "desire" to harm civilian populations; it is sufficient the harm occurs, for instance, in pursuit of broader aims such as making a profit.[265] This approach could effectively prosecute crimes committed against the environment, and Indigenous Peoples whose ways of life are tied to ancestral lands, therefore also influencing domestic prosecutions.

In this respect, Colombia's Special Jurisdiction of Peace, in seeking transitional justice is pursuing a more ecocentric approach recognising

[261] *Ibid.*
[262] *Ibid.*
[263] *Ibid.*
[264] *Ibid.*
[265] *Ibid.*

Indigenous territories as victims of its non-international armed conflict,[266] including indicting mid-level FARC-EP members for crimes against humanity in case 05, and indicating environmental destruction is "a war crime".[267] In its resolution, the Special Jurisdiction of Peace uses words of affected Indigenous groups to recognise the Great Nasa Territory of the Cxhab Wala Kile is "a living being [who]…feels [and]…must be nourished and cared for".[268] Its indictment recognises that FARC-EP rebels implemented "a 'regime of terror'" against Indigenous Peoples, including homicides and child recruitment, with their reckless conduct "br[eaking] the environmental balance of the region" in mowing down vegetation to establish camps, plant landmines and illegal mining, including cultivating coca crops to manufacture cocaine.[269] The environmental destruction is described as "a war crime", and the attitude of FARC-EP "ambiguous" in not "hav[ing] an active policy to prevent the damages caused", but also directly allowing the harm which "altered the relationship of communities with their ancestral lands".[270] The judgment of the Special Jurisdiction of Peace therefore recognises the environmental harm inflicted, the value in protecting the environment as a person, including to uphold Indigenous ways of life during armed conflicts.

Moreover, international criminal law could push its field and international humanitarian law forward in protecting the environment and Indigenous Peoples during armed conflicts, through a new ecocide crime.[271]

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[266] Alexandra Huneeus and Pablo Rueda-Saiz, "Territory as a Victim of Armed Conflict", *International Journal of Transitional Justice*, Vol. 15, No. 1.

[267] Andrés Bermúdez Liévano, "Colombia: New FARC Indictment Puts Spotlight on Indigenous and Afro Victims", *JusticeInfo.Net*, 27 March 2023, available at: https://www.justiceinfo.net/en/114385-colombia-new-farc-indictment-indigenous-and-afro-victims.html; Andrés Bermúdez Liévano, "Colombia's Transitional Justice Cannot Agree on How to Prosecute Environmental Crimes", *JusticeInfo.Net*, 9 Mau 2023, available at: https://www.justiceinfo.net/en/116565-colombia-transitional-justice-cannot-agree-on-how-to-prosecute-environmental-crimes.html.

[268] A. Huneeus and P. Rueda-Saiz, above note 266, pp. 220–1.

[269] A. Bermúdez Liévano, above note 267.

[270] *Ibid.*

[271] Polly Higgins, *Eradicating Ecocide*, Shepheard-Walywyn, 2nd ed, London, 2015; Rosemary Mwanza, "Enhancing Accountability for Environmental Damage Under International Law:

This crime would decolonise international criminal law and international humanitarian law by not only including the environment within its ambit of protection but underscoring the environment deserves protecting per se.[272] The International Criminal Court should drop the cumulative threshold in Article 8(2)(b)(iv) to implement a list of acts constituting ecocide with the crime defined along the lines of ecocide as: "any of the following acts or omissions committed in times of peace or conflict which cause or may be expected to cause widespread or long-term and severe damage to the environment."[273] The new crime of ecocide would therefore be able to prosecute serious crimes committed against the environment, including for instance, damage to the Nova Kakhovka dam and resulting flooding committed during the Russia Ukraine conflict.[274] It could also encourage States to change their laws and domestic constitutions to recognise the crime of ecocide and provide further protection to the environment during armed conflicts.[275]

Still, if the International Criminal Court were to introduce the crime of ecocide, making its field less anthropocentric, a successful case should address underlying structural issues such as the discrimination and oppression of Indigenous Peoples.[276] For instance, "the 'end' of ecocidal conduct may not signal the end of subjugation or denied access to natural resources" for marginalised groups such as Indigenous Peoples.[277] While "land restitution and related reparations" are important, they may not tackle underlying systems of practice that exclude Indigenous understandings of caring and

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Ecocide as a Legal Fulfilment of Ecological Integrity", *Melbourne Journal of International Law*, Vol. 19, No. 2, 2018.

