Hans-Joachim Heintze
Pierre Thielbörger *Editors*

From Cold War to Cyber War

The Evolution of the International Law of Peace and Armed Conflict over the last 25 Years

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Part I
Progressive Development of International Law

From Cold War to Cyber War: The Evolution of the International Law of Peace and Armed Conflict over the Last 25 Years—An Introduction

Hans-Joachim Heintze and Pierre Thielbörger

This book follows the history of the international law of peace and armed conflict over the last 25 years. It highlights both parameters that have remained the same during this time as well as new challenges that this field of international law faces today.

The idea for this book was born at the international conference 'From Cold War to Cyber War', held in Bochum on 14–15 November 2013. The conference celebrated the 150 years anniversary of the Red Cross, the 25 years anniversary of the Institute for International Law of Peace and Armed Conflict (IFHV) and also the 20 years anniversary of the Network on Humanitarian Action (NOHA). The conference was so rich in inspiring contributions from both academics and practitioners that organisers and participants decided to combine the results of the conference into an edited book collection on the recent evolvement of the international law of peace and armed conflict—the result of which you hold now in your hand.

In his introductory contribution 'Perspectives of International Humanitarian Law', **Professor Dr. Knut Ipsen (Ruhr-University Bochum)**—founding father of the IFHV and former President of the Red Cross—highlights the different categories of armed conflict and describes the problems in applying international humanitarian law to these conflicts. He particularly explains the difficulty the 'expectation of reciprocity' meets in asymmetrical armed conflicts. Professor Ipsen also argues it is necessary to apply international humanitarian law in combination with other fields of international law, in particular human rights law, and highlights the general meaning of the rule of law. He finishes by stressing the important role that the International Committee of the Red Cross (ICRC) has played

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in promoting international humanitarian law in the past and concludes with a positive outlook for the future of this important field of law.

In the second part, the book turns to a specific tension existing in international law that is as old as international itself but at the same time as topical as ever: the tension between State sovereignty and people's right to self-determination. **Professor Dr. Markku Suksi (Åbo Akademi University Turku)** introduces us to the concept of autonomy in international law. He analyses precisely how this concept has been shaped in several cases over the last few decades. He reflects on the legislative powers of several autonomous entities and analyses the legislation governing Sub-State entities, including the Åland Islands (Finland), Hong Kong (China), Zanzibar (Tanzania) and Aceh (Indonesia).

Lisa Gow (Ruhr-University Bochum), a Scottish lawyer by training, takes up these considerations and applies them to the most recent case in which the Scottish people sought to exercise their right to self-determination by establishing a new State. She sheds light on the independence referendum held in September 2014 in Scotland, arguing, that while a majority of Scottish voters answered the question 'Should Scotland be an independent country?' with 'no', the Scottish people nevertheless gained a stronger form of autonomy from the United Kingdom through the process.

In the third part, the book turns to a relatively new challenge for peace and security: the dramatic effects of man-made climate change, for example increasing armed conflicts over scarcer-growing resources or climate migration. **Professor Dr. Pierre Thielbörger (Ruhr-University Bochum)** highlights the critique the United Nations Security Council has faced in the past when dealing with this issue, as many States regard climate change as an environmental concern or a development issue rather than a threat to peace and security. He also highlights that, although many of the effects of climate change currently occur at the local or national level, a competence of the Security Council could still be justified (if politically so desired) in several ways. He particularly highlights the nature of climate change as a global prisoner's dilemma, meaning that both the cause, and the only possible solution to the problem, lie in the international not the national sphere.

Dr. Kerstin Rosenow-Williams (Ruhr-University Bochum) also looks at the phenomenon of climate change, but from an organizational-sociological, rather than legal, perspective. She follows discussions within humanitarian organizations concerning environmental migration and analyses both the challenges and opportunities in addressing the needs of environmental migrants from a humanitarian perspective. In doing so, she focuses on the positions developed within the Red Cross Movement, the ICRC, and particularly within the International Federation of the Red Cross (IFRC).

In the next part, the focus moves on to 'New Forms of Warfare and Weaponry'. **Professor Dr. Stephan Hobe (University of Cologne)** focuses in his contribution on the applicability of air law in the case of civil use of remotely piloted aviation systems (RPAS). He analyses both the civil uses, in particular surveillance, and military uses, including the killing of combatant forces, of RPAS. Professor Hobe

also highlights the legal challenges that the use of these systems pose, including the applicability of international humanitarian law and the protection of fundamental rights through data protection legislation.

In the next contribution, **Professor Dr. Robert Kolb (University of Geneva)** considers the question, to what extent railway lines used for deportation of civilians may be attacked under international law. Under jus in bello, the attack is difficult to square with article 52(2) of Additional Protocol I of 1977 and related customary international law, which exhaustively provide for the likely objects of attack by belligerents. The contribution then canvasses some arguments as to how an attack could be rendered compatible with international law, considering in particular other legal sources, external to the law on the conduct of hostilities.

Professor Dr. Peter Hilpold (University of Innsbruck) deals with the applicability of article 51 of the UN Charter to asymmetric wars. He underlines that the term asymmetric war is not really a legal term of art in international law. However, in its broadest understanding it comprehensively denotes situations of war where there is a disparity between the factual and the legal situation applying to the various actors. In this sense a divide in the power between the participants would suffice to qualify a situation of war as 'asymmetric'. In his analysis this term clearly relates to the legal qualification of the actors, i.e., to the question whether one or more non-State actors are participating and therefore, whether article 51 of the Charter applies at all. Against this background he considers the category of terrorists, which receives the most attention in both theory and practice.

Professor Dr. Wolfgang Benedek (University Graz) gives an overview of the state of the art in the field of human security research and practice. Since its conception 20 years ago, the concept of human security has seen ups and downs in the United Nations and scholarly literature. However, the United Nations have recently agreed on a definition and the concept is broadly employed in the context of violent and non-violent security issues. While international organizations are still hesitant to use the concept directly, there appear to be various forms of indirect usage. This is in line with an emerging human rights-approach to security and humanitarian action. Whereas challenges remain both on a conceptual and a practical level, there is a growing common understanding of the main characteristics of the concept, which remains an inspiring perspective for many scholars and actors.

Professor Dr. Hans-Joachim Heintze (Ruhr-University Bochum) argues in his contribution that the international law governing disaster response and humanitarian assistance has developed into a comprehensive body of law dealing with the initiation of relief, questions of the status of humanitarian actors and the right of access to victims. The Special Rapporteur of the UN International Law Commission on the Protection of Persons in the Event of Disasters underlines, in the first set of articles adopted by the Commission, it is the primary responsibility of the affected State for protecting persons under its territorial jurisdiction and the affected State's consent for providing international assistance. The author predicates that the codification project has given a fresh impetus to the ongoing

discussion on State sovereignty versus the obligation to receive international humanitarian assistance.

Charlotte Lülf, LL.M., M.A. (Ruhr-University Bochum) explains the recent armed conflicts and increasing occurrence of natural disasters will result in massive displacement of people within the affected country or across international borders. Protection of victims lies at the centre of the most fundamental but also opposing principles of international law, on one side the principles of State sovereignty and territorial supremacy, and on the other side the humanitarian ideas of the international community framed in State obligations under international treaties. Refugee protection is composed of intersecting and mutually reinforcing rights and duties stemming from different fields of international law, particularly international human rights law, asylum law and international humanitarian law. Her article addresses the specifics of one of the major principles of refugee protection, the principle of non-refoulement.

In the next contribution, **Dr. Wolfgang Heinz** and **Judith Kaiser** (**German Institute for Human Rights**) highlight the issue of sexual violence in armed conflict. The authors give an overview of the relevant legal regime and highlight existing activities at the international and regional level. They particularly stress the importance of, and at the same time the difficulty with, monitoring rights violations in this particular field. They identify, as one of the key remaining difficulties, the urgent need to integrate respect for standards in this field more effectively during all stages of a conflict.

In the next part, academics share insights with practitioners from the government, humanitarian organizations and think tanks on progresses and challenges in humanitarian aid. **Dr. Eltje Aderhold (German Foreign Ministry)** describes current structures of humanitarian coordination and outlines their historical origins. The chapter also analyses the existing efforts to reform the international humanitarian system between the years 2005 to 2011. The author identifies furthermore achievements and remaining challenges in international humanitarian coordination efforts and emphasizes Germany's strong commitment towards international and German humanitarian coordination.

Dr. Ulrike von Pilar, Corinna Ditscheid and **Alfhild Böhringer (Médecins sans Frontières)** criticise the western trend to increasingly use humanitarian aid as a tool for political and military ends. The authors fear that humanitarian action will become, or has already become, part of governmental action, and argue that this would be a fundamental breach of several key humanitarian principles. They also highlight the negative consequences for aid workers and affected populations that result from the politicization of humanitarian aid. They draw on several examples of recent interventions to illustrate this point. While the authors focus on German foreign policy, they also make a broader point about a general tendency in Western countries: to use humanitarian aid increasingly for political or military purposes.

Dr. Sascha Lüder (German Red Cross Blood Transfusion Service West, Hagen) argues that emergency services, and the blood transfusion service, are objects of public interest in the form of resilient healthcare systems. Thus, the provision of these services must not only be economically sufficient, but the

security of supply must also be ensured. Emergency services and the blood transfusion service have to be provided comprehensively and around the clock—at inconvenient times and under difficult circumstances. In order to operate further under these circumstances, emergency services and of blood transfusion service have to be prepared and equipped accordingly.

Dr. Christian Schaller (Stiftung Wissenschaft und Politik, Berlin) addresses in his contribution the political and legal difficulties faced when dealing with rebel groups. He analyses the legal implications of recognizing rebel groups, focusing on the cases of the Syrian and the Libyan rebels. He stresses that a premature recognition can easily be in violation of international law. The author further reflects on initiatives to increase military assistance to these rebels by the United States of America (USA), the United Kingdom (UK) and others. The author emphasizes the importance of having such military involvement authorized by a Chapter VII resolution of the Security Council rather than relying on the 'responsibility to protect' which has, according to his account, not reached the status of international customary law.

The demand for crisis management has triggered the involvement of various kinds of actors in the field of humanitarian action. **Professor Daniel-Erasmus Khan (University of the Bundeswehr Munich)** addresses civil-military relations against the background of humanitarian relief operations, the humanitarian principles and cooperation with humanitarian organizations. Referring to core legal and political instruments and State practice, he argues that, although civil-military cooperation is not a new invention, guidance on conflicting priorities in the field of humanitarian action can rarely be found. Nonetheless, humanitarianism has to hold its ground against dominant political and strategic considerations in future operations.

We hope that the book will be of use and interest to anyone concerned with the development of international law and humanitarian studies or working in areas where such issues are raised, whether in circles of academics or practitioners.

We would especially like to thank the Network on Humanitarian Action (NOHA) and the *Verein für die Förderung der Lehre und Forschung des Friedenssicherungsrechts und des Humanitären Völkerrechts* for their moral and financial support for the publication of this book.

Bochum, Winter 2014/15

Perspectives of International Humanitarian Law

Knut Ipsen

1 Perspectives of Armed Conflict

International lawyers are often inclined to take primarily into focus of their interest problems of applicability, scope and interpretation of the law in force. This approach—which is doubtless acceptable and necessary—includes, however, the danger of blocking, at least sometimes, the perception of a changing reality. Such a changing reality includes especially the well-known phenomenon that the development of the factual situation may diminish more and more the appropriateness of legal norms to serve effectively their purpose. Among the numberless examples of this phenomenon in the field of the law of war may only be mentioned the III. Hague Convention relative to the Opening of Hostilities or art. 1 para 4 of the First Protocol Additional to the Geneva Conventions. This famous provision qualifies so-called "wars of liberation" of non-State entities against colonial domination, foreign occupation and racist regimes as *international* armed conflicts. In force since more than three decades this provision has never been applied in the reality of armed conflicts.

Such a possible development recommends a brief consideration of the armed conflict as a factual phenomenon during the decades since the end of World War II, when with the Charter of the United Nations a world-wide collective security system had been installed. Determined "to save succeeding generations from the scourge of war"[1] and based on the principal prohibition of the threat or use of force[2]

Prof. Dr. Dr. h.c. mult. Knut Ipsen, em. Professor, former Rector of the Ruhr-University Bochum, former President of the German Red Cross

[1] Charter of the United Nations, Preamble.

[2] Id., art. 2 para. 4.

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the U.N. Members, declaring themselves as "peace-loving States",[3] were nevertheless confronted with an uninterrupted continuity of armed conflicts. This continuity may be demonstrated by reference only to such armed conflicts in which the use of armed force has led, at least temporarily, to territorial control of both parties to the conflict as now required by art. 1 para. 1 Prot. II. To underline this continuity by some figures: After the end of World War II, but still in 1945, 5 armed conflicts occurred and this number increased until 1960 to 15 every year. During the next 15 years this number was even doubled to about 30 armed conflicts per annum. The top of this crucial development was reached in 1992 with more than 50 armed conflicts,[4] just at the time, when optimistic voices demanded, because of the end of the Cold War, a "peace dividend" in the national budgets. Since that time we have an annual range of variation between 20 and 40 armed conflicts.

This deplorable evidence of the inability of mankind to abstain from the use of armed force shows specific features which stand against an in any way positive assessment of the perspectives of armed conflicts with regard to their significant containment or even their total suppression. As far as *international* armed conflicts are concerned, there is at least a certain indication that their occurrence may furthermore decrease. It is, however, not a universally growing peacefulness of mankind, but the disproportionately growing expenses of military superiority that have reduced international armed conflicts. Moreover, the Gulf Wars of 1991 and 2003 have demonstrated that a conventional war of a State like the Iraq against an adversary of the operative standards and the highly developed armaments on which the United States dispose is without any prospect to defeat such an adversary as the U.S. armed forces. On the other hand, Vietnam and Afghanistan twice have demonstrated that military superiority of a superpower is not a guarantee for succeeding in a *non-international* armed conflict of asymmetric character. More than 80 % of the total number of the armed conflicts of the last two decades have been non-international armed conflicts. The fact that at least about 40 of the 196 States of this Earth are to be qualified as fragile States that are in the process of failing or have already failed adds to the continuity of such conflicts. Thus the decreasing number of international armed conflicts is outweighed by an increasing number of non-international armed conflicts. The present situation of the African Continent, but also of some regions of Asia and of Latin America are sufficient indicators that the reality today and in future includes more and more such asymmetric armed conflicts.

Does international humanitarian law keep up with this factual development? The answer cannot be, what is to be regretted, affirmative. The law in force is based on some preconditions which are incompatible with the characteristics of asymmetric conflicts. This presumption will be corroborated by the following deliberations.

[3] Id., art. 4 para. 1.

[4] See among others, D. Smith, The State of War and Peace Atlas, 3rd ed., Oslo/London 1997.

2 Deficiencies of the Law in Force with Regard to Non-international Armed Conflicts

First of all we should recall that it was the International Committee of the Red Cross being the guardian of international humanitarian law that had drafted at the beginning of the seventies of the last century the two additional protocols to the Geneva Conventions of 1949.[5] These drafts contained with some exceptions more or less identical rules for the international and the non-international armed conflict. Both drafts served as the basis for the negotiations of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.[6] Three years and three sessions had been exclusively concentrated on the law of *international* armed conflict. The main concern of a majority of the participating States which had recently acquired their independence was to include the wars of liberation into the category of international armed conflicts. The at that time highly controversial and afterwards insignificant art. 1 para. 4 of the First Protocol has been the well-known result. For the Second Protocol on the law applicable in *non-international* armed conflicts only a few days of the last session of the Conference had been spared. The Protocol was, moreover, during these days endangered to be deleted at all from the agenda. Due to the special efforts of two delegations which reduced the draft to a minimised set of rules a deletion could be avoided.

The Second Protocol nowadays in force is, therefore,—and this has to be underlined—only a torso of the draft originally presented to the Conference by the ICRC. Thus the ICRC succeeded in initiating the reaffirmation and progressive development of humanitarian law applicable in *international* armed conflicts, especially by including the so-called Hague Law into the First Protocol, but it failed to develop sufficiently the law of *non-international* armed conflicts. This outcome of the Diplomatic Conference means that the chance of a *comprehensive* Protocol for non-international conflicts has *intentionally* not been realised by the States participating in the Conference of Geneva. It has been doubtless a failure of these States which has also doubtless serious consequences for the perspectives of humanitarian law applicable in the most frequent category of armed conflicts.

Taking this factual background it was conceivable and with regard to the shortcoming of the Second Protocol even necessary to concentrate further efforts on an assessment of *customary* humanitarian law applicable in non-international armed conflicts. So the ICRC initiated the famous study on Customary International Humanitarian Law published in 2005[7] according to which most of the there

[5] Y. Sandoz et al. (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 149, Geneva 1987, p. XXXI.

[6] The following findings are based on the experience of the author as a Member and Legal Adviser of the Delegation of the Federal Republic of Germany at the Diplomatic Conference.

[7] J.-M. Henckaerts et al. (eds.), Customary International Humanitarian Law, Vol. I, Rules, Cambridge 2005.

formulated customary rules applicable in *international* armed conflicts are also to be applied in *non*-international armed conflicts. These findings are controversial and to some extent hardly compatible with the reality of asymmetric conflicts. Nonetheless the study is an important contribution to the discussion of customary law applicable in non-international armed conflicts. The study may, based on the authority of the ICRC, hopefully exercise an influence on the respective parties to non-international armed conflicts, if such parties can be identified what is not always the case.

Is the attempt to strive for identical rules applicable in international and non-international armed conflicts at all a realistic approach? The answer to this question is decisive for the perspectives right now under consideration. The States participating in the Conference of Geneva have explicitly refused such an approach because of undeniable differences between both categories of armed conflicts. Whether this position can be maintained shall be examined by dealing with four basic problems of both conflict categories:

1. When exactly starts an armed conflict, because this is the point of time from which on humanitarian law has to be applied?
2. Which are the parties to the conflict responsible for the application of humanitarian law and what is the legal position of persons taking a direct part in hostilities?
3. What about methods and means of warfare in international and non-international armed conflicts?
4. Does the prohibition of any adverse distinction as to be found in both protocols establish the guarantee of legal equality which is a fundamental principle of international law as a whole, not only of international humanitarian law?

These four problems are related to factual situations in which death or life are at stake. Thus their discussion cannot be confined to the common legal disputes among scholars on principles, rules and terms of law. When elaborating on the four problems we have always to keep in mind that the decisive criterion of the effectiveness of the law of armed conflicts are not "the teachings of the most highly qualified publicists of the various nations" as mentioned in art. 38 para. 1 lit. d ICJ Statute as subsidiary means for the determination of rules of law. It is to a considerable extend the reality of armed conflict upon which the appropriateness and thus the effectiveness of rules are depending.

The four problems will, therefore, be taken under consideration on the background of that reality. A striking example for that reality is the Kunduz Case of September 2009. The air attack of U.S. combat aircraft requested by a German Colonel against two tank-lorries seized by Taliban fighters contains all factual elements which are closely connected with the four problems mentioned before. The Kunduz Case has been and is still highly controversial in Germany. It has recently been called by a press organ the most horrible fault German military personal has committed since 1945.[8]

[8] G. Mascolo, Maschinenkrieg, Der Spiegel, 8 April 2013, p. 31.

To start with the first problem: Which is the precise point of time from which on humanitarian law is to be applied? Art. 2 common to the Geneva Conventions and art. 1 para. 3 of the First Protocol permit in most cases the exact determination of the beginning of situations referred to in both provisions and thus of the moment of applying international humanitarian law. The beginning of an international armed conflict is usually combined with a controversy which State is in violation of art. 1 para. 4 U.N. Charter the *attacker*. Such a controversy, however, logically presupposes that an interstate armed conflict at all exists and may be identified as such, what presupposes, too, to determine the point of time of its beginning.

The legal and factual situation as to the beginning of a *non-international* armed conflict is by far more complicated. There has hardly been one non-interstate armed conflict since the entry into force of the Second Protocol that has from the beginning of the respective hostilities fulfilled the requirements of its first article. The definition of art. 1 para. 1 of the Second Protocol requires among other characteristics of the non-State party a responsible command, territorial control, the ability to carry out sustained and concerted military operations and the ability to implement the Second Protocol. Internal disturbances and tensions as sporadic acts of violence are expressly excluded from the scope of application of this Protocol by its art. 1 para. 2. To determine on the basis of this definition the applicability the law of non-international armed conflict—be it customary or conventional—to uprisings like in Tunisia, Libya, Syria, Egypt, Congo, Mali and others is hardly possible, what has been especially demonstrated, when one Permanent Member of the Security Council regards the respective conflict as an international affair and another Permanent Member insists on defining that conflict as an internal disturbance.