[272] T. Lindgren, above note 255, pp. 539–43.

[273] A. Bustami and M.C. Hecken, above note 247, p. 173.

[274] Richard Honey, "Environmental Damage in the Context of International Criminal Law," *Francis Taylor Building*, available at: https://www.ftbchambers.co.uk/elblog/view/environmental-damage-in-the-context-of-international-criminal-law.

[275] *Ibid.*

[276] Rachel Killean, *Reparation in the Aftermath of Ecocide*, UCLA School of Law Symposium Paper, 2023, pp. 5 –8.

[277] *Ibid.*

protecting the environment.[278] Instead, identifying intersections of race, class, gender, sexuality, and disability "which influence access to natural resources" remains crucial, including hearing these perspectives before a reparation order is made, as this would better accord with the Martens' clause "dictates of public conscience" and "humanity" to achieve justice for Indigenous Peoples and the environment.[279]

D. Indigenous Peoples' Inclusion in International Humanitarian Law Political Processes Remains Crucial

The final crucial means to push international humanitarian law forward to better protect the environment and Indigenous Peoples, is to include Indigenous Peoples in international humanitarian law political forums and peace-making processes. The inclusion of Indigenous Peoples is a key part of the procedural element of the right to a clean, healthy and sustainable environment, which underscores the importance of "access to information, public participation and access to justice with effective remedies".[280] Indigenous Peoples' knowledge has much to offer, including the Martens clause "dictates of public conscience" and "humanity", to create a fairer international humanitarian law that overcomes its colonial origins to uphold their interests.[281] For instance:

- Indigenous laws of war can contribute to interpretations of principles of distinction,[282] necessity[283] and proportionality in attack.[284] Australian First Nations' applied the principle of junkarti (equity in

[278] *Ibid.*
[279] *Ibid;* Martens Clause, above note 7.
[280] "Promoting Environmental Democracy: Procedural Elements of the Human Right to a Clean, Healthy and Sustainable Environment," *United Nations Human Rights Office of the High Commissioner*, 2 October 2023, available at: https://www.ohchr.org/en/calls-for-input/2023/promoting-environmental-democracy-procedural-elements-human-right-clean; Right to a Healthy Environment: Good Practices, above note 166, pp. 5–8.
[281] Martens clause, above note 7.
[282] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Arts. 48 and 52.
[283] Hague Convention IV, above note 7, Art. 23(g); Geneva Convention IV, above note 27, Art. 53; *United States v List*, above note 27.
[284] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Art. 51(5)(b).

damages), seeing "no one…walk away holding a grudge".[285] This principle created rules limiting attacks against civilians and civilian objects, stopping fighting against injured persons, and ending conflicts "on a note of complete forgiveness and goodwill".[286] Similarly, Aotearoa New Zealand's Indigenous Māori underscored warfare is conducted per tikanga/customary principles of utu/reciprocity to restore mana/moral authority, balance and peace whereby all becomes kua ea/settled.[287]

- The 2011 Me Rongo Congress for Peace, Sustainability and Respect for the Sacred reinforced Indigenous Peoples' knowledge contributes to international humanitarian law peace-making processes, including environmental protection.[288] Its Congress gathered Indigenous Peoples to share peacekeeping traditions, with its title coming from Aotearoa New Zealand's Moriori Indigenous term of "me rongo" which translates to "in peace" or "to listen".[289] Their reissued Covenant of Peace provides ingredients of peaceful living, recognising armed conflict is often due to disputes over resources and lands.[290] The way forward includes "(re)learning how to live 'in connection with', rather than increasingly 'disconnected from', our planet and planetary systems", and for international humanitarian law to listen to Indigenous Peoples if the environment and their rights are to be upheld.[291]

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[285] Samuel White and Ray Kerkhove, "Indigenous Australian Laws of War: *Makarrata, Milwerangel and Junkarti*", *International Review of the Red Cross*, Vol. 102, No. 914, 2020, pp. 971–3.