Afghanistan is a typical example for hardly controllable complications, if an armed conflict starts on the basis of self-defence (against a State or a non-State entity), leads then to the establishment of a new government which is supported by several States on the basis of an agreement with that government and endorsed by a repeatedly renewed Mandate of the U.N.S.C. authorising these States to take by means of an International Security Assistance Force (ISAF) "all necessary measures to fulfil its Mandate". Parallel to this development the reorganisation, the reinforcement and the armed activities of the Taliban fighters led to a non-international armed conflict. An exact date of its beginning cannot be determined. A very diligent and comprehensive analysis of this development comes to the conclusion: "This non-international armed conflict had certainly come into existence by 2005, and probably had already done so two years earlier".[9] As far as Northern Afghanistan including the Kunduz region is concerned and such a conflict may be localised, the hostilities in the North had "certainly exceeded the threshold of an armed conflict as of the beginning of 2009".[10]

[9] W. Heintschel von Heinegg/P. Dreist, The 2009 Kunduz Air Attack: The Decision of the Federal Prosecutor-General on the Dismissal of Criminal Proceedings Against Members of the German Armed Forces, in: T. Giegerich/A. Proelß (eds.), German Yearbook of International Law 53, Berlin 2011, pp. 833 (843).

[10] See ibid.

In spite of this situation the German Minister of Defence felt induced, even after 2005, to insist upon his view that the German armed forces of ISAF were only involved in a *mission of stabilisation* and not in a *war*. It was after the Kunduz Attack that his successor dared to speak, standing at the coffin of a soldier killed in action, of warlike circumstances. This absolutely superfluous controversy on war or "only" a mission of stabilisation contained two grievous faults. Firstly the S.C. is neither authorised nor capable at all to qualify by a Mandate under chapter VII a breach of peace as a war or only a situation requiring stabilisation. This question has to be decided on the basis of the respective provisions of international law applicable in armed conflicts by the parties of the conflict concerned. Secondly the apparent fact that the situation in Northern Afghanistan had developed to a non-international armed conflict was not even mentioned by the German Minister. The strict consequence of his position would have been that international humanitarian law would not have been applicable at the time of the Kunduz Attack. The Federal Prosecutor-General in his decision of April 2010 corrected these faults which were really not a honourable page in the annals of a well functioning government. To sum up: In past time it was and in future it may be and will be more and more difficult to decide upon the beginning of a non-international armed conflict.

The second basic problem is closely related to the fundamental structure of international law which is basically qualified as the existence of subjects bound by the law and having to apply it. Thus the Geneva Conventions and their Additional Protocols speak of the parties to the conflict which are responsible for the application of the law of armed conflict. As far as the international armed conflict is concerned, the states participating in the hostilities are the parties to the conflict. As *the* subjects of international law they are internationally responsible for the conduct of their armed forces being their organs. Such a clear-cut structure is seldom if at all to be found in non-international armed conflicts on the part of the non-State fighters. Moreover, the non-State fighters cannot be and are not interested to inform their adversary about their command structure if they have one at all. The Kunduz Attack again presented a typical example. The German commanding officer had been informed by his reconnaissance resources that two full-loaded civilian tank-lorries destined for the ISAF had been seized by Taliban fighters; one of the two drivers had been killed, the other had been forced to drive on and cross the Kunduz River, where both tank-lorries run aground on a sand bank and were immovable. According to the photographic reconnaissance of U.S. combat aircraft requested for close air support by the German officer there were about 70 persons around the lorries many of them carrying small arms and rocket-propelled grenades. Insofar the facts are uncontested and proved by photographic reconnaissance. They are laid down in the Report of the Federal Prosecutor-General of April 16, 2010.[11]

This leads to the question: When is it permitted to attack persons in an armed conflict? The law of international armed conflict is sufficiently clear: Members of

[11] For text see the link quoted by id., at p. 833 fn. 1.

the armed forces of a party to a conflict "are combatants, that is to say, they have the right to participate directly in hostilities" (art. 42 para. 2 Prot. I) and are, therefore, military objectives that may be attacked by legal means and methods of warfare. The basic rule of distinction between combatants and civilians is laid down in art. 48 of Prot. I and very detailed elaborated in the following articles of that instrument.

As far as the non-international armed conflict is concerned, the States negotiating at the Geneva Conference were not prepared to grant the status of combatant also to the fighters of the non-State entities taking a direct part in the hostilities as it had been proposed by the ICRC. The Governmental Delegations drafting Prot. II in the Working Group of the Third Commission (where no records had been taken) were of the opinion that it is and shall remain a monopoly of the State to use armed force. It was, therefore, regarded as incompatible with that monopoly to grant the citizens an individual right to participate directly in hostilities, especially not against the own State. Such acts have always been and are still qualified as serious crimes against the public order under national law. This position was particularly underlined by the delegates of States that had recently acquired their independence by the use of armed force. Thus the Second Protocol is confined to fundamental guarantees to "all persons who do not take a direct part or who have ceased to take part in hostilities". From this rule, however, is derived by *argumentum e contrario* that persons who *do* take a direct part in hostilities are military objectives. The "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law" prepared by the ICRC in 2009[12] may be helpful, but cannot overcome all difficulties as the ongoing discussion on the "civilians" killed by the Kunduz Attack shows. This distinction will remain *a* if not *the* basic problem in non-international armed conflicts.

The third basic problem connected with limitations and prohibitions of methods and means of warfare will, of course, require a permanent examination whether new developments as f. i. cyber and drone warfare and others are compatible with the respective rules applicable in international armed conflicts (it may be referred to the definite obligation under art. 36 Prot. I). In this field there had been substantial progress *at* the and *since* the Geneva Conference, take f. i. parts III and IV of the First Protocol, the CCW Convention, the Mine Ban Convention or the Convention on Cluster Munitions. Nevertheless there remain critical developments. Some of them such as cyber and drone warfare present fundamental problems and demand basic new approaches. With regard to non-international armed conflicts, however, the Second Protocol does *not* contain a part concerning methods and means of warfare. This had not been a mere negligence of the negotiating States, but their clear-cut intention. They have argued that the fighters of the non-State party do not have combatant status and, therefore, cannot be legally permitted to use methods and means of warfare that are under international law only admissible to combatants.

[12] See id., p. 845 fn. 18.

As far as the reality is concerned, it is again the Kunduz Case that shows how inadequate the combatant status for such fighters is. To call to our recollection again the beginning of this incident: Taliban fighters stopped and seized the two tank-lorries, killed one driver and forced the other driver to cross the Kunduz River with his tank-lorry. If the Taliban had been combatants, they would doubtless have committed a serious war crime by killing a civilian. These initial actions of the Kunduz Case demonstrate in a typical manner that non-State fighters because of their normally existing inferiority in equipment will always be inclined to make the best of their technically modest possibilities, no matter what the law commands. Their most effective means in Afghanistan have been and are still the ied's, the improvised explosive devices for which they need especially gasoline. Perhaps for this reason the Kunduz incident was not the first capture of tank-lorries by Taliban. Thus the asymmetric character of most non-international armed conflicts is particularly evident with regard to methods and means of warfare. It is, therefore, utopian to strive in this field for more or less identical rules in both categories of armed conflicts.

This is just the point which leads us to the last basic problem, namely to the prohibition of *any adverse distinction* to be found in both Protocols, but with different formulations. This distinction has been included as a basic principle of international humanitarian law into the preamble of the First Protocol by reading "that the provisions of the Geneva Conventions. . . and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict". The "adverse distinction" defined by art. 2 para. 1 of the Second Protocol has another meaning. It says: "This Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status or other similar criteria to all persons affected by an armed conflict as defined in Article 1". The preamble of the First Protocol is aimed at the suppression of doctrines such as those of just and unjust war. Art. 2 para. 1 of the Second Protocol transfers the human right-based principle of legal equality from the fundamental guarantees contained in art. 75 para. 1 of the First Protocol to the Second Protocol, where it is also included in the fundamental guarantees of art. 4. This complicated and questionable construction shows, however, an intention relatively clear: The authors were firmly determined *to permit* any adverse distinction based on the nature or origin of the armed conflict with regard to the *non*-international armed conflict. To use now a formula of the ICRC Customary Law Study: "No official contrary practice"[13] was found with respect to the position of the Geneva Conference as laid down in the different "adverse distinctions" of the two Protocols.

[13] See J.-M. Henckaerts et al. (eds.), supra note 7, pp. 4, 10, 28.

3 Summary

Finally four concluding remarks may sum up the perspectives of this important body of international law:

1. The most effective guarantee to ensure the application of international law is and will remain the expectation of the subjects of international law that their counterparts will comply with the law if they do the same. Notwithstanding the absolute prohibition of reprisals against the persons and objects protected by Part II of the First Protocol and the attempts to exclude the principle of reciprocity from international humanitarian law at all it cannot be denied that at least the *expectation* of reciprocity has always been a fundamental safeguard of international law as a whole and will remain so in future. Reciprocity, however, presupposes a certain legal symmetry. This symmetry does simply not exist in non-international armed conflicts. Especially the non-State party of such a conflict has normally only the choice between victory or total defeat, a situation which is not at all favourable to the application of law.
2. International law can only contribute to the formation of international relations; it has not always, as some international lawyers mean, the dominating power to decide on international relations—especially not under conditions, when existential problems are at stake. Armed conflicts have unfortunately the tendency to reduce the effectiveness of law, especially on the non-State part of an asymmetric conflict where the intentional disrespect of law is sometimes a method of warfare, is "lawfare", as some authors say by combining "law" and "warfare".[14] For these reasons it is urgently necessary to try to apply in such situations international humanitarian law and international law restoring peace including human right law in combined operation.—This has been, by the way, the basic idea on which 25 years ago the Institute of International Law of Peace and International Humanitarian Law of the Ruhr-Universität Bochum had been founded.
3. States which claim according to their constitution to be based on the rule of law should maintain this position also in a non-international armed conflict by doing their utmost to apply international humanitarian law and especially its fundamental guarantees to individuals of the non-State party to the conflict. To recur for a last time to the Kunduz Case: The decision taken by the Federal Prosecutor-General in this Case did correctly apply the provisions most favourable to the individuals of the non-State party; it has been a decision based on the rule of law.
4. To pay finally the due respect to the 150th anniversary of the ICRC: The world is really indebted to the ICRC that international humanitarian law has reached, in

[14] See especially C. J. Dunlap, Jr., Do We Need New Regulations in International Humanitarian Law? One American's Perspective, in: Journal of International Law of Peace and Armed Conflict 25 (2012), p. 120; for a critical position see K. Ziolkowski, "Lawfare" – die Theorie von der Fortsetzung des Krieges mit "rechtlichen Mitteln", in: Journal of International Law of Peace and Armed Conflict 23 (2010), p. 112.

spite of many obstacles some of which are previously mentioned, a considerable level of order. To finish with an impressive example of practice: Some years ago I met on a Red Cross Mission in a Latin American State a Red Cross Delegate who had prepared a dozen of charts each showing by a picture a basic prohibition in guerrilla warfare. This Delegate travelled around in that country twice as large as Germany and instructed the guerillero groups active in different regions, with the consent of their "Commandantes", what they were under all circumstances prohibited to do. The charts had the purpose to enable also illiterates to understand what they should never do. Such experience for which that activity is only one example may induce the hope that there is after all a positive perspective of international humanitarian law.

Part II
Old Wine in New Bottles: Autonomy and Independence in International Law

Autonomy and Conflict Resolution

Markku Suksi

1 Introduction

The Cold War and the more modern phenomenon, cyber war, are normally associated with States. As subjects of international law, States engage in regular wars with each other, or at least that is the common perception. States are also the entities that normally resolve conflicts between each other and conclude peace treaties. The methods of warfare have, during the past two-three decades, been complemented by a new way of carrying out hostile action, namely the cyber war, in which the intention of one party is to inflict damage on the other party. Cyber war, however, is not necessarily very straight forward from the point of view of the traditional understandings concerning parties to a war, but may allow for a more diverse palette of warring parties and a more diversified understanding of the level of the conflict: not all cyber wars are necessarily wars between States, and the level of engagement may be relatively low, but clearly of such a nature that at least a minimum level of conflict is constantly maintained. Also, in cyber wars, human casualties can probably be avoided.

Today, traditional wars between States are diminishing in numbers, but internal conflicts within States are still very common. In such contexts, one part of the population of the State is often making claims that another part of the population of the same State is unwilling to accept. One important reason for such internal conflicts is the grievances of a minority population. If the State allows the majority population to be very hegemonic in relation to minorities within the territory of the

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State, potential inequalities, forced assimilation, and setting aside of human rights may drive the minority population to seek for change of government or even secession. Examples range from the Tamil population of Sri Lanka, where territorial autonomy was at some point into the conflict put on the agenda as a solution to the conflict (only to fail at the end, when the Sri Lankan armed forces succeeded in bringing about a complete victory over the rebel forces), to Southern Sudan, where independence of the southern part of Sudan was the end result of a process after a transitional stage of autonomy. However, the estimated 65 territorial autonomies in the world that are in existence today display varying degrees of successful conflict resolution and thus in many cases contribute to maintaining internal peace in the States concerned. At the same time, the existence of such Sub-State entities as territorial autonomies of different sorts may advise humanitarian actors as to which is the most effective contact-point for the delivery of humanitarian assistance. Humanitarian actors should perhaps not only interact with the State, but also with Sub-State entities representing vulnerable groups.

An exposé of autonomy in a conflict resolution context has to start with a short note on the Åland Islands (however, that situation did not, during 1917–1921, actualize any limitation of the human rights of the population of Åland). The main issues in this article are, however, the following: what could an autonomy solution be based on in a conflict resolution context, what types of autonomy are there that could be used, how is territorial autonomy distinguished from federal forms of organization, which is the position of an autonomous entity as a possible recipient of humanitarian aid, and how should autonomies be understood in the context of data communication and data protection? At the end, we might even be in a position to indicate a plausible answer to the question of why Edward Snowden first travelled to Hong Kong, when he was about to leak the NSA documents. These issues necessitate reflections on the legislative powers of autonomous entities, and to that end, legislation governing Sub-State entities such as the Åland Islands, Hong Kong, Zanzibar, and Aceh is utilized.

2 The Åland Islands in Finland

The Åland Islands are often referred to as the oldest existing autonomy arrangement in the world; its autonomy was instituted more than 90 years ago. The Åland Islands are situated in the Baltic Sea between Finland and Sweden, and consist of one main island and numerous smaller ones inhabited by a predominantly Swedish-speaking population. For strategic and perhaps to some extent also for linguistic reasons, Sweden displayed an active interest in the area after World War I, and a dispute was generated between Finland and Sweden about the national affiliation of Åland. The dispute was resolved under the auspices of the League of Nations, which prevented the conflict from escalating and helped to extinguish the conflict between the two countries.

As early as August 1917, several months before Finland declared independence from Russia, an unofficial assembly of the inhabitants of the Åland Islands proposed that the area should secede from Finland and join Sweden. Soon after the Finnish Declaration of Independence on 6 December 1917, a petition campaign was launched to support the wish of the Åland inhabitants to secede. Of the approximately 21,000 inhabitants of the Islands at that time, around 12,500 had the right to vote, and about 8,000 of them were presented with a petition on the issue. Altogether 7,135 persons signed the petition to 'the king and people of Sweden' asking for Sweden to take steps toward annexation. A majority of those with the right to vote was thus in favour of union with Sweden.

Soon thereafter, a dispute about the islands arose between Finland and Sweden. Although Sweden was not a party to the 1856 treaty establishing the Åland Islands as a demilitarized area, it brought the matter before the Paris Peace Conference in 1919 in the hope that a solution similar to that of Denmark regarding Schleswig would be found, where a referendum resolved the border issue. This plan did not succeed, mainly because Finland and Sweden were not warring parties in World War I, although it was supported by another petition campaign in Åland, which was completed on 29 June 1919. This second petition was signed by 9,735 persons who all supported union with Sweden.

The legislative process for the enactment of an Act on the Self-Government of the Åland Islands by the Parliament of Finland was started in the Fall of 1919, probably as a pre-emptive measure. The Governmental Committee that prepared the Act on Self-Government for the Åland Islands was originally commissioned with the task of developing a scheme of regional devolution or decentralization for the entire country, but its work resulted only in a proposal for a self-government act for one specific part of the country. The Committee made a comparative analysis of cases of territorial self-government with law-making powers that included the British Islands of Man, Guernsey and Jersey, those dominions or self-governing colonies which were part of the British Empire (i.e., Canada, Australia, South Africa, and New Zealand, but also India), Iceland (which at that point of time was a part of the Kingdom of Denmark), Croatia and Bosnia and Herzegovina (as parts of the Austro-Hungarian Empire that broke up as a consequence of World War I), and Elsass-Lothringen (while it still was a part of Germany). However, the Committee concluded that none of these models was suitable as a point of departure for the self-government of the Åland Islands.

The drafting documents do not contain much information on this, but it is not unlikely that the recent experience of Finland as an autonomous Grand Duchy of the Russian Empire between 1808 and 1917 constituted the main model on the basis of which the autonomy or self-government of the Åland Islands was framed. The governmental bill to the Parliament stated that the aim of the Self-Government Act was to secure for the Åland Islanders the possibility of arranging their existence as freely as is possible for a territory which does not constitute a State. With the Self-Government Act of the Åland Islands (Statutes of Finland, SoF 124/1920), the province of Åland gained its own Legislative Assembly with general competence in

fields that were not included in the enumeration of exclusive legislative powers of the Finnish Parliament. This meant that the Åland Islands in the beginning possessed residual powers (however, the Self-Government Acts of 1951 and 1991 establish an enumeration of law-making powers for both the Åland Islands Legislative Assembly and the Parliament of Finland).

In 1920, the League of Nations took the matter up following a proposal by Great Britain, which was a party to the 1856 treaty. However, because the inhabitants of Åland felt that the self-government legislation had been imposed upon them, the Assembly did not convene until 1922, when the Åland Islanders became convinced that the 1921 Åland Islands Settlement between Finland and Sweden, brokered under the auspices of the League of Nations, was the best deal they could get and when the text of the Settlement had, in 1922, been passed into domestic law by the Finnish Parliament. This so-called Guaranty Act (SoF 189/1922) was an addition to the 1920 Self-Government Act. However, the 1921 Settlement is not a treaty under public international law.

In June 1921, the League of Nations decided that sovereignty of the Åland Islands would belong to Finland, but under the condition that guarantees for the Islanders' prosperity and happiness would be established in the Autonomy Act. The main purpose of the Åland Islands Settlement of 1921 therefore was and still is the preservation of the language, culture, and the local Swedish traditions on the Islands. The specific aims of the Settlement were the maintenance of the Swedish language in schools, the preservation of real property in the hands of the inhabitants, regulating within reasonable limits the franchise for persons who move to the Åland Islands, and guaranteeing that the Governor appointed enjoys the confidence of the population. Hence the purpose of the autonomy was originally primarily linguistic. The mechanisms created for the protection of the Swedish-speaking character of the Åland Islands aimed at preventing or at least discouraging an influx of Finnish-speaking population. It should, however, be emphasized that the establishment in the Ålandic jurisdiction of special rights for those with the right of domicile does not directly affect the freedom of movement of persons between the mainland and the Åland Islands or the freedom to take up residence on the Islands.

The autonomy of the Åland Islands should not, however, be confused with the neutralized and demilitarized status of the area.

After the Crimean War, the Åland Islands were demilitarized on the basis of the 1856 Convention on the Demilitarisation of the Åland Islands, concluded between Russia (to which the Åland Islands belonged at that point of time), Great Britain and France. The 1856 Convention was annexed to the 1856 Peace Treaty of Paris after the Crimean War.

When the Council of the League of Nations dealt with the Åland Islands issue in 1921, it recommended that the conflict be resolved also through another method than the above-mentioned Settlement, namely through the continued demilitarization of the area. In order to replace the 1856 Convention, a Convention concerning the Non-fortification and Neutralization of the Åland Islands was concluded between a number of States, including France and Great Britain as signatories of

the 1856 Convention, but excluding the Soviet-Russia. Finland (but of course not the Åland Islands) was party to this 1921 Convention together with Germany, Denmark, Estonia, France, Great Britain, Italy, Latvia, Poland and Sweden. In article 9(2) of the Convention, it is established that the Åland Islands form an integral part of the Republic of Finland. However, autonomy or self-government was not mentioned in the 1921 Convention. In the 1921 Convention, Finland took such a position of the party to obligations concerning the area as had been held by Russia in the 1856 Convention.

In the aftermath of the so-called Winter War of 1939–1940 between Finland and the Soviet Union, the two States concluded a bilateral treaty under which the Åland Islands are to be demilitarized and non-fortified. This bilateral treaty, the continued validity of which has been confirmed in subsequent agreements between Finland and the Soviet Union or the Russian Federation, contains in article 3 a provision according to which the Soviet Union (now the Russian Federation) has the right to maintain on the Åland Islands a consulate which, in addition to the ordinary consular functions, is given the task to oversee the implementation of the bilateral treaty.

As these treaties concerning demilitarization and neutralization demonstrate, the Åland Islands have been at the centre of security concerns in the Baltic Sea area are and continue to be so. As explained above, there is, in addition to the formal treaties under public international law, the Settlement before the Council of the League of Nations on the special rights of the inhabitants of the Åland Islands. This two-track strategy for the promotion of peace withstood the test of the Cold War and provided at the same time human security for the inhabitants of the territory. However, it is important to distinguish between the two arrangements, the treaty arrangements in the 1921 Convention for the demilitarization and neutralization of the Åland Islands and the 1921 Settlement that confirmed the autonomy arrangement and added certain special rights for the inhabitants of the autonomous territory.

3 The Proliferation of Sub-State Arrangements

Currently, there are around 65 territorial autonomies in the world, perhaps even more. Some of the territorial autonomies have been created for minorities as minority protection mechanisms, while some are not originally designed for minority protection reasons, but for other reasons. Some territorial autonomies, such as the Åland Islands, have been created for reasons of conflict resolution and dispute settlement, while some exist as features of the ordinary organization of the State. Examples of territorial autonomy range from Aceh to Muslim Mindanao and Bougainville via Rodrigues and Zanzibar to Bolivian autonomous areas and the Atlantic Coast of Nicaragua. The States within which they exist are Indonesia, the Philippines, Papua-New Guinea, Mauritius, Tanzania, Bolivia, and Nicaragua. These examples serve to prove that territorial autonomy is a global phenomenon,

not only a European one. These examples also serve to indicate that territorial autonomies are not only island territories, but are also found in 'mainland' conditions.

In Europe, there are less pure unitary States than States with Sub-State entities, when combining States including territorial autonomies with federally organized States. The textbook example of the unitary State should therefore not anymore be understood as the prime example of State organization, at least not in Europe. Instead, States with different variants of Sub-State forms of organization constitute the main model of the State in Europe and introduce asymmetries of many kinds in what for instance the European Union law has, until recently, tried to treat in a very straight forward way by interacting only with the Member States. In addition to the Åland Islands in Finland, territorial autonomy can be used to denote the diversification of State powers for the Faroe Islands and Greenland in Denmark, Scotland, Wales and Northern Ireland in the United Kingdom, Corsica in France, the autonomous communities in Spain, Azores and Madeira in Portugal, South Tyrol and some other special regions in Italy, Gagauzia in Moldova, and Crimea in the Ukraine. The State looks very different from a Sub-State perspective.

The territorial autonomies are, of course, very different, and they assume a variety of positions in relation to each other (and in relation to, for instance, constituent States in federations). Territorial autonomies exist in a variety of different situations, and they also have very different powers. In addition, they may be created at different normative levels, and they may be entrenched in the legal order by means of a multitude of mechanisms. When comparing the different situations, it becomes apparent that the powers granted to autonomies are not of a similar character in terms of extension or substance. The powers do not deal with same material fields, but vary instead from case to case according to the specificities of the aims to be achieved. Amongst the national constitutions, it seems that only the 1978 Spanish Constitution in its article 2 and the 2009 Bolivian Constitution in its article 2 formulate autonomy as a constitutional right. The variation in the creation of the autonomies is particularly interesting in respect of the norm-hierarchical level at which any given autonomy is established. The combined variation in the powers of the European autonomies and the norm-hierarchical level of the generic legislation can be illustrated as shown in Fig. 1.

It is possible to conclude on the basis of the chart summarizing some key features of European autonomies that legislative powers and regulatory or administrative competence have, in many States, been granted or devolved to so-called sub-national entities. At least a greater part, if not all, of these entities can be identified as autonomies. The competences devolved are, however, not of the same nature and do normally not concern the same substantive areas. Instead, it seems that the competences vary from case to case with a view to the needs that a specific case displays. The creation of individual autonomy arrangements does not follow any general pattern, and as concluded above, each and every autonomy arrangement is not established in order to create a minority protection arrangement. It is also important to note that only the Spanish and Bolivian constitutions create a

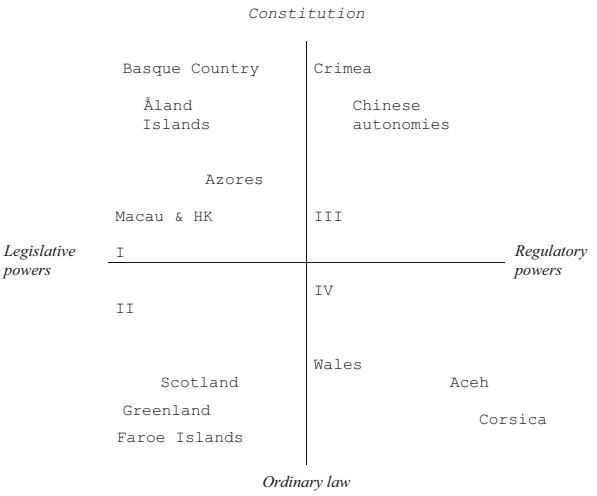

Fig. 1 Various autonomy positions

constitutional right to autonomy for territorial entities. In addition, one should also be aware of the difficulties in characterizing the British sub-national entities in this chart (see Fig. 1). The absence of a written constitution results in the absence of more definitive fixation points of these entities in the chart.

Those self-governmental arrangements that can be placed in section I of the figure can probably be considered autonomies proper. They are organized on the basis of the national constitutions of their respective 'mother-countries', and special jurisdictions involving exclusive law-making powers have been created for them against the background of the constitutions. The material fields of activity they possess vary between the different autonomies, but they are entitled to make laws of their own. This brings the European areas clearly within the ambit of article 3 of the First Protocol to the European Convention on Human Rights, which means that the legislatures must be elected in the manner prescribed in the provision. In this respect, there is a clear participatory dimension in the territorial arrangement.

Entities in section II of the figure lack the formal constitutional delegation of law-making powers, but they nevertheless make their own laws in the spheres determined for them in ordinary legislation. From a purely formal point of view they are not in the category of autonomies in section I, but the powers they exercise and the elevation of their status by way of non-statutory constitutional conventions or by way of customary constitutional law make them, for all practical purposes, autonomies.

Although the entities that can be placed in section III have a certain constitutional basis, their powers are of a non-legislative kind, limited to regulatory or administrative jurisdiction and subordinated to the ordinary legislative powers of the national law-maker of the country in which they exist. Here the use of the term 'autonomy' could be misleading, provided that a narrow understanding of the term is used in order to refer to territorially delineated entities with exclusive law-making powers. The powers of the regional ethnic autonomies in China to

enact by-laws on the one hand and to exercise a gap-filling power on the other seem to warrant the placing of those autonomous entities in section III of the chart. Section IV represents cases that probably should not be considered autonomies, but rather as regions with self-government of an administrative nature. In practice, however, they tend to be understood as autonomies.

No matter how much or little autonomy a territorial arrangement wields, such arrangements can nevertheless be understood as ways to promote participation in accordance with article 25 of the UN Covenant on Civil and Political Rights, which provides, *inter alia*, that '[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (. . .)'.

From this perspective of participation, it is very interesting to consider the processes of the CSCE/OSCE started at Helsinki in 1975, because they contributed strongly to the end of the Cold War. It is possible to say that the end of the Cold War was marked, in particular, through the 1990 CSCE Copenhagen Document on the Human Dimension. In this context of conflict resolution between the East and the West, the Participating States pledged at the level of political commitments to cater for the needs of individuals and groups in the new Europe that was developing. In paragraph 35 of the Copenhagen Document, the Participating States agreed on the following:

> The participating States will respect the right of persons belonging to national minorities to *effective participation* in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities.
>
> The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or *autonomous administrations* corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned. (italics by MS)

The concepts used in paragraph 35 of the Copenhagen Document should be understood in the security context of the CSCE/OSCE and against the background of the wish of the States to protect their sovereignty and territorial integrity against, for instance, secession. 'National minority' is a concept used to denote such ethnic, cultural, linguistic and religious identity that differs from that of the majority in the State, and persons belonging to minorities could possess some rights on the basis of that status. Here the language is different from article 27 of the UN Covenant on Civil and Political Rights, which is mainly focused on a negative freedom of the persons of minorities to interact with each other in the horizontal dimension: the State shall not interfere in their freedom to interact with each other. Paragraph 35 indicates that there exist some other rights, too, for persons belonging to minorities.

If there are 'specific historical and territorial circumstances', such circumstances may be used to justify the creation of appropriate local or autonomous administrations. Paragraph 35 of the Copenhagen Document was novel in its use of the concept of 'effective participation', later on to be found in the 1992 UN Declaration on Rights of Minorities and in the 1995 Framework Convention of the Council of Europe for the Protection of National Minorities. Effective participation in public affairs is stepping up the expectation of the impact of participation: where article 25 of the CCPR mentions participation in public affairs, paragraph 35 creates the expectation of something more, a threshold of 'effective' that should be met. This effective participation in public affairs is apparently meant to be realized at a general level in all public matters, because the provision contains a specification that effective participation should include participation in the affairs relating to the protection and promotion of the identity of such minorities, which means that effective participation of minorities in public life is not only limited to those issues that are of an immediate interest for the minority itself. Effective participation therefore has to take place in relation to all exercise of public affairs.

Paragraph 35 makes reference to the concept of 'autonomous administrations' as one means of achieving minority protection aims. Autonomous administrations are here presented as an alternative to local administrations, which would seem to mean that ordinary local government is not to be understood as included in the concept of autonomous administrations and that autonomous administrations should be located somewhere between the central administration and the local administration of the State, that is, at the Sub-State level. At the same time, the wide nature of the concept of 'autonomous administrations' is underlined by the term 'appropriate', which does not necessarily mean only territorial autonomy, but also other forms of autonomy (see below). In addition, the appropriate autonomous administrations should correspond to the specific historical and territorial circumstances of the minorities involved and be in accordance with the policies of the State concerned.

All this seems to leave a lot of freedom to the State to decide, within the security frame of the OSCE, whether or not to use autonomy, however, to promote the effective participation of minorities and if so, how much public powers such an autonomous administration should have at its disposal. In fact, the reference to autonomous administrations might mean that there is no need to furnish an autonomy arrangement with law-making powers proper; instead, some administrative powers of a lesser order could suffice. Therefore, it can be asked what the different forms of autonomy could be that are covered by the reference in paragraph 35 to appropriate autonomous administrations?

4 Different Forms of Autonomy

Clearly, territorial autonomy is found amongst those appropriate autonomous administrations that paragraph 35 refers to. However, as indicated by Fig. 1, the question is what kind of powers the autonomous territory has, legislative powers or regulatory or administrative powers. Often, legislative powers would be the hallmark of an autonomy proper. Irrespective of which kind of powers the autonomous territory has, the core of autonomy centres around self-government, where the inhabitants of the area elect a representative body that is in charge of exercising the powers. In this way, participation of the inhabitants through elections becomes effective participation. As indicated above, territorial autonomy is not necessarily a minority protection mechanism, but often more explicitly a conflict resolution mechanism, as is the case with the Åland Islands and Aceh, or a feature of the general organization of the State, as is the case in, for instance, Spain and Italy.

The term 'territorial autonomy' already in itself indicates that there might also exist some non-territorial forms of autonomy.

Cultural autonomy for ethnic minorities or national cultural autonomy (NCA) is one form of autonomy of a non-territorial kind that could qualify as an autonomous administration in paragraph 35 of the Copenhagen Document. Examples of such NCA are mainly found in Eastern and Central Europe, and the theoretical basis for such expressions of autonomy is often found in the conceptual conceptions developed by the Austrian theoreticians Bauer and Renner. For instance, in 1996, Russia adopted a Federal Law on National Cultural Autonomy that allows ethnic minority communities to establish ethnic organizations and to obtain designated funding from the federal State. Cultural autonomy, however, is not well defined in either the text of the law or in the minds of legislators. Experiences with national cultural autonomy in Russia have been both positive and negative, but it seems that the same results could be achieved by using the civil law association (normal NGOs) as a platform for activities for a minority population. With the exception of Serbia, where NCA is a relatively recent phenomenon, the powers exercised by NCAs are almost non-existent. They do not exercise legislative powers and therefore, article 3 of the First Protocol to the European Convention on Human Rights concerning free elections does not apply, and the extent of administrative powers they have been assigned is normally narrow. For that reason, it can be doubted whether NCAs generally can function as vehicles of effective participation, although NCAs are organized as self-governing entities (in the form of statutory associations of some sort) in which the members exercise self-government by way of elections to the governing bodies of the NCAs.

Functional autonomy can be constructed on the basis of a number of examples of non-typical administration found in, for instance, Finland as well as elsewhere in the world. Functional autonomy could be understood as a functional self-administration or functional self-management with no law-making authority, granted to a minority group. Functional autonomy aims at providing adequate linguistic services to a minority population in respect of a certain public function

(such as education) by means of creating special linguistically identified units at different administrative levels inside the general line-organization charged with the national or local administration of the public function. Functional autonomy may exist also in such fields of public administration as day-care of children, ecclesiastical matters and radio and television broadcasting. Examples of functional autonomy can be drawn, for instance, from Finland, Sweden, Canada, and India. Functional participation may imply effective participation, but mainly under article 25(c) of the CCPR, according to which every citizen has the right '[t]o have access, on general terms of equality, to public service in his country'. Functional autonomy could enhance this part of the right to participation by opening a particular branch of the public administration of the State to the minority population.

Personal autonomy can be defined as the freedom of association, understood as a general civil right, for persons belonging to a minority group to carry out cultural activities and other matters that a group may feel are important. The concept of personal autonomy may be grounded in various existing provisions found in international legal documents such as the UN Covenant on Civil and Political Rights, the Framework Convention for the Protection of National Minorities adopted by the Council of Europe and the European Convention on Human Rights as well as the documents of the Organization for Security and Co-operation in Europe. The protection afforded by these provisions focuses mainly on the freedom of association and on the right of persons belonging to minorities to set up associations for the promotion of aims which minorities might have. Minorities can achieve a lot through private organizations (NGOs) created within the framework of personal autonomy. According to article 27 of the CCPR, the State must not interfere in such activities: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.' If the State delegates to such NGOs public powers, for instance, in the field of education, the private associations actually start to perform functions of the State and become drawn closer to the State so as to transform the association into an entity within the so-called 'indirect public administration'. As a consequence, the NGO is drawn from the ambit of pure personal autonomy to functional autonomy.

5 Autonomies v Federations: Conceptual Distinctions Between Autonomy and Federalism

The Åland Islands constitute a territorial autonomy and is in this respect comparable to other similar Sub-State solutions, including Sub-State entities that are connected in a federal way with each other. Åland is not, however, a federally organized part of Finland, but conforms relatively well to a general definition of territorial autonomy that can be developed, *inter alia*, on the basis of the norms that

regulated the status of the Memel Territory as a part of Lithuania between 1924 and 1938.

On this basis, a territorial autonomy involves a singular entity in what otherwise would be a unitary State or a federal State, so that the entity introduces an asymmetrical feature in the State through a transfer of exclusive law-making powers on the basis of provisions, which often are of a special nature and defined in such a manner that the central State level remains with the residual powers, while the Sub-State level relies on enumerated powers, at the same time as the State level contains no institutional representation of the Sub-State entity.

A federation of a classical kind is differently organized and displays often an aim to introduce symmetry in the treatment of the federated entities so that these Sub-State entities of a federation are left with the residual powers, while the federal level is vested with enumerated powers. At the same time, the Sub-State level in a federation is institutionally represented in a senate or a federal chamber, which participates in at least some legislative functions so as to create a mechanism of joint management of issues at the federal level.

As concerns the Åland Islands, it can be said that Åland conforms well to the expectation that an autonomy would not be institutionally represented in the national parliament: the Finnish Parliament is unicameral, and thus the inhabitants of the Åland Islands participate in the exercise of the national legislative powers through the mechanism of general elections to the Parliament. In order to secure the representation of the inhabitants of Åland, there is a system in place since 1947 that reserves one mandate out of the altogether 200 seats in the Parliament for a representative from the Åland Islands. From the point of view of the ratio of representation, this special mandate does not produce any great imbalance, because the citizens of Finland in the constituency of the Åland Islands are more or less as many as those who support a seat amongst each of the other 199 mandates in the Parliament of Finland. It should also be noticed that the special seat for the citizens of the Åland Islands is not created on the basis of the Åland Islands Settlement of 1921, nor is the right to vote in these elections limited to those who have the right of domicile in the Åland Islands (which is the case for elections to the Legislative Assembly of the Åland Islands). This is instead a mechanism of general participatory nature of a domestic origin.

What causes a slight deviation in the case of the Åland Islands from the definition of a territorial autonomy is the manner in which the powers are distributed between the national Parliament and the law-maker of Åland. As explained above, the law-making powers of the Legislative Assembly are enumerated, but so, too, are the law-making powers of the Parliament of Finland. This latter feature is not quite in harmony with the definition of a territorial autonomy and causes a slight deviation in the case of Åland from the typical position of an autonomy in the direction of a federal organization, but the deviation is a slight one and would not cause us to change our characterization of Åland as a territorial autonomy.

In fact, there is one particular feature found in federations that strongly supports our conclusion that the Åland Islands is a relatively typical territorial autonomy. In

a federation, it is rather the rule than the exception that the relationship between the federal level and the several States involves a supremacy clause or a preemption doctrine on the basis of which it is held that the legislation agreed to at the federal level sets aside legislation produced at the State level. This is the case, for instance, in the Constitution of the USA, which contains the rule that federal law supersedes State law. The same is true according to the Constitution of the Federal Republic of Germany, according to which '*Bundesrecht bricht Landesrecht*' (see below, Sect. 5 of this article).

The legislative powers of the typical territorial autonomies, however, imply that the law-making powers of the autonomy are exclusive in relation to the national law-making powers and that there is an absence of a supremacy doctrine on the part of the national law-maker so as not to allow any preemption on the part of the national government within the competencies of the Sub-State entity. This is certainly the case with the Åland Islands: the Parliament of Finland cannot enact a piece of ordinary law within the competence of Åland even in the case that there would exist a normative void within the legal order of the Åland Islands. This absence of national supremacy and preemption has been confirmed several times over in case law of the courts and in *travaux preparatoires* of national legislation. The national law-maker cannot enter the sphere of authority of the law-maker of Åland. This feature is certainly explaining at least a part of the robustness of the autonomy arrangement of Åland: in relation to the national government and the national Parliament, the Åland Islands are very autonomous, enjoying legislative 'independence' within their sphere of competence. This means that the core group of territorial autonomies are very independent in relation to the government and law-maker of the State, and it could be said that in autonomies of this kind, '*kein Bundesrecht bricht Landesrecht*'.

The matter is different in relation to the EU. The supremacy of EU law in relation to not only the legal order of Finland but also in relation to that of the Åland Islands is, as explained above, cutting into the material law-making powers of the Legislative Assembly of the Åland Islands. The effect of the supremacy of EU law is that the autonomy of the Åland Islands is watered down: the law-making powers of the Åland Islands are being drained to the national government and to the EU, because in principle the EU only talks to the governments of the Member States. It could thus be said that Åland is autonomous in relation to Finland, but not in relation to the EU.

In comparison with most other autonomous territories in the world, the Åland Islands stands out as an autonomous territory with a very strong legal position. This applies both in relation to its powers (save for the inroads EU law is making into the powers of Åland) and the permanency of the autonomy arrangement. In comparison with other Sub-State arrangements, including federal forms of organization, it can be said that Åland belongs to a core group of territorial autonomies together with the historical example of the Memel Territory (MT), Hong Kong (HK), and Zanzibar (ZA), while a number of Sub-State entities, such as Puerto Rico (PR) and Aceh (AC), may have a weaker position and approach regional self-government of

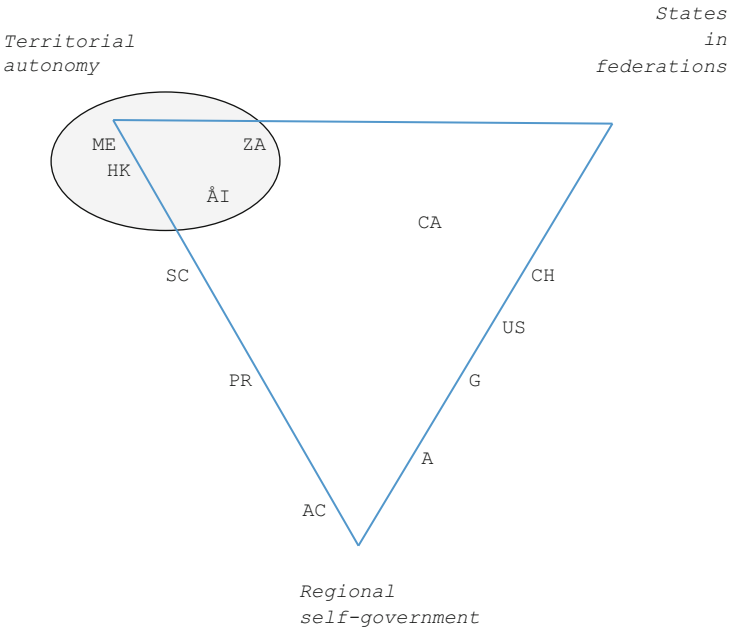

Fig. 2 Comparison of territorial autonomies with states in federations and regional self-government

some sort. At the same time, the Åland Islands (ÅI) can be placed, on the basis of material and institutional criteria (see above, Sect. 3 of this article), amongst territorial autonomies, not amongst federally organized entities such as the Sub-State entities in Canada (CA), Switzerland (CH), the United States (US), Germany (D), or Austria (A). A comparative figure could illustrate this comparison in a very approximate way as shown in Fig. 2.