[286] *Ibid,* p. 978.

[287] Hirini Moko Mead, *Tikanga Māori: Living by Māori Values*, Huia Publishers, revised ed, Wellington Aotearoa New Zealand, 2016, pp. 270–1 and 278–81; Te Aka Matua o te Ture/Law Commission, *He Poutama*, Study Paper No. 24, September 2023, pp. 66–71.

[288] Heather Devere et al., "Regeneration of Indigenous Peace Traditions in Aotearoa New Zealand" in Heather Devere, Kelli Te Maihāroa and John Synott (eds), *Peacebuilding and the Rights of Indigenous Peoples: Experiences and Strategies for the 21st Century*, Springer, Cham, 2017, pp. 53 and 56–7.

[289] *Ibid.*

[290] "Me Rongo Declaration 2011", *Education Resources: Moriori Resource*, webpage, para 6, available at: https://education-resources.co.nz/moriori/2019/08/15/me-rongo-declaration-2011/.

[291] H. Devere, above note 288, p. 57.

Accordingly, if international humanitarian law is to better protect the environment and Indigenous Peoples during armed conflicts, it must include Indigenous Peoples in its forums and advocate for a holistic international humanitarian law recognising the interconnections between humans and non-human life.[292] This approach could adopt resolutions with Indigenous Peoples' input to recognise their customary rights to lands and self-determination during armed conflicts.[293] Through including Indigenous Peoples in these processes, alongside applying principles from international environmental law, international human rights law, as well as international criminal law, international humanitarian law could come full circle. That is, it could move away from its colonial origins of excluding Indigenous Peoples to create a coordinated regime better protecting both the environment and Indigenous Peoples during armed conflicts.[294]

## V. Conclusion

This Article explored how international humanitarian law can better protect the environment and Indigenous Peoples during armed conflict. Its answer is that while international humanitarian law has few provisions protecting the environment in international armed conflicts, and none in non-international armed conflicts, the Martens clause which originally "othered" Indigenous Peoples, can via modern intersectional interpretations of "the principles of humanity" and "dictates of public conscience", open the door to principles from other bodies of law.[295] This combined approach of applying international humanitarian law and international environmental law/international human rights law/international criminal law[296] sees proposals for protected zones to uphold the environment and Indigenous rights to self-determination, along with the precautionary principle and right

[292] *Ibid.*

[293] Inna Toropenko, "Indigenous Peoples: Rights in Armed Conflicts", *New Geopolitics*, 31 May 2021, available at https://www.newgeopolitics.org/2021/05/31/indigenous-peoples-rights-in-armed-conflicts/.

[294] F. Mégret, above note 11; M. Lehto, above note 8.

[295] Martens clause, above note 7.

[296] M. Lehto, above note 8; R. Steenberghe, above note 8, pp. 15 and 22; K. Hulme, above note 41, pp. 1158 and 1163–71.

to a clean, healthy and sustainable environment increasing militaries' due diligence in conducting operations.[297] Further avenues for prosecuting crimes against the environment and Indigenous Peoples can deter future offending, with Indigenous Peoples' inclusion in international humanitarian law political processes crucial to garner understandings on peacekeeping and environmental protection.[298] The "dictates of public conscience" and "humanity" see the value of these processes, together, in helping international humanitarian law overcome its colonial origins to protect the environment and Indigenous Peoples during armed conflict.[299]

[297] Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16, principles 4 and 18; K. Hulme, above note 41, pp. 1165–71.
[298] H. Devere, above note 288.
[299] Martens clause, above note 7; M. Lehto, above note 8.