It seems, on the basis of the horizontal dimension in this comparative figure, that a certain variation can be detected between typical autonomous entities and typical States in federations, at least when such Sub-State entities are considered that are most powerful in relation to the national level. The Memel Territory (and Hong Kong, too) stands out as the most typical case of territorial autonomy, because the entity possessed enumerated law-making powers, while the residual powers were held by the central government of Lithuania. The Åland Islands moves a step or two from this ideal position towards a federal form of organization for the reason that the powers of both the Åland Islands legislature and the legislature of Finland have been enumerated. Zanzibar is probably even further away in the federal direction, but can still be considered a territorial autonomy.

A similar variation from the classical federation towards autonomy can be detected, for instance, in the Canadian case. In Canada, the powers of the provinces are not of a residual nature, but enumerated, which is a feature that in itself separates the Canadian federalism from the classical federation, and this feature

is enhanced by the position of the senate in the Canadian federal government, which seems weak in comparison with other senates or federal chambers in federations. It deserves to be pointed out that at the same time, the arrangement with two enumerations of competencies in the Canadian case, one list of competencies for the provinces and another list of competencies for the federation, is an arrangement similar to that of the Åland Islands.

The vertical dimension in the comparative figure tries to illustrate the extent of the powers of the Sub-State entities both amongst entities that could be viewed as territorial autonomies and States in federations. Starting with the federal arrangements, it seems that there is a relatively weak supremacy clause or federal preemption doctrine in place in the Canadian federation, which means that the federal law-maker cannot normally trump the legislative decisions at the provincial level. According to article 91 of the Canadian Constitution, it is in some situations possible for the federal legislature to make laws for the peace, order and good government of Canada, a federal power that introduces a limited measure of federal supremacy. That supremacy is not, however, of the same nature as established in the supremacy clause of article VI, clause 2, of the US Constitution, according to which in situations where the federal and State laws are in conflict with one another, the federal enactments will prevail and override the State enactments. More or less this is the situation in Switzerland, too, in relation to the cantons under article 49 of the Federal Constitution of the Confederation of Switzerland. In the Federal Republic of Germany, the principle of '*Bundesrecht bricht Landesrecht*', that is, federal law breaks State law, is established in article 31 of the Basic Law of Germany. It means that if there is a conflict between a norm established in State law and a norm established in federal law, the federal norm takes precedence. In the Austrian case, the *Länder* seem even less powerful than the *Länder* of Germany.

This 'federal' consideration involving a supremacy clause or a federal preemption doctrine can also be used to distinguish between different entities that might be referred to as territorial autonomies. No such preemption or supremacy existed in relation to the Memel Territory under the law that governed the position of Memel (however, the Lithuanian government refused to accept the exclusivity of the Memel jurisdiction and was involved in constant attempts to break into the legislative powers of Memel). Such a preemption or supremacy is also absent in the cases of Hong Kong and Zanzibar. The situation is similar in relation to the Åland Islands, for which both case law and *travaux preparatoires* from the Parliament of Finland exist that conclude that the legislation of the national Parliament is not applicable within the jurisdiction of the Åland Islands to the extent the Legislative Assembly is competent to enact legislation.

Scotland (SC, in Fig. 2) is already in a slightly different position in this respect, because the Parliament of England might, under the principle of parliamentary sovereignty, decide to enact legislation within the competence of Scotland. However, and as mentioned above, it has promised not to do so without the consent of the Scottish Parliament in a political convention entitled the Sewel Convention, which is the closest to a provision in positive constitutional law that the British

system can arrive in the absence of a written constitution. The jurisdiction of Puerto Rico is, from this perspective, wide open for legislative enactments passed by the US Congress under the plenary powers of the Congress on the basis of the US Constitution in a manner which distinguishes Puerto Rico from the States in the US federation. Aceh stands out as the weakest entity in this comparison: although the Law on Governance of Aceh, enacted by the Indonesian Parliament, establishes certain powers for the representative assembly of Aceh, the actual distribution of powers between Djakarta and Banda Aceh is supposed to be determined in a Decree passed by the Indonesian Government after an agreement on the details of the arrangement has been reached between Aceh, on the one hand, and the Indonesian government, on the other. According to an interlocutor in Indonesia, no such Decree has been passed as of November 2013, which should mean that the unclear situation continues.

The strong position of the Åland Islands and the exclusive legislative powers the Legislative Assembly of the Åland Islands mean that under international human rights law, the Sub-State entity actually assumes the position of the State in relation to the inhabitants of the jurisdiction. Hence the governmental institutions of Åland that apply the legislation of Åland in individual cases, for instance, in the area of social affairs, education and the environment, have to take into consideration that under the European Convention on Human Rights, the rights of an individual must not be limited more than is necessary in a democratic society and that the rule of law must be observed. This means that problems related to the realization of the human rights of an individual may occur also in the jurisdiction of the Åland Islands: although the arrangement is, in itself, a very positive example of how the position of the inhabitants of a territorial entity could be protected, the government of an autonomous territory is government just in the same way as the government of a State is. This observation serves to remind everyone of the fact that even in a territorial autonomy, the position of the individual under international human rights law has to be upheld.

6 Autonomy and Aid: The Issue of the Legitimate Recipient

Foreign affairs and international relations are normally the responsibility of the State. In the life of a State, it sometimes happens that it becomes in need of some international assistance. If the State belongs to those that are less well off, the State may be a recipient of development aid, and if the State is hit by natural calamities or disasters or by international or internal conflict, the State may become a recipient of humanitarian aid. At those instances, the State is, of course, also expected to act so that the population of a possible Sub-State entity is covered by the aid schemes, for whatever reasons they may be created. The starting point for the delivery of aid should therefore be equality and non-discrimination also to such areas of the State

where territorial autonomies and other Sub-State entities exist. In particular, the delivery of aid should, in all instances, take care of vulnerable groups, and because minority populations, such as the Tamil population in Sri Lanka and many others, often find themselves in disadvantaged positions in relation to the majority populations, donors and distributors of aid should make sure that minorities are not excluded from aid schemes, but that they receive aid on an equitable basis.

The case in point is development aid given to Tanzania. When Tanganyika and Zanzibar joined in 1964 in order to form a new independent State, Tanzania, foreign affairs were defined as a so-called Union matter taken care of by the Government of Tanzania. This is now established in point 2 of the first schedule to the Constitution of Tanzania. It is therefore clear that Zanzibar as an autonomous territory of Tanzania does not have any powers in the area of foreign affairs and cannot, for that reason, establish direct contacts with third States or become member of international organizations. At the same time, it is not indifferent to Zanzibar how Tanzania is carrying out its foreign powers. Because no mechanism of consultation has been institutionalized between the two governments, but takes place on an *ad hoc* basis, a relatively normal situation is that no advance consultations take place between the Governments of Tanzania and Zanzibar before the foreign powers are exercised. For instance, there often is no relationship between a minister of the Government of Mainland Tanzania and a minister of the Government of Zanzibar.

Therefore, for instance within the area of agriculture, development aid has by default been going to the Government of Tanzania, leaving the Government of Zanzibar lacking in transfers from the international aid funds. A solution has, however, been reached during the recent years: out of the development aid received by Tanzania, 4.5 % is allocated to Zanzibar. This situation is not entirely satisfactory for Zanzibar, because this share indicates that Zanzibar is treated as any other region of Tanzania and not as an autonomous entity with its own law-making powers within key areas of public services and development decisions. In particular, the equal share in this context does not recognize the fact that Zanzibar would have the same cost of 'central government' for its own competencies as Tanzania has for its own when administering the development aid.

The need for aid is sometimes called for by emergencies and takes on the form of emergency relief. For instance, as concerns the Åland Islands, civil defence is, according to section 27(28), a legislative competence of the Parliament of Finland. However, under the provision, the decision to evacuate residents of Åland to a place outside Åland may only be made with the consent of the Government of Åland. This rule has its background in the aim of maintaining the Swedish character of Åland first established in the 1921 Åland Islands Settlement. The Government of the Åland Islands is thus the public institution that bears a final responsibility for the population of Åland under such compelling conditions that would necessitate an evacuation of inhabitants to some place outside of the Åland Islands, most likely in mainland Finland. No doubt, if a nuclear fallout or a natural catastrophe would threaten the Åland Islands, any government of Åland would give such consent, but

perhaps under some conditions such as relocation of the population to such areas of mainland Finland which are Swedish-speaking and return of the same population as soon as the circumstances permit. The point here is that also during emergencies, Sub-State entities may be the legitimate bodies to express the opinion of the population of the territory.

Human security was and is an important consideration, for instance, in Aceh. The military confrontation between the Government of Indonesia and the Free Aceh Movement (the GAM) had been going on for decades, and negotiations towards ending the armed conflict had been carried out in Geneva since the year 2000, but the process was difficult and stalled sometime in 2003, with some new contacts made in 2004. Only days before the devastating tsunami struck southern Asia on 26 December 2004, the negotiation process was re-ignited. Both parties to the negotiation, the Government of Indonesia and the GAM, were confronted with a humanitarian catastrophe in the form of the tsunami, an incident that brought the parties to the realization that the concrete situation demanded political reconciliation. In a series of meetings during a relatively short period of time, the parties were able to come to an agreement involving self-government for Aceh, established in a Memorandum of Understanding signed on 15 August 2005. The sense of urgency created in the aftermath of the tsunami is also recorded in the preamble of the Memorandum of Understanding, according to which the parties are 'deeply convinced that only the peaceful settlement of the conflict will enable the rebuilding of Aceh after the tsunami disaster on 26 December 2004 to progress and succeed'. According to the introduction to the Explanatory Notes on the Law on the Governance of Aceh, the aim of the Law is to accelerate the achievement of prosperity, and several provisions of the Law are focused on the development of Aceh. The role of relief agencies and humanitarian aid organizations in Aceh is, however, peculiar. As has been the case in many other places, they caused the creation of a particular economy of a temporary nature. When the relief agencies left Aceh, the Sub-State entity's economy receded so as to place Aceh again amongst the five poorest regions of Indonesia.

The three cases presented above are instructive with a view to 'new' duties for humanitarian actors: donors, relief agencies and other humanitarian actors should consider the Sub-State level as a legitimate counterpart and interact with that level in all suitable ways. Although the central government is both traditionally and for legal reasons the natural counterpart of donors and of public and private relief agencies, the central government might not be all that legitimate in the territory of an autonomous entity. In fact, the government of the State might in some situations use aid as a means to achieve its own ends that would not necessarily be acceptable for the Sub-State level. The State might be inclined to use aid for its own purposes for the reason that the normal condition between the State and a Sub-State entity is a certain level of conflict, not a violent one but a political one. If a Sub-State entity exists in a State, it should be considered a duty for those delivering aid to take into account the possibility that the Sub-State entity organized as a territorial autonomy is likely to be more legitimate in the eyes of the inhabitants of that territory than the government of the State in question.

7 Autonomy and Cyber (Cold) War

Generally speaking, data communication and data protection are more often a competence of the State than of an autonomous Sub-State entity. For instance, as concerns the Åland Islands, section 27(40) of the Self-Government Act prescribes that the Parliament of Finland has legislative competence over telecommunications, while data protection is the competence of the Parliament of Finland under section 27(2) of the Self-Government Act, albeit not in an explicit way. Hong Kong is an exception to the general pattern, having control under the Basic Law of both data communication and data protection in the territory of Hong Kong, while mainland China has its own, most likely much less protective legislation in these two areas of law.

Against this background, it is interesting to speculate around the reasons for why Edward Snowden, a former National Security Agency (NSA) operative of the United States of America and a US citizen, chose to travel to Hong Kong in the first instance when leaving the United States. Hong Kong has, under the Basic Law, its own visa regime under its own legislation. Under the Hong Kong legislation, US citizens are not required to obtain a visa if they are not travelling to Hong Kong for work or business and if their stay does not exceed 90 days. A tourist with US citizenship could thus enter Hong Kong without a visa. If such a tourist would want to continue to mainland China, it would not be impossible to approach the relevant Chinese State authority present in Hong Kong with questions concerning a visa to mainland China. Snowden could therefore relatively easily and undetected leave from the USA for Hong Kong, while a visa application at the Embassy of China in Washington could have exposed him before he had even had the opportunity to leave the USA for mainland China.

Once in Hong Kong, Snowden was, of course, under Chinese sovereignty, out of the immediate reach of the US Government. Once in Hong Kong, Snowden could also enjoy the benefit of several legal provisions and legal regimes, such as the freedom of expression, data protection and the free data communication, all elements of a regular Western society entrenched in the autonomous legal order of Hong Kong. Presumably, Snowden had stored the various NSA documents in electronic versions on some memory devices, from which he then moved the information and the documents to one or several servers in Hong Kong. Perhaps he in addition used the services of the banking sector of Hong Kong to store the memory devices in bank lockers. In these ways, the data of Snowden might be stored within the legislative competence of Hong Kong so that they ultimately stay under Chinese sovereignty.

Once NSA documents have been released from the comprehensive collection, they have become public through news media. However, at the same time, they have become materials in cyber wars between different States and also in cyber war and regular armed encounters between States and terrorist organizations. Without doubt, mainland China finds the NSA materials released through Edward Snowden very useful, not only for intelligence work, but also politically: until recently, it was

commonly thought that China was among the very few States that actively controlled the Internet and limited the use of the Internet by its own citizens, but the NSA materials reveal that the US has at least the same capacity, probably even more, to process and sift through electronic communication over the Internet.

However, there may exist some measure of cyber war also between a State and a Sub-State entity. During the 1990s, the Slot Machine Association of the Åland Islands, a statutory association created under a legislative act of Åland that operates a gaming monopoly under the legislative competence of the Åland Islands, started to establish itself in gaming over the Internet on the basis of a license for gaming, *inter alia*, over the Internet from the Government of Åland. In doing so, it did not only establish webpages in the Swedish language, but established such webpages also in other languages, including Finnish. This meant that the Slot Machine Association actually marketed its products in mainland Finland, where the language of the majority population is Finnish. By doing that, the Ålandic Slot Machine Association entered into the domains of the mainland Finnish Slot Machine Association, with a similar gaming monopoly in mainland Finland established by the Parliament of Finland, and tapped into the gaming market of mainland Finland. As a consequence, the Parliament of Finland at some point tried to re-establish a border between the two slot machine associations and thus push back the Ålandic association from the market in mainland Finland.

In a curious process in which the Parliament of Finland wanted to avoid using criminal sanctions by inserting administrative measures in the gaming legislation of mainland Finland, the conflict between the two slot machine associations was revealed, but so, too, was a conflict over the same issue between the governments of Åland and mainland Finland. In addition, the low-level cyber war between the two slot machine associations and the two legislative bodies exposed the asymmetrical nature of the determination of legislative competence between the Åland Islands and mainland Finland. The conflict over legislative competence within gaming shows the difficulty in regulating the Internet: the Slot Machine Association of Åland is still marketing its products in Finnish, and persons from mainland Finland use the services of the Ålandic gaming association, thus contributing to increasing the proceeds returned from the Slot Machine Association of Åland to the budget of the Government of the Åland Islands. The potential damage inflicted on the Slot Machine Association of mainland Finland from this ‘internal’ competitor seems relatively significant, but because the Internet is open and also foreign corporations are offering games in Finnish (and, of course, in Swedish), there is not much that the Government of Finland can do. The fact that the two gaming associations are in the same market and within the same sovereign State may, however, keep alive a low level of political conflict within a very particular material sphere of competence. Perhaps it could be said that there is a cold cyber war between the two slot machine associations in Finland over the consumers of gaming services.

8 Concluding Remarks

Autonomy arrangements that result in the creation of territorial autonomy are from time to time used for conflict resolution purposes, and sometimes also for minority protection purposes. Formerly, regular wars were fought between States, and they could result in exchange of territories, but today, internal conflicts constitute the greater part of violent strife, which may result in the creation of Sub-State entities on the basis of peace deals. Non-territorial forms of autonomy, that is, national cultural autonomy, functional autonomy and personal autonomy, are more clearly connected to the protection of minorities. Whatever the reason for the creation of territorial autonomy is, the result is the emergence of special jurisdictions that have their own particular powers. These powers may be regular legislative powers, but there also exist territorial autonomies with only administrative or regulatory powers. The distribution of powers between the State and the Sub-State entity organized as a territorial autonomy normally reflects the particular issues that separate the policy-makers of the State and of the Sub-State entity from each other.

Territorial autonomies and federally organized Sub-State arrangements can be distinguished from each other. Territorial autonomies of a typical kind have enumerated powers, while the State keeps the residual powers. This functions the other way around in federations, where the federal level would have the enumerated powers, leaving the residual powers to the constituent States. Territorial autonomies also do not have any institutional representation in the law-making body of the State, but the population living in the area of a territorial autonomy normally participates in ordinary parliamentary elections of the State, while in federations, the constituent States are represented in a federal chamber or a senate. What is a special feature amongst a number of territorial autonomies identified as the most independent autonomies is that there is no supremacy doctrine or preemption doctrine in operation between the State and the territorial autonomy under which the State could set aside enactments of the territorial autonomy. Of course, all territorial autonomies are not constructed in this strong manner, but are affected by some measure of preemption or supremacy from the State level.

The typical unitary State is no longer the main type of the State. However, the traditional focus on States may distort the fact that important processes take place on the Sub-State level and that important matters are resolved at the Sub-State level. This is dependent on how sovereignty has been divided through the distribution of law-making powers between the State and the Sub-State level. This may be present, for instance, in the contacts taken by those who donate development aid or deliver humanitarian aid: institutions in charge of development aid or humanitarian aid might naturally approach the central government of the State, thinking that it is the only relevant counterpart. Of course, the central government is a relevant counterpart, in particular because it is normally in charge of foreign powers and international relations even in States where Sub-State governance is present through territorial autonomy or other Sub-State solutions. It should not, however, be forgotten that a more legitimate counterpart could exist at the Sub-State level, in

particular in situations where a minority population can be identified. Naturally, Sub-State arrangements can also provide opportunities for creative ‘forum-shopping’, because the legislation and legal protection offered by a Sub-State arrangement may be favourable in certain situations, propelling individuals and also business enterprises to choose the location of their activities in autonomous territories.

Permutations of Popular Sovereignty Before, During and After the Scottish Independence Referendum

Lisa Gow

1 Introduction

On 19 September 2014, after years of discussion about the implications of secession, the people of Scotland woke up to the news that they would remain in the United Kingdom. Early that morning, Prime Minister David Cameron delivered a speech outside his official residence at 10 Downing Street, stating:

> The people of Scotland have spoken. It is a clear result. They have kept our country of four nations together. . .We now have a chance – a great opportunity – to change the way the British people are governed, and change it for the better. Now the debate has been settled for a generation or as Alex Salmond has said, perhaps for a lifetime.[1]

David Cameron's words must have reassured those who, in the two years prior to the referendum, assumed that a vote to stay in the UK would sate the appetite for discussion on Scottish separatism and rule out the likelihood of a future referendum for at least another 30 years.[2] On the other hand, his speech also discouraged the assumption that Scotland's rejection of independence at the ballot box should imply

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[2] N. Barber, After the Vote – Regulating Future Independence Referendums, Scottish Constitutional Futures Forum Blog, 22 March 2014, at http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/3260/Nick-Barber-After-the-Vote--Regulating-Future-Independence-Referendums.aspx (last accessed on 7 August 2014).

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the maintenance of the constitutional *status quo* for the UK as a whole, let alone for Scotland's devolution settlement. Indeed, in the days leading up to the referendum, David Cameron, Ed Miliband and Nick Clegg, the leaders of the UK's three major Unionist parties, namely the Conservatives, Labour and Liberal Democrats, fearing that the tide was turning against them, unexpectedly abandoned their usual parliamentary business in order to make a last-minute campaign trip to Scotland to persuade voters of the benefits of staying in the UK. Their pleas were then transformed into a "vow" to "deliver extensive new powers"[3] to the Scottish Parliament, with the hope that "the people of Scotland will be engaged directly"[4] in decisions about the country's future governance. This was signed by the three leaders and printed in the *Daily Record*, a Scottish tabloid newspaper.[5] Suddenly, voters in Scotland were presented with a third, equally mysterious prospect for their constitutional future—one which had been deliberately excluded from the referendum ballot paper—namely the possibility of greater autonomy for Scotland, but falling short of full independence. Some view the "vow" as the precursor to hasty constitutional reform, resulting directly from a desperate attempt to appease voters in Scotland:

> Now, it is hard to avoid the image of Mr Cameron and his peers scrawling a new constitution on the back of a panini wrapper as their trains hurtle north for a jaunty last-minute campaign stop they never expected to have to make.[6]

Much has been written (and imagined) about both the wider constitutional consequences of an independent Scotland, as well as about those arising from the actual situation in which Scotland now finds itself. However, this chapter considers a more specific question, namely the foreseeable consequences for the well-established political principle of popular sovereignty. The belief that ultimate power rests with the people drove both the pursuit of legislative and executive devolution and the recent independence referendum in Scotland. In particular, does the rejection of independence imply a concomitant rejection of ultimate popular sovereignty? Following an overview of the legal framework of the devolution settlement in its global and domestic political-constitutional contexts, the competing models of sovereignty within the devolution settlement will be discussed with reference to a selection of constitutional and legal texts. An examination of the different stages during, before and after the referendum suggests permutations of sovereignty throughout the process. At times, emphasis is on Scotland's former

[3] D. Clegg, David Cameron, Ed Miliband and Nick Clegg Sign Joint Historic Promise which Guarantees more Devolved Powers for Scotland and Protection for NHS if We Vote No, Daily Record, 15 September 2014, at http://www.dailyrecord.co.uk/news/politics/david-cameron-ed-miliband-nick-4265992 (last accessed on 6 November 2014).

[4] Ibid.

[5] Ibid.

[6] J. Ganesh, Gifted Amateurism Is No Foundation for a United Kingdom, Financial Times, 15 September 2014, at http://www.ft.com/cms/s/2/c81d8298-39c1-11e4-93da-00144feabdc0.html#axzz3EyaZNYwz (last accessed on 2 October 2014).

status as a sovereign State at the time of Union, while at other points, such as the independence referendum, a citizen-led conception of sovereignty is invoked. Elsewhere, focus is on Scotland's elected representatives, and occasionally through civil society. Finally, the implications for the competing models of sovereignty arising from two of the most significant proposals made by the post-referendum Smith Commission will be considered. It will be shown that the most conservative—and, by implication, least participative—strand of popular sovereignty looks likely to be given enhanced *legal* recognition in the next devolution reforms.

2 Scotland's Autonomy Regime in Its Global Context

In recent years, the principle of self-determination[7] has become topical following demands for secession within Sri Lanka, Indonesia, the Russian Federation, Canada and Spain, to name but a few examples. In the extreme cases, internal conflicts between separatist movements and hostile parent States give rise to devastating bloodshed and violence. In this international context, Scotland's pursuit of self-determination is notable for its absence of violent conflict. Situating Scotland on the broad spectrum of the world's autonomous regimes reminds us that "[a]utonomy is an indefinite and general legal term that has to be given concrete content in each case".[8] At one end of this spectrum, international and domestic legal provisions exist to enable minority groups to pursue self-determination through the practice of their particular cultural, linguistic and religious customs. In some parts of the world, Sub-State entities strive for the further delegation of legislative and executive power by central government. Further, some federal systems, such as in Germany, afford their Sub-State members constitutionally-secured, extensive autonomy, including the power to enter into treaty relations with foreign States.[9] A system of self-government or devolution is often seen as offering a solution to the threat of separatism; it is supposed to offer minority groups a means to quench their thirst for secession, while maintaining the stability of internal State sovereignty and preventing a proliferation of new States.[10] Indeed, in the 1990s, it was hoped that

[7] The right to political self-determination is now protected by international law and is recognised in Article 1(2) United Nations Charter. Article 1 of the International Covenant on Civil and Political Rights and Article 1 of the International Covenant on Social, Economic and Cultural Rights state that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

[8] H.-J. Heintze, Implementation of Minority Rights through the Devolution of Powers – The Concept of Autonomy Reconsidered, in: International Journal on Minority Group Rights 9 (2002), pp. 325–343, at p. 328.

[9] Article 32 III, Basic Law of Germany. This power is qualified by the requirement to obtain consent from the Federal Government.

[10] H.-J. Heintze, supra note 8, p. 330.

devolution to Scotland would "kill nationalism stone dead".[11] Since then, however, our experience indicates that the establishment of an autonomy regime within an already flexible constitutional framework may be the initial stepping stone towards independence.

Within this context, Scotland's autonomy regime is fairly unusual, but not simply because it was established peacefully, or because the UK Government agreed to grant Scotland the power to hold a referendum on independence. The UK itself is a peculiar entity which can neither be described as a nation State, nor as a nation of States.[12] It is more accurate to describe it as a "plurinational"[13] State encompassing multiple identities which have, since before the unions of its member nations, been in a constant state of metamorphosis. Today, this is reflected in the political and legal divergences among Scotland, Northern Ireland and England and Wales. This transformation of identity correlated with the gradual evolution of the unwritten constitution which, while traditionally understood as unitary in character, has, through devolution, recently shifted towards federalism. Furthermore, as the following discussion shows, this shift is accompanied by a tendency to give constitutional norms legal recognition only after they have garnered normative legitimacy through political practice. It is within this context, which sets the UK apart from most other codified constitutional frameworks, that the contemporary treatment of popular sovereignty in Scotland should be understood.

3 The Scotland Act 1998

Like many of the other constitutional reforms consciously adopted in the UK, the chosen mechanism for the decentralisation of power was not an entrenched law, but ordinary legislation enacted by the Queen in Parliament, namely the Scotland Acts of 1998[14] and 2012.[15] The 1998 Act was enacted following a referendum on devolution, in which a decisive majority of 74 % of voters consented to the creation of a Scottish Parliament, and 63 % expressed their wish for the Parliament to be

[11] This quote is attributed to George Robertson, former Shadow Secretary of State for Scotland. For further discussion, see S. Meisch, Devolution in Scotland: A Historical Institutionalist Perspective for the Explanation of Anglo-Scottish Relations, in: A. López-Basaguren/L. Escajedo San Epifanio (eds.), The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain, Berlin 2013, p. 317.

[12] A. Tomkins, Scotland Choice, Britain's Future, in: Law Quarterly Review 130 (2014), pp. 215–234, at p. 215.

[13] S. Tierney, Giving with One Hand: Scottish Devolution within a Unitary State, in: International Journal of Constitutional Law (2007), pp. 730–753, at p. 734.

[14] See http://www.legislation.gov.uk/ukpga/1998/46/contents (last accessed on 31 December 2014).

[15] See http://www.legislation.gov.uk/ukpga/2012/11/contents/enacted (last accessed on 4 January 2015).

endowed with income tax-varying powers.[16] In 1999, while still in its temporary premises, the new Parliament was officially opened by the Queen.[17]

3.1 *Scottish Self-Determination as an Exercise in Political Constitutionalism*

The Scotland Act 1998 was but one element of an *ad hoc* package of constitutional reforms[18] introduced by the newly-elected "New Labour" Government, under the leadership of then Prime Minister Tony Blair. Its passage coincided with the Northern Ireland Act and Government of Wales Act of 1998, creating separate, less extensive autonomy regimes in these parts of the UK, thus giving rise to a so-called "asymmetric system of devolution".[19] For Scotland, devolution was a "peculiarly political answer to a particular and peculiar constitutional problem".[20] For those familiar with the UK constitution, this was no surprise, given the British preference for pragmatic, incremental change, rather than the collective catharsis of radical upheaval leading to constitutional entrenchment. While the devolution settlement enables a decentralisation of power from the previously "authoritarian" central government in London towards the UK's three smaller nations, the absence of "grand constitutional design"[21] underpinning the three devolution statutes highlights the gulf between the political forces driving the evolution of the UK constitution and the principled legal framework enshrined in federal constitutions, such as the German Basic Law. The pointedly *political* motivation for decentralisation is suggested by the UK Parliament's apparent assumption that the demand for autonomy in Scotland in the late twentieth century was much stronger and more urgent than in Northern Ireland or Wales. Further, England was considered to have no real need for decentralisation at all; her 53 million inhabitants have not been given a Parliament of their own and all of her primary legislation continues to be enacted at

[16] See http://www.scotland.gov.uk/About/Factfile/18060/11550 (last accessed on 1 October 2014). Indeed, an earlier attempt at the creation of a devolution settlement was made under the Scotland Act 1978, but failed due to an inadequate turnout at the post-legislation referendum.

[17] The new Scottish Parliament building, situated at Holyrood Palace in Edinburgh, was not opened until October 2004.

[18] Alongside the devolution Acts, the Human Rights Act 1998 was enacted, making certain of the provisions in the European Convention on Human Rights and Fundamental Freedoms enforceable in the British courts.

[19] Devolution – a Decade on, Justice Committee, UK Parliament, at http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/529/52904.htm (last accessed on 2 September 2014).

[20] M. Goldoni/C. McCorkindale, Why We (Still) Need a Revolution, in: German Law Journal 14 (2013), pp. 2197–2228, at p. 2218.

[21] Ibid.

Westminster.[22] Meanwhile, the incoherent nature of the devolution settlement has given rise to a curious and seemingly intractable anomaly known as the "West Lothian Question"[23]—namely the fact that the 59 MPs representing Scottish constituencies in the House of Commons are able to vote on domestic matters affecting England only, while English MPs have no power to decide upon Scottish devolved matters.

3.2 *Devolution and UK Parliamentary Sovereignty*

The Scotland Act 1998 deploys a "retaining model" to confer upon the Scottish Parliament a broad legislative competence "closely comparable to that of the German *Länder*".[24] This includes the areas of health, education, transport and justice. However, as a matter of law, the Parliament's legislative and executive powers are clearly circumscribed by the Westminster Parliament, which has expressly reserved for itself the power not only to legislate on macroeconomic policy, welfare and foreign policy for the entire UK, but also on devolved matters[25] and even to repeal the Scotland Act 1998 altogether. Nevertheless, as a matter of practice, the Westminster Parliament will not normally legislate on matters devolved to the Scottish Parliament unless the latter has given its consent, expressed through the collective approval of a so-called "Legislative Consent Motion". Though not codified in law, this "constitutional convention" is recognised in the Memorandum of Understanding between the UK Government and Scottish Government.[26] Thus, technically speaking, the legal foundations of Scotland's autonomy regime were not formulated so as to divide internal sovereignty between Westminster and Holyrood. Rather, the Westminster Parliament has retained for itself ultimate parliamentary sovereignty or supremacy over the devolved nations. Parliamentary sovereignty, in the absence of a fundamental constitutional text, is traditionally considered to be "the very keystone of the British constitution". Unlike most other Western liberal democracies, the UK Parliament theoretically enjoys the legal power to enact or amend any law whatsoever, provided resolutions are passed by simple majority in each House. Moreover, in the absence of a written

[22] However, London now has a form of administrative devolution in the form of the Greater London Authority.

[23] The question is attributed to Tam Dalyell, the Labour MP for the Scottish constituency of West Lothian, who raised the issue in 1977 during parliamentary debates in response to devolution proposals.

[24] M. Ogorek, The Doctrine of Parliamentary Sovereignty in Comparative Perspective, in: German Law Journal 06 (2005), p. 970.

[25] Section 28(7), Scotland Act 1998 expressly specifies that "this section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland".

[26] See http://www.scotland.gov.uk/About/Government/concordats/mou (last accessed on 1 October 2014).

constitution such as the German Basic Law, all Acts of Parliament are of an equal legal status—although some might have a special constitutional significance, no legislative hierarchy exists to require a legislative special majority for the passage, amendment or repeal of any UK primary legislation. As such, the politics of the day is one of the key driving forces behind constitutional reform and no matter is put out of the reach of the majority. This orthodox understanding of the UK constitution is famously attributed to the nineteenth-century English constitutional lawyer and political scientist, Professor Albert Venn Dicey, who described the British Parliament as having:

> . . .the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.[27]

Notwithstanding the more recent challenges that have been mounted upon the traditional "Westphalian" conception of State sovereignty in general, especially by virtue of membership of supranational legal and political entities such as the European Union,[28] this thinking represents the classical account of British constitutionalism. As such, ultimately there are no *legal* impediments to the repeal of the devolution Acts or legislating for Scotland in devolved matters without the Scottish Parliament's consent, but for *political* reasons this would now be considered unconstitutional. Thus, if we view the UK's various autonomy regimes from this perspective, the devolved institutions of Scotland, Northern Ireland and Wales could *prima facie* today be described as "Sub-State entities [which] do not possess any original sovereignty".[29]

4 Re-thinking Sovereignty

However, this perspective risks an overly narrow and legalistic interpretation of "sovereignty", to which, viewed through the lens of Sub-State nationalism, an altogether more "holistic"[30] meaning can and should be attributed. "Sovereignty" is dynamic; it combines both political and legal powers and is "relational in nature"[31]: within a multinational State such as the UK, it accommodates the

[27] A. V. Dicey, Introduction to the Study of the Law of the Constitution, London 1959.

[28] See R v Secretary of State for Transport, ex parte Factortame Ltd and others (No. 2) (Case C 213/89), [1990] 3. W.L.R. 818, [1991] 1 A.C. 603.

[29] M. Suksi, Keeping the Lid on the Secession Kettle – a Review of Legal Interpretations Concerning Claims of Self-Determination by Minority Populations, in: International Journal on Minority Rights 12 (2005), pp. 189–226, at p. 195.

[30] S. Tierney, Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation State, in: The International and Comparative Law Quarterly 54 (2005), pp. 161–183, at p. 161.

[31] Ibid.

relationships between government and the *peoples* who are governed, demonstrating a significant socio-political dimension.[32] As Tierney has shown, the existence of Sub-State regions or nations, such as Quebec and Catalonia, mounts a normative challenge upon the dominant constitutional narrative of the respective parent State. The closer the Sub-State nation comes to secession, the more this challenge is transformed into the threat of "[striking] at the twin pillars of the Westphalian State system: sovereignty and territorial integrity".[33] It is with this more nuanced approach to sovereignty that the trajectory of Scotland, even after her rejection of independence, should be understood.

4.1 A Scottish Approach to Sovereignty

A closer examination of constitutional discourse in Scotland reveals that conceptions of sovereignty, long before and after the enactment of the Scotland Acts, present exactly this kind of challenge to the Diceyan hegemonic narrative explained above. Indeed, it is perhaps due to the recognition of this challenge that the Scotland Act 1998 includes—lest any doubt should arise—an express provision confirming the continuation of the Westminster Parliament's power to legislate for Scotland in devolved matters.[34] The attempt to reconcile two competing narratives—giving Scotland just enough power to extinguish the threat of separatism, with quasi-federal effect for the UK constitution, while retaining *de jure* sovereignty in the Westminster Parliament—underlies the delicate balance underlying the UK devolution settlement and, furthermore, gives rise to the demand for more power. While Dicey's principle represents the *legal* fact of power distribution, it sits uncomfortably within Scotland's political reality and recent flirtation with secession.

In light of the historical ambivalence between England and Scotland, and irrespective of contemporary party political allegiances, it is hardly surprising that the normative appeal of Westminster sovereignty has never been as strong in Scottish politics as it is south of the border. In some ways, this lack of consensus reflects the historical conflicts between Scotland and England, stretching far back and long before the creation of the Union. While Dicey's theory is now a firm staple in the Scots legal education, an "indigenous Scottish tradition of popular sovereignty",[35] residing with the people of Scotland and putting a limit on the powers of

[32] Ibid.

[33] C. K. Connolly, Independence in Europe: Secession, Sovereignty and the European Union, in: Duke Journal of International and Comparative Law 24 (2013), pp. 51–106, at p. 67.

[34] Section 28(7), supra note 14.

[35] S. Douglas-Scott, British Withdrawal from the EU: an Existential Threat to the United Kingdom?, 12 October 2014, Scottish Constitutional Futures Forum Blog, at http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4411/Sionaidh-Douglas-Scott-British-Withdrawal-from-the-EU-an-Existential-Threat-to-the-United-Kingdom.aspx (last accessed on 4 January 2015).

the monarch and the legislature, has long existed within Scottish constitutional discourse. This political principle was notably revived in the mid-twentieth century and undoubtedly catalysed both the re-establishment of a Scottish Parliament and the recent independence referendum.

4.2 *The Historical Origins of Popular Sovereignty in Scotland*

Perhaps the earliest known expression of the sovereign will of the Scottish people is to be found in the Declaration of Arbroath of 1320, a plea by Scottish barons and nobles to Pope John XXII to support Scotland during a bloody conflict between the English King Edward II and the Scottish Robert Bruce. Referring to Robert the Bruce, the Declaration, which is considered to have been an influence on the American Declaration of Independence,[36] stated:

> He is that by the providence of God we have made our Prince and King, not only by right of succession according to our laws and customs, which we are resolved to maintain unto the death, but also with the due consent and assent of us all . . . but were he to abandon the task to which he has set his hand or to show any disposition to subject us or our realm to the King of England or the English, we would instantly expel him as our enemy and the betrayer of his own rights and ours, and we would choose another King to rule over us who would be equal to our defence.[37]

An examination of the Articles of the Treaty of Union, which were ratified by the separate States of Scotland and England nearly four centuries later, suggests pre-existing divergences between Scottish and English conceptions of sovereignty and an ambiguity inherent in the meaning of the UK polity itself. Ratification was effected by means of two separate Acts passed by the now defunct Scottish and English Parliaments, giving birth to the new Parliament of Great Britain. However, it should be acknowledged that the process of union was not citizen-led: the terms of the Treaty of Union were created by commissioners acting on behalf of the respective executive branches of Scotland and England.[38]

Scotland's agreement to enter into a political and economic union with England could only be secured on the condition that certain key Scottish institutions, such as the Scottish system of private law, universities and Presbyterian Church, would be guaranteed and preserved.[39] While Article XVIII recognises the British

[36] For further discussion, see E. Hague/A. Mackie, To see Oursels as Ithers See Us: Reflections on Scottish Independence from the United States, in: Scottish Affairs 23 (2014), pp. 381–388.

[37] Quoted in E. Attwooll, The Tapestry of the Law: Scotland, Legal Culture and Legal Theory, Dordrecht 1997, p. 39.

[38] D. Walker, The Union and the law, 18 June 2007 in. The Journal of the Law Society of Scotland, available at http://www.journalonline.co.uk/Magazine/52-6/1004238.aspx#.VNCzTGO8ES8 (last accessed on 2 February 2015).

[39] For a more detailed historical explanation of the context of the Acts of Union, see T. M. Devine, The Scottish Nation: 1700–2000, London: 1999, chapter 1.

Parliament's power to amend public law, it also imposes a limitation on its power to interfere with the pre-existing Scottish system of private law, stipulating that "no Alteration be made in Laws which concern private Right, except for evident utility of the Subjects within Scotland". While these institutional frameworks have retained their distinctive Scottish flavour ever since the passage of the Acts of Union, since then, the constitutional pendulum swings between competing narratives about the significance of the Acts of Union for the new UK polity: "[f]or English public lawyers, the Union of 1707 amounted to no more than the absorption of Scotland into the pre-existing English constitution".[40] By contrast, from a Scottish interpretation, the Union was agreed upon by two sovereign equals and the Articles themselves constitute "a document of concealed contradictions"[41]—making reference to both a "*Kingdom* of Scotland" and a new "united Kingdom". This suggests the rather ambiguous mix of, on the one hand, the continuation and preservation of certain aspects of Scottish sovereignty, while on the other, the recognition of a new entity called Great Britain. On this note, Aroney asserts that "[t]he fact that the union came about following a treaty between the two kingdoms and pursuant to separate statutes passed by the two Parliaments provides support for the view that the United Kingdom is better understood as a kind of union State rather than a unitary State".[42] As a corollary thereof, we may be encouraged to depart from the Diceyan principle that unlimited legal sovereignty is inherent within the Westminster Parliament and to reconceptualise it as a voluntary pooling by the UK's constituent nations.

The understanding of the polity of the UK as a union State has had a very strong influence on the Scottish constitutional narrative, among both those who support and reject Scottish independence. Clearly, one aspect of its normative appeal is that it places Scotland in a position of dignity, rather than as a small (and, in 1707, economically weak)[43] State, subsumed by the larger and more powerful England. This interpretation has given Scots politicians further reason to reject the Diceyan conception of the UK as a *unitary* State in which power automatically flows in a "top-down" direction from central Government. Even before the passage of the Scotland Act 1998, Scotland has enjoyed a limited degree of autonomy within the UK framework. This was reflected in the existence of the Scottish Office between 1885 and 1999, which constituted a tie between Scotland and London and was remitted to represent and promote Scottish interests and legislation at the level of central Government.

[40] A. Tomkins, supra note 12, p. 218.

[41] M. Pittock, Scottish Sovereignty and the Union of 1707: Then and Now, in: National Identities 14 (2012), pp. 11–21, at p. 13.

[42] N. Aroney, Reserved Matters, Legislative Purpose and the Referendum on Scottish Independence, in: Public Law 3 (2014), pp. 422–445, at pp. 427–428.

[43] The Darien scheme, an unsuccessful attempt to establish a colony on the isthmus of Panama in the late 17th century, had left Scotland in financial ruin by time of Union.

4.2.1 Recognition of Popular Sovereignty in the Courts

Judicial challenge of the British constitutional narrative can be found in the case of *MacCormick v Lord Advocate*,[44] which was considered in the Scottish Court of Session[45] in 1953. The pursuer[46] in this case challenged the right of the newly-crowned Queen to style herself with the title "Elizabeth the Second"; unlike England and Wales, Scotland had never before been under the reign of a Queen Elizabeth the First.[47] In his famous *obiter* remarks, Lord Cooper of Culross, then Lord President of the Court, stated:

> the principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law...Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England.[48]

The fact that the Scottish judiciary has consistently respected the legal sovereignty of the Westminster Parliament vis-à-vis legislation affecting Scotland does not detract from the tension between the competing conceptions of sovereignty which are brought to light in Lord Cooper's judgment. That his remarks are merely *obiter* and therefore not authoritatively binding is, for our purposes, not crucial.[49] Alongside the existence of a devolution settlement for Scotland, they "[raise] serious doubts about the long-term viability of Dicey's concept of parliamentary sovereignty".[50]

4.2.2 Recognition of Popular Sovereignty in Scottish Politics

In the last 30 years, references to popular sovereignty became a fixture in Scottish political discourse and helped to bolster the normative justification of a right to autonomy.[51] Driven by aspirations for "Scottish solutions to Scottish problems",[52] as well as for a new, consensus-based politics which would contrast Westminster's

[44] 1953 S.C. 396.

[45] This is the court of first instance in Scotland's supreme civil court.

[46] In Scottish legal lexicon, this is equivalent to "claimant" or "plaintiff".

[47] The reign of Elizabeth I of England (1558–1603) had taken place before the Union of Scotland and England in 1707.

[48] 1953 S.C. 396 at p. 411.

[49] The claim was thrown out of court, on the basis of the petitioners' lack of "title and interest to sue" i.e. standing.

[50] G. Little, Scotland and Parliamentary Sovereignty, in: Legal Studies 24 (2004).

[51] A. Tomkins, supra note 12, p. 215.

[52] This quote is attributed to the late Donald Dewar, in a speech at the newly-opened Scottish Parliament on 15 June 1999.

adversarial style, the Scottish Constitutional Convention (SCC) played an instrumental role in developing the blueprint for a devolved Scottish Parliament. The cross-political spectrum of Scottish civic society was represented in the membership of the SCC, including political parties, church groups and other interest groups, who were all united by their wish to see a stronger, more autonomous Scottish nation *inside* the UK. In 1989, all SCC members subscribed to a document entitled *A Claim of Right for Scotland*[53] which made reference to "the sovereign right of the Scottish people to determine the form of government best suited to their needs", alluding to the Declaration of Arbroath. As we shall see, following the independence referendum, almost exactly the same wording was included in the Smith Commission's recommendations for further reform to the Scottish devolution settlement.[54] Clearly, popular sovereignty "is by no means exclusive to the SNP among Scottish politicians".[55] Despite the fact that the dream of Scottish devolution appeared to have been shelved in the 1990s during the Conservative Government under Prime Minister John Major, the SCC's blueprint for a Scottish Parliament with tax-varying powers proved to become a strong influence on the subsequent policy of the later "New Labour" Government under Prime Minister Tony Blair. Still today, we see that this concept of a Scottish popular sovereignty has been appropriated for use in the Scottish Nationalist Party (SNP) narrative.[56]

4.3 Popular Sovereignty Versus Parliamentary Sovereignty?

The lexicon of popular sovereignty, considered even before devolution, thus contributes towards an alternative account of the polity of the United Kingdom and, in fact, brings into view the tension at the heart of the devolution settlement. The fact that it does not correlate precisely with the Diceyan conception of Westminster legislative supremacy has not prevented it from acquiring a "considerable political resonance within Scotland".[57] Indeed, as Tierney[58] has shown, a stateless nation,

[53] O. Dudley Edwards (ed.), A Claim of Right for Scotland, Edinburgh 1989.

[54] Smith Commission, Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament, 27 November 2014, at https://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf (last accessed on 10 December 2014).

[55] D. N. MacCormick, Is there a Constitutional Path to Scottish Independence?, in: Parliamentary Affairs 53 (2000), pp. 721–736, at p. 730.

[56] For example, the First Minister of Scotland, Alex Salmond, recently referred to "the greatest authority of all; that is the sovereign will of the people of Scotland", First Minister's Questions, 7 August 2014, at https://www.youtube.com/watch?v=gygljq5mUHs&list=PL4l0q4AbG0mnVsKDGswgL2CUUNzzMlNCT&index=1 (last accessed on 11 August 2014).

[57] A. McHarg, quoted in I. MacLean, Scotland's Choice and the Constitution(s): Are we all Neil MacCormick's Bairns?, Scottish Constitutional Futures Forum Blog, 2 May 2013, at http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/1540/Iain-McLean-Scotlands-Choice-and-the-Constitutions-Are-We-All-Neil-MacCormicks-Bairns.aspx (last accessed on 2 September 2014).

[58] S. Tierney, supra note 13, p. 734.

such as Scotland, presents a greater challenge to the State than a minority group making a demand for respect for cultural diversity. A minority group can, to a degree, be tolerantly "accommodated" within a (liberal democratic) national society, without threatening the stability of the State as a whole. On the other hand, the agenda of a Sub-State entity, such as Scotland, is more extensive; its *raison d'être* is no less ambitious than a separate process of nation-building. Indeed, Tierney observes that "[t]he radical claims of Sub-State nationalists are aimed at a conceptual reorientation of the nature of the State".[59] Thus, perhaps the grant of legislative and executive devolution to Scotland at the end of the twentieth century can be viewed not simply as the direct consequence of the devolution campaign, but also a more muscular attempt of the State "to redefine the United Kingdom's constitution in a plurinational direction".[60] Tierney concludes, however, that this claim is unfounded: regardless of the devolution of power and the aforementioned "Scottish sovereignty", the "gatekeeper control" exercised by the UK Government and Parliament helps to maintain the unitary flavour of the UK constitutional framework. However, from a contemporary perspective, ultimately, the UK State has given clear acknowledgement that the decision to leave the UK rests with the people who live in Scotland. What appears less clear, however, is whether the same can be said for Scotland's future governance *within* the UK. More broadly, given the current uncertainty as to the future of the UK's relationship with the EU, a second question, which is beyond the scope of this paper, should now be asked—who or what possesses the ultimate power to decide on the UK's membership of the EU: a majority of the UK population (decided by referendum), the Westminster Parliament, or the constituent nations within the UK?

Furthermore, in time, even when its legislative competences are legally circumscribed by the parent State, the normative strength of the Sub-State's nationhood may, as a matter of politics, come to be viewed in parity with the latter.[61] Hence, following the Scottish National Party's election into minority government in 2007, the "Scottish Executive" (the devolved administrative body) rebranded itself the "Scottish Government",[62] a change which was formally enshrined in primary legislation by the UK Parliament, 5 years later.[63] Two observations should be made in this respect. Firstly, this change falls squarely within the aforementioned British tradition of political constitutionalism, namely the tendency to assume the existence of and shape constitutional norms through practice and custom, as opposed to their formal adoption through a special procedure. Secondly, regardless of the subordinate constitutional position of the Scottish Parliament and Government as a matter of technical constitutional law, the appeal of the *idea* of constitutional equality

[59] Ibid.

[60] Id., p. 731.

[61] Id., p. 735.

[62] See Scottish Executive Renames Itself, BBC News, 3 September 2007, at http://news.bbc.co.uk/2/hi/uk_news/scotland/6974798.stm (last accessed on 11 August 2014).

[63] Section 12(1), Scotland Act 2012.

between the Governments of Scotland and the UK precipitated the former's formal legal recognition. From a political perspective, it has also helped to impress upon the people of Scotland the normative value of a Scottish sovereignty. The next part of this chapter will consider the referendum stage and its consequences for the trajectory of sovereignty.

5 Moving Forward: The Independence Referendum

It is remarkable that, unlike in many other plurinational or federal States threatened by separatist movements—Catalonia being a contemporary example—the UK Government acquiesced, albeit somewhat reluctantly, to the Scottish Government's plans for a referendum. It is instructive to examine whether the recent developments in preparation for the 2014 independence referendum have contributed to any developments in the transformation of sovereignty. Has the balance between the two conceptions of sovereignty, one resting with the Scottish people, the other in the UK Parliament, been altered by the Scottish independence referendum and its immediate aftermath?

The prospect of a referendum on Scottish independence was thrust onto the political agenda by the Scottish Nationalist Party[64] rather than a grassroots organisation. Originally a smaller party on the fringes of mainstream politics, the SNP was first elected to minority government in 2007 in the third Scottish parliamentary election, winning 49 out of 129 seats. From early on, the SNP pushed the question of further Scottish autonomy, with the introduction of a programme called the "National Conversation". In 2010, the Scottish Government expressed its belief "in the sovereignty of the people of Scotland" in a consultation paper on Scotland's constitutional future,[65] as well as the (Draft) Referendum (Scotland) Bill. However, this bill did not envisage independence *per se*, but the rather more modest aim to obtain electoral opinion about a possible transfer of further powers to the Scottish Parliament. As a minority government and with no support from any of the other major parties, at this point the SNP administration refrained from pushing the matter of independence any further. However, at the next election in 2011, against all expectations,[66] the party successfully secured a majority of 69 seats, giving it a stronger democratic mandate to push ahead for an independence referendum for Scotland.

[64] Hereinafter "SNP".

[65] Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper, at http://www.scotland.gov.uk/Resource/Doc/303348/0095138.pdf (last accessed on 1 October 2014).

[66] This outcome was surprising because the "Mixed Member" system of proportional representation enshrined in the Scotland Act 1998 – loosely modelled on the electoral system of the German Bundestag – makes coalitions much more likely than single-party governments.

5.1 *Legislating for a Referendum: A Question of Competence*

Despite the SNP's mandate, conflicting views arose over the question whether the Scottish Parliament possessed the legislative competence to hold a non-binding, advisory referendum to ascertain the degree of electoral support for independence. As noted above, according to the Diceyan doctrine of parliamentary sovereignty, it is beyond doubt that the UK Parliament has the legal authority to legislate for a referendum for Scotland. However, due to a non-legal constitutional norm, known as the Sewel Convention,[67] as a matter of practice rather than law, it will not pass legislation with respect to devolved matters or to vary the legislative competence of the Scottish Parliament without the consent of the latter. As such, co-operation and agreement between the Scottish and UK Governments are now expected whenever any devolution reforms are under consideration. Clearly, such co-operation would have been necessary, had the UK Parliament decided to legislate for an independence referendum.

By contrast, the matter of the Scottish Parliament's authority to legislate for a referendum was unclear. This turned on the interpretation of "the Union of the Kingdoms of Scotland and England", listed under the heading of "The Constitution", one of the many policy matters reserved for the exclusive competence of the Westminster Parliament in Schedule 5 of the Scotland Act 1998. Any Act of the Scottish Parliament which "relates to" a reserved matter is "not law" within the meaning of section 29 of the 1998 Act, and can be judicially struck down under the *ultra vires* doctrine.[68] What was even less clear was whether or not the Scottish Parliament possessed the unilateral competence to legislate for and hold a referendum to gauge electoral support for mere *further powers*, rather than full independence. While this would have been intended as advisory as opposed to legally binding, it could well be expected to assume "*de facto* a decisive character"[69] and create a tremendous political pressure on the UK Government and Parliament to give effect to the wishes of the Scottish electorate. A hypothetical scenario of this kind would have been an unambiguous recognition of both citizen-led sovereignty and the power of the Scottish Parliament to pursue an agenda diametrically opposed to that of the UK Parliament.

Both the Scottish and UK Governments issued consultation papers on this matter and the UK Government insisted that the Scottish Parliament did not have the legal

[67] The Sewel Convention is named after Lord John Sewel, a Minister in the Scottish Office at the time the Scotland Act 1998 was passed. For further information, see P. Bowers, The Sewel Convention SN/PC/2084, London 2005, p. 2.

[68] The doctrine of *ultra vires* (Latin for "beyond the powers") is a basic principle of administrative law which holds that executive action which cannot be justified according to law is unlawful.

[69] M. Suksi, The Advisory Referendum in Finland, in: European Public Law 5 (1999), pp. 535–556, at p. 556.

authority to legislate for the referendum.[70] Accordingly, two options were considered: an Act of the UK Parliament could be passed, enabling the referendum to take place. Alternatively, the power to hold the referendum could be devolved to Scotland under a so-called "section 30 Order in Council".[71] In the UK, Orders in Council are a type of statutory instrument which are made at the discretion of government ministers. While they are ultimately subject to the approval of both Houses of the UK Parliament, they are not afforded the same degree of parliamentary scrutiny that would (or should) normally be given during the passage of a significant constitutional bill.[72]

Following several months of negotiations, the so-called "Edinburgh Agreement"[73] was signed on 15 October 2012, by the UK Prime Minister David Cameron and the Scottish First Minister, Alex Salmond, confirming the choice of an Order in Council to devolve power to Scotland. The Agreement framed certain technical aspects of the referendum, such as timing and campaign finance, as well as the normative principles underpinning the entire event, namely that the referendum "should have a clear legal base, be legislated for by the Scottish Parliament [and] deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect". Further, the governments agreed that the referendum should be regulated by the same framework which is generally applicable to UK-wide referendums and overseen by the Electoral Commission.

As this question of competence was finally resolved by the granting of power by central Government to the Scottish Government, the pre-referendum planning process appeared to have given clear recognition to the supremacy of central Government and Parliament over Scotland. Moreover, since Acts of the Scottish Parliament are of an inferior status to those of the UK Parliament, the decision to allow the Scottish Parliament to legislate created an—as yet hypothetical—opportunity for judicial strike-down of the resulting legislation. However, on closer examination we arrive at more nuanced conclusions for our discussion on sovereignty. Both the choice of an Order in Council and David Cameron's apparent lack of resistance to the prospect of granting this particular power enabled a more straightforward and expedient procedure than would have been the case, had the matter been legislated by the UK Parliament. But most importantly, it enabled the primary decisions regarding numerous aspects of the referendum, such as the

[70] Scotland's constitutional future, January 2012, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/39248/Scotlands_Constitutional_Future.pdf (last accessed on 30 September 2014).

[71] Section 30, Scotland Act 1998 enables amendments to be made to the list of policy matters which have been reserved to the Westminster Parliament in Schedule 5, Scotland Act 1998.

[72] For criticism of this choice of instrument, see C. Hood, A Tale of Two Cities: Devolution, a Referendum and the Constitution, in: Aberdeen Student Law Review 3 (2012), pp. 100–111.

[73] Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, 15 October 2012, at http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence (last accessed on 1 October 2014).

electoral franchise,[74] to be made in the Scottish Parliament itself, putting the entire matter beyond the purview of Westminster. At this stage of the trajectory, the more moderate conception of Scottish popular sovereignty, as an exercise of the will of the elected representatives was the point of focus.

5.2 *A Nuanced Trajectory for Popular Sovereignty After the Referendum*

Having considered the history and nature of Scotland's constitutional narrative within the broader context of the patchwork British constitution, our attention should now turn to the consequences of the referendum, with respect to the future of sovereignty. For now, Scotland's autonomy regime will continue under the umbrella of the UK State. However, since "devolution is a process, not an event",[75] the incrementalist tradition[76] of the UK constitution makes further autonomy, not just for Scotland, but also for Northern Ireland and Wales, highly likely. New taxation and borrowing powers, provided for under the Scotland Act 2012, will come into force in 2015 and 2016, increasing the Parliament's accountability for its spending. Clearly, those in favour of the preservation of the Union, including the Prime Minister, hope that the question of Scottish independence has been settled once and for all. However, in retrospect, this conclusion may have been drawn in haste, for at least three reasons. Firstly, the referendum brought about a degree of passionate public engagement which has rarely been seen before in UK politics. 85 % of the electorate, including 16 and 17 year-olds,[77] turned out to vote—the highest turnout since universal suffrage was introduced in the UK.[78] Secondly, as the referendum had been planned more than two years in advance—much longer than usually planned for UK referendums—voters had plenty of time to digest and discuss the issues with friends, family and colleagues, and to develop an appetite for further autonomy. Secondly, although independence was ultimately rejected by a

[74] The Scottish Parliament later enacted the Scottish Independence Referendum (Franchise) Act 2013. Section 2(1)(a) extended the franchise to persons aged 16 and 17 – a novelty in UK electoral history.

[75] This quote is attributed to a lecture given in 1997 by Ron Davies, former Secretary of State for Wales.

[76] M. Elliott, Scotland Has Voted 'No'. What Next for the UK Constitution?, LSE Blog, at http://blogs.lse.ac.uk/politicsandpolicy/scotland-has-voted-no-what-next-for-the-uk-constitution/ (last accessed on 2 October 2014).

[77] Section 2, Scottish Independence Referendum (Franchise) Act 2013 extended the electoral franchise for the referendum to persons aged 16 and 17.

[78] S. Johnson, Voter Turnout for Scottish Referendum Could be Highest of any British Election, The Telegraph, 18 September 2014, at http://www.telegraph.co.uk/news/uknews/scottish-independence/11107463/Voter-turnout-for-Scottish-referendum-could-be-highest-of-any-British-election.html (last accessed on 2 October 2014).

decisive margin of 55–45 %, this degree of support was markedly higher than opinion polls had indicated at the start of campaigning. The very fact that nearly half of the electorate was ready to make such a leap into the unknown should serve as a sobering reminder of the fraying threads holding the 300-year old British patchwork together. Finally, polls taken during the months preceding the referendum indicate that the support for further autonomy—in the spheres of welfare and taxation—had gradually risen to 74 %. Given the UK party leaders' last-minute promise of a consolation prize to Scotland if she voted 'No', a clear dialogue appeared to have been established between the people and the Westminster political establishment. If the latter does not deliver on the former's demands for further autonomy, the disillusionment felt by the people of Scotland could create a dramatic threat to the constitutional *status quo*.

5.3 *The Implications of the Smith Commission for Popular Sovereignty*

However, the recent process of consultation and negotiation on the terms of future devolution reform encourages us to make a more sober assessment of the post-referendum state of popular sovereignty. On the day after the independence referendum, David Cameron announced that Robert Haldane Smith, Lord Smith of Kelvin, a prominent Scottish businessman and independent member of the House of Lords, would oversee cross-party talks "with the purpose of agreeing a package of powers to be devolved to strengthen the Scottish Parliament within the UK".[79] Each of the five political parties which are currently represented in the Scottish Parliament (SNP, Labour, Liberal Democrats, Conservatives and Greens) nominated two representatives to the Smith Commission and submitted their views on reform by 10 October 2014, while bilateral and plenary meetings began 3 days later.

While the Prime Minister's appointment of Lord Smith may indicate an attempt to maintain subtle control of the devolution reform process from the top down, the delegation of member selection to the parties suggests recognition of a type of popular sovereignty exercised through Scotland's elected representatives, but no opportunity for direct participation by the people themselves. This represents a marked contrast with the composition of the aforementioned SCC, whose Claim of Right for Scotland in 1989 had been signed by 160 political and religious groups and a variety of other members of Scotland's civic society. Thus, the experience of the Smith Commission indicates that the previously deliberative role played by civic society in negotiating the blueprint of Scotland's devolution settlement had been significantly scaled down to allow only the written submission of their views to the Commission throughout a brief, 4-week consultation process. At this point, it appeared that in rejecting independence, the people of Scotland had also rejected

[79] Smith Commission, supra note 54.

the opportunity to exercise their sovereignty to the fullest extent possible—and had indeed unwittingly signed a "blank cheque"[80] for a consultative Commission in which they would play no part. Clearly, this fell foul of the promise made in the "vow" that "the people of Scotland would be engaged directly"[81] in the matter of post-referendum devolution reform.

5.3.1 The Smith Commission's Recommendations

Despite the obstacles outlined above, certain of the recommendations in the Smith Commission's report[82] will, if implemented, have drastic consequences for the principle of popular sovereignty and indeed for the UK constitution as a whole. Under Pillar 1 of the Report's Heads of Agreement, the Commission repeats almost verbatim the words of *A Claim of Right for Scotland*: "the sovereign right of the people of Scotland to determine the form of government best suited to their needs", before proceeding to two startling recommendations. These are that the UK Parliament should pass legislation to place the Scottish Parliament and Government, as well as the aforementioned Sewel Convention (the aforementioned rule of practice which requires the Scottish Parliament's consent in cases when the UK Parliament legislates on devolved matters or on the autonomy framework itself), on a permanent statutory basis.

Several consequences arise from these proposals. First, it appears likely that any resulting UK legislation that establishes the permanence of the Scottish Parliament and Government will be, like the Scotland Acts of 1998 and 2012, treated as constitutionally fundamental.[83] As such, although the legislation would still be *legally* vulnerable to repeal by the UK Parliament, this would need to be done by way of an Act expressly indicating the UK Parliament's intention do so do. The political opposition envisaged in such a scenario makes express repeal unlikely, and would thereby give rise to the *de facto* entrenchment of the Scottish Parliament. Secondly, this entrenchment will be even more significant if, as is proposed in the Report, the Sewel Convention is placed on a statutory footing—meaning that the UK Parliament would now, as a matter of *law* rather than practice, be obliged to

[80] S. Tierney, Is a Federal Britain Now Inevitable?, Scottish Constitutional Futures Blog, 27 November 2014, at http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4736/Stephen-Tierney-Is-a-Federal-Britain-Now-Inevitable.aspx (last accessed on 1 January 2015).

[81] D. Clegg, supra note 3.

[82] Ibid.

[83] In its recent judgment in R (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3, the UK Supreme Court recognised the existence of fundamental "constitutional legislation", which challenges the Diceyan principle that all UK Parliament legislation is of equal status. For a recent discussion, see M. Elliott, Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution, in: European Constitutional Law Review 10 (2014), p. 379.

obtain the Scottish Parliament's consent on every occasion that it considers the enactment of legislation on a devolved policy matter. Technically, as with the earlier case of the possible permanence of the Scottish Parliament, it would ultimately still be legally possible to repeal such a provision, thus keeping the doctrine of parliamentary sovereignty intact. However, such a scenario would give rise to the peculiar and probably insurmountable hurdle, namely the UK Parliament's need to obtain the Scottish Parliament's consent in order to repeal or amend the provision. Such a prospect appears to signal the death of UK parliamentary sovereignty over Scotland and the granting to the Scottish Parliament of a stronghold over its own existence—indeed, recognition of its own sovereignty—which it has hitherto lacked. These particular recommendations in the Smith Commission's Report can therefore be considered as a more profound acknowledgement of the normative strength of popular Scottish sovereignty—expressed through Scotland's elected representatives in the Scottish Parliament. Further, this norm would not simply receive political recognition, as has been the *status quo* until now, but would be transformed into a *legal* constitutional norm. Furthermore, it also represents another example, typical from a political-constitutional perspective, of the UK's tendency towards the *ad hoc* legal adoption of constitutional norms which have initially emerged and evolved through political practice. At this stage, two possible consequences of the Smith Commission should be considered: firstly, the attempt to entrench the Scottish Parliament might become a stepping stone on the path to eventual independence—an arguably ill-advised course of action at a time when the survival of the Union depends on it being held together and not torn apart. The Scottish Parliament's stronger political and legal status will help to justify further incremental steps towards greater autonomy, creating "the very real risk that as Scotland becomes ever more detached from Westminster, the Union will become largely irrelevant to many Scots".[84] Secondly, it must also be borne in mind that there is no guarantee that the next UK Government will sponsor any of the draft clauses due to be published in early 2015. The anger and disillusionment that can be imagined from the failure to take these proposals forward can reasonably be expected to put independence back onto the political agenda.[85] The difference would be that this time, the demand for a second referendum would be fuelled not simply by the SNP Government, but also by the people, who have been galvanised by their first taste of direct democratic participation.

The Smith Commission's recommendations,[86] which were published at the end of November 2014, are intended to be transformed into a draft bill by January 2015, thus fitting into a tight timetable. Given that the next UK General Election will be

[84] S. Tierney, supra note 80.

[85] S. Carrell, Nicola Sturgeon Parks Independence and Opts for Devolution: Five Reasons Why She Is Right, The Guardian, 25 September 2014, at http://www.theguardian.com/politics/scottish-independence-blog/2014/sep/25/nicola-sturgeon-parks-independence-and-opts-for-devolution-five-reasons-why-she-is-right (last accessed on 2 October 2014).

[86] Smith Commission, supra note 54.

held in May 2015, the prospect of rushing through devolution legislation before the dissolution of the Westminster Parliament at the end of March 2015 suggests that the matter might not be given the depth of consideration and reflection that it deserves. Moreover, if this deadline cannot be met, future reforms may be jeopardised in the event that the next UK government leadership proves unwilling to sponsor the legislation. This is particularly pertinent, as many Conservative Party backbenchers of the House of Commons do not support further devolution.

6 Concluding Remarks

This chapter has shown that in Scotland, the constitutional orthodoxy of Westminster parliamentary sovereignty has long been tempered by the alternative model of sovereignty residing with the people, a somewhat romantic principle which was resurrected in the 1980s to provide an important justification for later legislative and executive decentralisation. The establishment of the Scottish Parliament and Government and the norms guiding the inter-institutional relationships with its "parent" institutions in London should be seen in the peculiarly British context of an ever-evolving uncodified constitution, which frequently attributes legal recognition to actually existing political-constitutional norms. While the focus of the recent independence referendum was popular sovereignty in its purest form—the ultimate expression of the will of the people, the post-referendum process has shifted focus to a more conservative and ultimately less participatory conception of popular sovereignty, expressed collectively through the democratically-elected members of the Scottish Parliament. The recent recommendations of the Smith Commission's Report, moreover, not only augur the next stage of Scotland's devolution process, but also a further weakening of the normative strength of UK constitutional orthodoxy.

Part III
New Threats to International Peace and Security

Climate Change and International Peace and Security: Time for a 'Green' Security Council?

Pierre Thielbörger

1 Introduction

The diagnosis for our planet is both clear and dramatic: through the almost uncontrolled emission of greenhouse gases, the global climate is rapidly changing. More extreme and frequent heat waves and storms occur,[1] biodiversity is irreversibly lost[2] and rising sea levels destroy fertile land and freshwater resources alike.[3] While climate change occurs both through natural variability and human activity,[4] it is clear that the latter is by now the predominant amongst the two factors.

To tackle this problem, the global community, already in the 1990s, developed an institution in which it placed high hopes at the time: the United Nations

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[1] IPCC, Climate Change 2013: The Physical Science Basis, Cambridge 2013, p. 1066; V. P. Pandey et al., Hydrologic Impacts of Climate Change: Quantification of Uncertainties, in: R. Surampalli et al. (eds.), Climate Change Modeling, Mitigation, and Adaptation, Reston 2013, pp. 256–257.

[2] IPCC, Climate Change 2007: Impacts, Adaptation and Vulnerability, Cambridge 2007, pp. 485–486.

[3] IPCC, supra note 1, Chapter 13, pp. 1137–1205.

[4] M. Jarraud/A. Steiner, Foreword, in: IPCC, supra note 1.

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Framework Convention on Climate Change (UNFCCC).[5] Its biggest success is the 'Kyoto Protocol' from 1997,[6] an optional international treaty under the UNFCCC. The Kyoto Protocol obliged industrialized nations, as well as the European Union (EU), to reduce emissions of greenhouse gases in an initial period from 2008 to 2012.[7] A promising first step was undertaken.

Different from the common saying, however, not the first, but the second step proved to be the hardest. For several years, States have been in the process of negotiating a follow-up agreement to the Kyoto Protocol—but without feasible success. The USA has, even under the supposedly more progressive Democratic government of President Barack Obama, not warmed to the Kyoto Protocol;[8] Canada, once a fervent supporter of the Kyoto Protocol, has even withdrawn from it.[9] After the (at least partial) failure of the last climate summits in Copenhagen (2009), Cancun (2010), Durban (2011), Doha (2012), Warsaw (2013) and Lima (2014) to renegotiate a follow-up mechanism to the Kyoto Protocol, hope now rests on the coming summit in Paris (2015). The world has proscribed itself to find a follow-up mechanism by the end of 2015[10]—it is open whether this goal will be met.

The above mentioned effects of climate change on human life also have a bearing on peace and security. Rising sea levels cause people to migrate in large numbers to safer destinations, and scarce resources—above all drinking water—create violent tensions over access to these resources. It is thus no surprise that in the recent past the Security Council has started to put the topic of climate change

[5] United Nations Framework Convention on Climate Change, entry into force 21 March 1994, UNTS Vol. 1771 (2000), p. 107.

[6] Kyoto Protocol to the United Nations Framework Convention on Climate Change, entry into force 16 February 2005, UNTS Vol. 2303 (2005), p. 148.

[7] Id., art. 3 Kyoto Protocol, see on the Protocol, for example, C. Bail, Das Klimaschutzregime nach Kyoto, in: Europäische Zeitschrift für Wirtschaftsrecht 9 (1998), pp. 15, 457; P. Kunig, Völkerrechtsschutz für das Klima – Gedanken zu einem Prozess, in: W. Benedek et al. (eds.), Development and Developing International and European Law: Essays in Honour of Konrad Ginther on the Occasion of His 65th Birthday, Frankfurt/M. 1999, pp. 251–262; J. Brunnée, The Kyoto Protocol: Testing Ground for Compliance Theories, in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 63 (2003), pp. 255–280.

[8] J. Kluger, A Climate of Despair, Time Magazine, 1 April 2001, at http://content.time.com/time/magazine/article/0,9171,104596-1,00.html; L. Friedman, Overseas Frustration Grows Over U.S. Domestic Impasse on Climate Policy, The New York Times, 3 August 2010, at http://www.nytimes.com/cwire/2010/08/03/03climatewire-overseas-frustration-grows-over-us-domestic-61456.html?pagewanted=all; S. Fischer, Obama sagt grüne Revolution ab, SPIEGEL Online, 18 October 2011, at http://www.spiegel.de/politik/ausland/klimawandel-obama-sagt-gruene-revolution-ab-a-792362.html.

[9] Statement of Canadian Minister of the Environment Kent, 12 December 2011, at http://www.ec.gc.ca/default.asp?lang=En&n=FFE36B6D-1&news=6B04014B-54FC-4739-B22C-F9CD9A840800.

[10] See UNFCC, The Doha Climate Gateway, at http://unfccc.int/key_steps/doha_climate_gateway/items/7389.php.

onto its own agenda. First in 2007[11] and again in 2011,[12] the 15 Security Council members discussed the topic of climate change in special sessions. In its 2011 meeting, the Council cautioned that "possible adverse effects of climate change may, in the long run, aggravate certain existing threats to international peace and security",[13] while some members of the Council have proposed using even stronger language, suggesting that climate change in itself constitutes a significant problem for peace and security.[14] It is likely that further sessions of the Security Council on climate change will follow in the future. This goes hand in hand with previous statements by several United Nations Secretary Generals, such as Boutros Boutros-Ghali,[15] Kofi Annan[16] und Ban Ki-moon,[17] who have all explicitly warned that growing resource scarcity, such as decreasing amounts of drinking water, will most likely lead to armed conflicts in the future.

This article pursues the question if, and to what extent, the Security Council can deal with the problem of global warming and climate change without exceeding its own mandate under the UN Charter. In a first step, the general role and task of the Security Council, as the main safeguard of international peace and security under the UN Charter, is briefly characterized. The article argues that the problem of climate change, the way it presents itself today, does not fall easily within the classical mandate of the Security Council, as many of the current effects of climate change occur primarily on the local or domestic, but not (yet) on the international, level.

In a second step, the article develops and discusses different ways the Security Council's competence could nevertheless be legally justified today. Whether this is a politically desirable endeavour, is a question that lies outside the scope of this legal analysis. Good arguments could also be made that the issue should be left to other international institutions. Different States have put forward very different opinions on this issue.[18] Should, however, the political will to engage the Security

[11] UN Security Council, Report of the 556th meeting, 17 April 2007, UN Doc. S/PV.5663.

[12] UN Security Council, Statement by the President of the Security Council, 20 July 2011, UN Doc. S/PRST/2011/15.

[13] Id., paras. 6, 7.

[14] See UN Security Council, Press Release SC/10332, 20 July 2011.

[15] In 1985, Boutros-Ghali stated "the next war in the Middle East will be fought over water, not politics", quoted by I. M. Jacobs, The Politics of Water in Africa: Norms, Environmental Regions and Transboundary Cooperation in the Orange-Senqu and Nile Rivers, London/New York 2012, p. 15.

[16] See, for example, UN News Centre, Annan Calls for "Blue Revolution" for Global Sharing of Scarce Freshwater, 22 March 2003, at http://www.un.org/apps/news/story.asp?NewsID=6542#.VDld7fmSxuI.

[17] See UN News Centre, Ban Ki-moon Warns that Water Shortages are Increasingly Driving Conflicts, 6 February 2008, at http://www.un.org/apps/news/story.asp?NewsID=25527#.VDleJPmSxuI.

[18] See, in particular, the statements of the Argentinean representative (delivered on behalf of the Group of 77 and China), of the Brazilian representative as well as of the Chinese representative

Council with the issue of climate change ripen, the article suggests that at least four different ways to justify a competence of the Council are imaginable: an "individual case"-based approach; an "imminent threat"-based approach; a "human rights"--based approach and a "cause and solution"-based approach.

The analysis favours the last option as it is an approach that emphasizes the undeniable reality that, while the *effects* of climate change are currently indeed experienced more locally or domestically, both the *cause* of these effects as well as the problem's only possible *solution* are inevitably international in nature. In this way, the threat for peace and security that climate change creates is indeed an *international* one and the competence of the Security Council for this problem appears appropriate.

2 The Security Council's Mandate and the Effects of Climate Change

On the one hand, according to article 39 of the UN Charter, the Security Council can act with its most powerful means under Chapter VII only if it finds a threat to the peace, a breach of the peace or an act of aggression. In the practice of the Council, the first category has been the by far the most relevant one[19] as it is the broadest of the three terms and gives the Council nonetheless equally broad competences as when declaring a "breach" of the peace or an "act of aggression". The Charter's preamble[20] and the second part of article 39 UN Charter make clear that the peace in article 39 does not mean just any peace, but that rather a form of international peace must be at stake. Article 24 UN Charter also states explicitly that the Security Council's primary responsibility is the maintenance of *international* peace and security. Purely internal conflicts thus do not fall within the prerogative of the Security Council, just as the prohibition on the use of force also only applies to international affairs and not to a State's domaine resérvé.[21] As a primary organ of the UN, the legal authority of the Council is rooted in the UN Charter as the organization's founding document—and so the Council is generally limited to the competences that were given to it in the Charter.

during the 2011 Security Council debate, UN Security Council, Report of the 6587th meeting, 20 July 2011, UN Doc. S/PV.6587, pp. 26–8, 7–9, and 9, respectively.

[19] C. Gray, The Use of Force and the International Law Order, in: M. D. Evans (ed.), International Law, 4th ed., Oxford 2014, pp. 618, 634; C. K. Penny, Greening the Security Council: Climate Change as an Emerging 'Threat to International Peace and Security', in: International Environmental Agreements 7 (2007), pp. 35, 48; N. Krisch, Art. 39, in: B. Simma et al. (eds.), The Charter of the United Nations, 3rd ed., Oxford 2012, p. 1278; M. N. Shaw, International Law, 6th ed., Cambridge 2008, at p. 1237.

[20] Charter of the United Nations, Preamble, "we the peoples of the United Nations determined [. . .] to unite our strength to maintain *international peace* and security [. . .] have resolved to combine our efforts to accomplish these aims." (Italics added by the author.)

[21] J. A. Frowein, Comments on Article 39, in: B. Simma et al. (ed.), The Charter of the United Nations: A Commentary, Vol. I, New York 1994, pp. 608–609.

However, the Security Council has interpreted its own task very broadly over the last few decades. It has assumed greater competences in conflicts that were arguably, mainly or entirely, internal conflicts.[22] This "activism"[23] has provoked severe criticism of the Security Council. While some academics accept that the Security Council today can also deal with situations that do not cause physical repercussions abroad, other authors insist that the Council in its current practice often overreaches its own competence,[24] even if one grants the Security Council a large discretion[25] for determining what constitutes a threat to international peace and security, and what does not.

It is almost uncontested that climate change, generally speaking, poses challenges from a peace and security perspective. The position that climate change does not raise any security concerns, but is instead purely a question of development,[26] is out-dated, in particular if one remembers the extent of the problem today. Migration research predicts at least 200 million people will become 'environmental migrants' by the year 2050, while some predictions go even much further.[27] Vital natural resources (such as drinking water) will also grow dramatically scarcer: currently, over 700 million people have no access to improved water sources;[28] by 2050, ½ to 3.1 billion people are expected to be exposed to water scarcity due to climatic changes.[29] Effects like these have the clear potential to destabilize peace and security. The crucial question for our analysis here is, however, whether they do so in a way that would trigger the competence of the Security Council in a traditional sense, if one assumes that the Council is not responsible for the

[22] C. Gray, supra note 19, p. 618; M. Wood, United Nations, Security Council, 2007, in: Max Planck Encyclopedia of Public International Law, at www.mpepil.com, para. 26; M. N. Shaw, supra note 19, pp. 301, 1237–1240; G. Nolte, Art. 2(7), in: B. Simma et al. (eds.), supra note 19, p. 1278.

[23] A. Knight, Global Environmental Threats: Can the Security Council Protect Our Earth?, in: New York University Law Review 80 (2005), pp. 1549, 1566.

[24] In favor of such extended competence, G. Nolte, supra note 22, p. 301, and ICTY, Prosecutor v Dusko Tadic, Appeal on Jurisdiction, 35 ILM 35, 43, para. 30; critical of such extension, J. A. Frowein, supra note 21, p. 409; B. Elberling, The Ultra Vires Character of Legislative Action by the Security Council, in: International Organizations Law Review 2 (2005), p. 337.

[25] C. K. Penny, supra note 19, pp. 35, 48, 55–57.

[26] See the statements, supra note 18.

[27] S. Atapattu, Climate Change, Human Rights, and Forced Migration: Implications for International Law, in: Wisconsin International Law Journal 27 (2009), pp. 607, 610–613; N. Stern, The Economics of Climate Change. The Stern Review, Cambridge 2009, pp. 111–112; M. M. Naser, Climate Change, Environmental Degradation, and Migration: A Complex Nexus, in: William & Mary Environmental and Policy Review 36 (2012), pp. 713, 746–750.

[28] WHO/UNICEF, Progress on Sanitation and Drinking-water: 2014 update, Geneva 2014, p. 6. One must note, however, that this number has recently been improved: as the most recent MDG report points out: from 1990 to 2012, 2.3 billion of people gained access to improved sanitation.

[29] S. N. Gosling/N. W. Arnell, A Global Assessment of the Impact of Climate Change on Water Scarcity, in: Climate Change (2013), p. 1; IPCC, Climate Change 2014: Impacts, Adaptation, and Vulnerability, Final Draft, Cambridge 2014, Chapter 3, p. 19.

maintenance of any peace and security, but rather for the maintenance of *international* peace and security. In the following, to assess whether climate change threatens indeed *international* peace and security, the two previously mentioned effects of climate change—climate change-induced migration and struggles over scarcer-growing vital resources—are looked at in turn.[30]

2.1 The Phenomenon of Climate Migration

Starting with the case of climate migration, different researchers operate with different parameters to assess the extent of climate migration. The terminology is already quite incoherent, as different researchers speak of "climate refugees",[31] "climate migrants"[32] or "environmental migrants",[33] just to name the most important terms.[34] The predicted numbers also vary dramatically: while some assume several millions of climate migrants, others expect almost a billion climate migrants over the coming decades.[35] Fortunately, the UN's warning of 50 million climate migrants by the year 2010 did not become a reality.[36]

[30] The choice of these two cases is in some ways necessarily arbitrary. One could also think of other examples that have a more "international" dimension. However, it is undeniable that the two chosen examples are at least amongst the most severe effects of climate change. This way, the examples chosen enable us to conclude that, as I will show, some of the most important effects of climate occur more on the national or local rather than on the international level.

[31] For example, N. Myers, Environmental Refugees, in: Population and Environment 19 (1997), p. 167; N. Myers, Environmental Refugees: A Growing Phenomenon of the 21st century, in: Philosophical Transactions of The Royal Society: Biological Sciences 357 (2002), p. 609; P. Gonin/V. Lassaily-Jacob, Les réfugiés de l'environnement. Une nouvelle catégorie des migrants forcés?, in: Revue Européenne des Migrations Internationales 18 (2002), p. 139.

[32] For example, F. Laczko/C. Aghazarm (eds.), Migration, Environment and Climate Change: Assessing the Evidence, Geneva 2009, pp. 18–19.

[33] For example, E. Marino, The Long History of Environmental Migration: Assessing Vulnerability Construction and Obstacles to Successful Relocation in Shishmaref, Alaska, in: Global Environmental Change 22 (2012), pp. 2, 374.

[34] In this article, I will use the term "climate migrant". On the one hand, the term "refugee", at least in a classical understanding in the context of Art. 1 Convention relating to the Status of Refugees, entered into force 22 April 1954, UNTS Vol. 189 (1954), p. 137, requires "persecution for reasons of race, religion" etc. and is therefore rejected by most scholars, see for instance S. Atapattu, supra note 27, pp. 607, 671. The term "environmental migrant" on the other hand mixes up persons whose motivations for migration are general environmental reasons and persons who becomes victims of climate change induced environmental changes.

[35] See F. Laczko/C. Aghazarm (eds.), supra note 32, p. 5; see, also with various figures, S. Atapattu, supra note 27, pp. 607, 610–13; N. Stern, supra note 27, pp. 111–112; M. N. Naser, supra note 27, pp. 713, 746–750.

[36] A. Bojanowski, Feared Migration Hasn't Happened: UN Embarrassed by Forecast on Climate Refugees, Spiegel Online, 18 April 2011, at http://www.spiegel.de/international/world/feared-migration-hasn-t-happened-un-embarrassed-by-forecast-on-climate-refugees-a-757713.html.

Despite these uncertainties, one finding is uncontested by climate scientists. People predominantly shift their geographic location because of climate change (within the borders of one State) internally rather than internationally (from the territory of one State to another).[37] This way, the problem is not so much one of international migrants, but often a problem of "internally displaced people" (IDPs).[38] This certainly has political, cultural and linguistic reasons, given that people prefer to stay within their political, cultural and linguistic environments. Thus the effect of climate change on migration takes a largely national rather than an international form.

2.2 *The Phenomenon of Conflicts over Scarce Natural Resources*

Turning to vital resource scarcity, the cases are different depending on the specific resource at hand. I will in this article focus on the issue of drinking water simply because water, apart from air, is potentially the most vital resource of all for human survival. It is at the same time dramatically affected by rising temperatures as a result of climate change.

Water has been called "the blue gold"[39] and one of planet earth's most valuable resources.[40] International politicians and diplomats have again and again warned about the possibility of future "water wars".[41] From a scientific perspective, however, these political statements are contested. Some authors have indeed claimed that resource scarcity, like freshwater scarcity, would increase the risk of armed conflict,[42] as it hinders economic development. Other authors, however,

[37] See UNHCR, Internally Displaced People Figures, at http://www.unhcr.org/pages/49c3646c23.html.

[38] J. Hampton, Internally Displaced People: A Global Survey, 2nd ed., Abingdon/New York 2002.

[39] M. Barlow/T. Clarke, Blue Gold: The Fight to Stop the Corporate Theft of the World's Water, New York 2002; V. Petrova, At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water, in: Brooklyn Journal of International Law 31 (2006), p. 577; M. Helal, Sharing Blue Gold: The 1997 UN Convention on the Law of Non-Navigational Uses of International Watercourses Ten Years On, in: Colorado Journal of International Environmental Law and Policy 18 (2007), p. 337.

[40] For example, S. Hoffmann, Planet Water: Investing in the World's Most Valuable Resource, Hoboken 2009; Water: The World's Most Valuable Stuff, The Economist, 20 May 2010, at http://www.economist.com/node/16163366#.

[41] UN News Centre, supra note 17; Iraq's PM Warns Arab States May Face 'Water War', BBC News Online, 30 May 2012, at http://www.bbc.com/news/world-middle-east-18262496; F. Harvey, Water Wars Between Countries Could be Just Around the Corner, Davey Warns, The Guardian Online, 22 March 2012, at http://www.theguardian.com/environment/2012/mar/22/water-wars-countries-davey-warns.

[42] W. Hauge/T. Ellingsen, Beyond Environmental Scarcity: Causal Pathways to Conflict, in: Journal of Peace Research 35 (1998), p. 299; IPCC, supra note 29, chapter 3, p. 23; H. A.

have claimed the exact opposite: namely that resource scarcity has no effect on the incidence of armed conflict at all or that it would even make cooperation between different groups necessary and thereby *de*crease the risk of armed conflict[43] and instead reinforce cooperation between different groups.

Regardless of these different findings, scientific research shows clearly that hardly ever has increasing water scarcity lead to a "war", and thus an *international* armed conflict between different States.[44] Peter H. Gleick and his team at the Pacific Institute have concluded in their extensive data collection that only once in history has water scarcity ever lead to an armed conflict, namely in the case of the two ancient city States of Lagash and Umma.[45] The conflicts over scarce water that occur today are thus much more of an internal nature, where different groups—within a State, rather than in several States—fight over access to water or over water distribution injustices. We find in water scarcity thus another effect of climate change that currently takes the form of a national rather than an international problem.

Thus, both phenomena we have looked at—climate migration and armed conflicts over drinking water—currently show greater effects in the domestic rather than in the international sphere. This in turn is somewhat at odds with the Security Council's traditional mandate to maintain *international* peace and security.

3 Approaches to Justify the Council's Competence for the Problem of Climate Change

How then could we bridge the apparent gap between the Security Council's traditional mandate to maintain international peace and security and the effects of climate change that we experience today at the local or domestic levels? I suggest in this article four ways of how to approach the problem conceptually: an "individual case"-based approach; an "imminent threat"-based approach; a "human rights"--based approach and a "cause and solution"-based approach. I will also show the advantages that the last approach carries over the other three.

Amery, Water Wars in the Middle East: a Looming Threat, in: The Geographical Journal 168 (2002), p. 313.

[43] D. C. Esty et al., State Failure Task Force Report: Phase II Findings, 1998; E. Miguel et al., Economic Shocks and Civil Conflict: An Instrumental Variables Approach, in: Journal of Political Economy 112 (2004), p. 725; A. Carius/G. D. Dabelko/A. T. Wolf, Water Conflict, and Cooperation, ECSP Report 10, 2004, p. 60.

[44] T. F. Homer-Dixon, Environment, Scarcity, and Violence, Princeton 1999.

[45] P. Gleick, Water and Conflict: Fresh Water Resources and International Security, in: International Security 18 (1993), p. 79; P. Gleick/P. Yolles/H. Hatami, Water, War & Peace in the Middle East, in: Environment 36 (1994), p. 6; P. Gleick/M. Heberger, Water Conflict Chronology, at http://worldwater.org/wp-content/uploads/sites/22/2013/07/ww8-red-water-conflict-chronology-2014.pdf. See also, on the prevention and resolution of water conflicts, A. T. Wolf et al., Transboundary Freshwater Dispute Database, at http://www.transboundarywaters.orst.edu.

3.1 An "Individual Case"-Based Approach

Firstly, one might see the Security Council's competence limited to specific cases in which the effects of climate change do exceptionally have—different from the general effects depicted above—an international dimension, e.g., in cases where climate change evidently causes feasible and concrete disruptions to international peace and security. We can think here of the drowning of island States with the loss of their entire territory, as predicted by some for the Maldives or Kiribati and Tuvalu over the next decades. These low-lying island States are existentially threatened by rising sea levels.[46] In these cases, migration necessarily will have an international dimension, simply because there is no domestic refuge possible in the long run. In a similar manner, the Security Council has on several occasions emphasized that in its view internal "refugees" in very big numbers, caused by a sudden natural disaster or an armed conflict, can constitute a threat to international peace and security.[47] In the logic of the Council, if refugee streams reach a significant size, they can threaten to spill over to other countries and thereby destabilize the security not only of the originally affected country, but the security of an entire region.[48]

In the case of water scarcity, we can think of instances where a scarcity becomes dramatic in a way that State leaders threaten each other to go to war over the issue. This has happened rarely in history, however Egypt in late 1960s provides an example when former Egyptian President Gamal Abdel Nasser threatened to go to war over water of the river Jordan with neighbouring countries.[49] The water conflict potential of the region has been re-affirmed in the recent dispute over the water of the Nile River between Egypt and Ethiopia,[50] where a military conflict appeared feasible.

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[46] See IPCC, supra note 29, chapter 29; R. Kendall, Climate Change as a Security Threat to the Pacific Islands, in: New Zealand Journal of Environmental Law 16 (2012), p. 83; H. Xu, From Tuvalu to Kiribati, the outlook for Pacific island States is perilous, The Guardian Online, 28 August 2014, at http://www.theguardian.com/global-development/poverty-matters/2014/aug/28/tuvalu-kiribati-asia-pacific-island-states.

[47] UN Security Council, Resolution 688, 5 April 1991, UN Doc. S/RES/0688 (1991); UN Security Council, Resolution 918, 17 May 1994, UN Doc. S/RES/918 (1994); UN Security Council, Resolution 1973, 17 March 2011, UN Doc. S/RES/1973 (2011).

[48] UN Security Council, Resolution 688, 5 April 1991, UN Doc. S/RES/0688 (1991), at para. 3 of the preamble; UN Security Council, Resolution 918, 17 May 1994, UN Doc. S/RES/918 (1994), at para. 8; UN Security Council, Resolution 1973, 17 March 2011, UN Doc. S/RES/1973 (2011), at para. 15.

[49] See F. Sindico, Ex-Post and Ex-Ante (Legal) Approaches to Climate Change Threats to the International Community, in: New Zealand Journal of Environmental Law 9 (2005), pp. 209, 213; M. R. Lowi, Water and Power: The Politics of a Scarce Resource in the Jordan River Basin, Cambridge 1995.

[50] See F. Sindico, supra note 49, pp. 209, 213; C. McGrath, Nile River Damn Threatens War Between Egypt and Ethiopia, Common Dreams: Breaking News & Views for the Progressive Community, 22 March 2014, at http://www.commondreams.org/news/2014/03/22/nile-river-dam-threatens-war-between-egypt-and-ethiopia; P. Schwartzstein, Water Wars: Egyptians Condemn

Such an "individual case"-based approach carries the advantage that it is easily in accordance with the original concept of the Security Council's competence, simply because the UN Charter does not prescribe what causes the threat to international peace and security. In that way, the Security Council has a competence to deal with climate change just as with any other event if it constitutes indeed in a given situation a threat to international peace and security. An approach along these lines has the disadvantage, however, that it limits the Security Council's competence to the most extreme cases: cases in which the effects of climate change have already reached a very high threshold. This approach would preclude the Security Council from dealing with the issue of climate change in a general manner. The Council could only deal with specific disputes or situations (Article 34 UN Charter) in which climate change already shows the most dramatic effects. Any pre-emptive action—as necessary at it may appear—for the issue of climate change as a whole would thus be excluded from the Security Council's mandate under such an "individual case"-based approach.

3.2 An "Imminent Threat"-Based Approach

A second approach would rely heavily on the nature of climate change as a permanent imminent threat where climate change is understood as a dormant problem hidden beneath the surface. In this way, climate change, while not yet constituting a direct or concrete threat to international peace and security, could spring to the forefront of international peace and security at any time and in a very sudden manner.

The Security Council has argued in a similar manner in several previous cases, such as in the case of terrorism[51] or the spreading of the viral disease of HIV/Aids.[52] In these cases, the Security Council did not identify a specific threat at a certain location or at a specific moment in time, but rather emphasized the general potential of these phenomena to destabilize international peace and security. Specifically for the case of terrorism it is by now widely accepted that the Security Council can deal with the issue in a general manner and not only for specific terrorist attacks.[53] In these resolutions, the Council obliged States in a general manner to take certain necessary steps or to refrain from specific actions to minimize the threat to international peace and security.

Ethiopia's Nile Dam Project, National Geographic Online, 27 September 2013, at http://news.nationalgeographic.com/news/2013/09/130927-grand-ethiopian-renaissance-dam-egypt-water-wars.

[51] UN Security Council, Resolution 1373 (2001) and UN Security Council, Resolution 1988 (2011).

[52] UN Security Council, Resolution 1308 (2000).

[53] N. Krisch, supra note 19, p. 1282.

Applying this approach to the case of climate change holds the clear advantage that the Security Council has used this exact argument previously to justify its own competence, as shown here for the cases of terrorism and HIV/Aids. It would thus not be a further stretch of the Security Council's self-assumed competence; it would rather be in line with previous practice of the Council to carry out its own mandate.

On the other hand, the Security Council was already at the time heavily criticised for doing exactly that: single-handedly stretching its own mandate from specific situations to general themes by including topics like terrorism and HIV/Aids.[54] Maybe even more importantly, the cases of terrorism and HIV/Aids on the one hand and the one of climate change on the other are significantly different. While acts of terrorism can occur often out of the blue and epidemics can spread across regions rapidly within a few days (as most recently sadly evidenced in the 2014 spread of Ebola in West Africa),[55] the nature of climate change is a progressive one: global temperatures increase from decade to decade, not from one day to the next, through the continued emission of green house gases. It is thus not convincing to equate the cases of terrorism and HIV/Aids with the case of climate change: while the effects might eventually be equally fatal for international peace and security, the course of events is fundamentally different in both scenarios: a potential sudden outbreak on the one hand and a rather progressive development over several decades on the other.

3.3 A "Human Rights"-Based Approach

A third approach to justify the Security Council's competence for climate change under article 39 UN Charter would be to emphasize the negative effect that climate change has on the realization of human rights.

The UN is obliged under article 55(c) UN Charter to promote universal respect for human rights and fundamental freedoms. Gross human rights violations are particularly instrumental triggering the competence of the Security Council under article 39 UN Charter as threat to international peace and security.[56] In the background of this lies the assumption that human rights create so called *erga omnes* obligations:[57] States are obliged not only towards their own people to uphold basic human rights; they owe this obligation also to the international community.

[54] B. Elberling, supra note 24, p. 337.

[55] See, for instance, the background information on Ebola and the 2014 outbreak at the WHO's website, at http://www.who.int/mediacentre/factsheets/fs103/en.

[56] UN Security Council, Resolution 688, 5 April 1991, UN Doc. S/RES/0688 (1991). Out of many, see A. Cassese, International Law, 2nd ed., Oxford 2005, pp. 347–348.

[57] ICJ, Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, 5 February 1970, ICJ Reports 1970, pp. 3, 33; J. A. Frowein, Obligations erga omnes, 2008, in: Max Planck Encyclopedia of Public International Law, at www.mpepil.com; M. Ragazzi, The Concept of International Obligations Erga Omnes, Oxford 2000.

In this way, the "domaine réservé"—the field that is traditionally reserved for a State's internal affairs—has become significantly smaller in the field of human rights over the last decades.[58] If it can be shown that climate change causes such grave human rights violations, one might assume a competence of the Security Council under article 39 UN Charter.

The loss of one's home or one's livelihood can certainly reduce the potential realization of certain human rights, in particular those protected under the International Covenant on Civil and Political (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). For instance, if physical harm caused by changed climatic conditions is threatening individuals, their right to life (Article 6 ICCPR) or their right to the highest attainable standard of health is at stake (Article 12 ICESCR). In case of necessary relocation to another place, the right to free movement and choice of residence (Article 12 ICCPR) or their right as a minority to enjoy their own culture (Article 27 ICCPR) is potentially implicated. If a person's livelihood is lost or significantly reduced, their right to work (Article 6 ICESCR) or their right to an adequate standard of living (Article 12 ICESCR) might not be realized.

An approach connecting climate change foremost with human rights violations carries the advantage that it takes the effects of climate change on the individual seriously. With the rise of human rights law and international criminal law over the last decades, the individual has increasingly—and rightly so—entered the stage of international law, a field of law that was traditionally concerned only with States and international organizations. In that way, an approach that recognizes the connection between human rights and international security takes into account the aspiring concept of 'human security'.[59] It is thus an approach that moves the individual into the centre of the problem.

On the other hand, there is not significant practice within previous resolutions of the Security Council acknowledging that human rights violations, without significant other factors being present, constitute a threat to peace and security.[60] There are even instances when the veto-power States, such as Russia and China, exercised their veto precisely for this reason: that the occurrence of human rights violations in itself would not constitute a threat to peace and security.[61] Explicit reference by the

[58] K. S. Ziegler, Domaine Réservé, 2013, in: Max Planck Encyclopedia of Public International Law, at www.mpepil.com, paras. 30–32; A. von Arnauld, Völkerrecht, Heidelberg 2012, p. 141, para. 352.

[59] W. Benedek/M. C. Kettemann/M. Möstl, Mainstreaming Human Security in Peace Operations and Crisis Management, London 2010; W. Benedek, Human Security and Human Rights Interaction, in: M. Goucha/J. Crowley (eds.), Rethinking Human Security, Oxford/Malden 2008, p. 7; W. Benedek, Human Rights and Human Security: Challenges and Prospects, in: A. Yotopoulos-Marangopoulos (ed.), L'Etat Actuel des Droits de l'Homme dans le Monde: Defis et Perspectives, Paris 2006, p. 97.

[60] N. Krisch, supra note 19, p. 1287.

[61] See for instances the draft resolutions, UN Docs. S/2008/447, S/2012/77, S/2011/612.

Security Council to human rights violations[62] does not mean that these violations in themselves constituted a threat to peace and security, but rather that they exacerbated an existing threat.

Even more, only particularly gross human rights violations have, in the past, been recognized as triggering an international responsibility. In this way, the so-called 'responsibility to protect'[63] has only been found to be applicable in cases of genocide, war crimes, crimes against humanity and ethnic cleansing. In a similar manner, international criminal law under the Rome Statute is only triggered by the worst crimes an individual can commit, namely genocide, crimes against humanity, war crimes, and since recently also aggression.[64] Thus, the threshold that a human rights violation must surpass before entering the international arena is significant. It is not impossible to argue that this threshold is already surpassed through environmental degradation in certain areas—and with worsening effects of climate change this might become a more and more feasible line of argument in the future. However, so far it appears still relatively far-fetched to equate crimes such as genocide or crimes against humanity with the effects of climate change that the world experiences today.

Following a "human rights"-based approach has the even greater negative consequence that the topic of climate change *in abstracto* would not be addressed by the Security Council (similar to the "individual case"-based model). It would be limited to concrete cases where effects of climate change already cause gross human rights violations, as otherwise an international responsibility could not be assumed. In this way, States have often insisted—albeit with different nuances and to different degrees—that the prime responsibility for the realization of human rights still lies within the territory and jurisdiction of each respective State (Article 2 I ICCPR). The concept of establishing "extra-territorial" human rights obligations[65] is still an idea in *statu nascendi*. The traditional focus on "territory and jurisdiction" that is still prevalent both in State practice and human rights literature[66] is drastically at odds with the nature of climate change—as the

[62] UNSC Res 688 (1991); UNSC Res. 794 (1992); UNSC Res. 929 (1994); UNSC Res. 1078 (1996).

[63] International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect, Ottawa 2001, at http://responsibilitytoprotect.org/ICISS%20Report.pdf; UN General Assembly, Resolution 60/1, 24 October 2005, UN Doc. A/RES/60/1, paras. 138–139.

[64] Rome Statute of the International Criminal Court, Art. 5 to 8 *bis*, entered into force 1 July 2002, UNTS Vol. 2187 (2004), 3.

[65] ETO Consortium, Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 2013, at http://www.etoconsortium.org/en/library/maastricht-principles; M. Milanovic, Extraterritorial Applications of Human Rights Treaties: Law, Principles, and Policy, Oxford 2011; O. Hathaway et al., Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially, in: Arizona State Law Journal 43 (2011), p. 389.

[66] M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd ed., Kehl 2005, pp. 43–44; C. Tomuschat, Human Rights: Between Idealism and Realism, 2nd ed., Oxford 2008, pp. 129–132.

consequences from greenhouse gas emissions are not limited to the emitting State's jurisdiction or territory.

3.4 A "Cause and Solution"-Based Approach

A fourth approach, not yet sufficiently discussed, is to use the specific nature of climate change as a distinct and unique reason to justify the Security Council's competence under Article 39 UN Charter.

Climate change has often been characterized as a collective action problem.[67] As a 'prisoner's dilemma',[68] the different international actors, mainly States, prove incapable of seeing beyond their own cost- and benefit analysis. Given that reducing green house gas emissions in any State is relatively costly while direct benefits for that State are limited (as the beneficial ecological effects are shared amongst all nations), this rational cost-benefit analysis prevents each individual State from committing to reduce its green house gas emissions.[69] Instead each State counts on the reduction of the green house gas emissions by other States. In this case, the effects are experienced by all States, including those who have not undertaken the effort of reduction themselves, which creates a classical 'free rider problem'.[70] The logical consequence is the inevitable joint failure to reduce greenhouse emissions on the global scale, as experienced in the climate change negotiations under the UNFCCC over the past years. As has been shown by Elinor Ostrom for

[67] D. H. Cole, Climate Change and Collective Action, in: Current Legal Problems 61 (2008), p. 229; D. C. Esty/A. Moffa, Why Climate Change Collective Action has Failed and What Needs to be Done Within and Without the Trade Regime, in: Journal of International Economic Law 15 (2012), p. 777; L. M. Schenck, Climate Change 'Crisis' – Struggling for Worldwide Collective Action, in: Colorado Journal of International Environmental Law and Policy 19 (2008), p. 319; M. Squillace, Climate Change and Institutional Competence, in: University of Toledo Law Review 41 (2010), pp. 889, 900.

[68] R. Axelrod, The Evolution of Cooperation, New York 1984, pp. 7–20; S. Gardiner, A Perfect Moral Storm: Climate Change, Intergenerational Ethics and the Problem of Moral Corruption, Oxford 2011; M. S. Soroos, Global Change, Environmental Security, and the Prisoner's Dilemma, in: Journal of Peace Research 31 (1994), p. 317; S. Cumberlege, Multilateral Environmental Agreements: From Montreal to Kyoto – A Theoretical Approach to an Improved Climate Change Regime, in: Denver Journal of International Law and Policy 37 (2009), pp. 303, 309–310.

[69] See, on the economical side of climate change, N. Stern, supra note 27; R. S. J. Tol, The Economic Effects of Climate Change, in: Journal of Economic Perspectives 23 (2009), p. 29; D. C. Esty/A. Moffa, supra note 67, p. 777.

[70] T. Bernauer/L. Schaffer, Climate Change Governance, IED Working Paper 12, 2010, p. 11, at http://www.ied.ethz.ch/pub/pdf/IED_WP12_Bernauer_Schaffer.pdf; J. Heitzig/K. Lessmann/Y. Zou, Self-enforcing Strategies to Deter Free-riding in the Climate Change Mitigation Game and Other Repeated Public Good Games, in: Proceedings of the National Academy of Sciences 108 (2011), pp. 15739, 15741–15742.

the global commons,[71] of which the global climate is a particularly important one, this dilemma can only be overcome by a system of trust and cooperation. Although the Kyoto Protocol is currently in deep water, a reliable international system is needed to address the issue and to move the different parties to make binding commitments. This is the only possible way out of this dilemma as the cause of the problem is truly international, and so is its only possible solution.[72]

A way to justify the competence of the Security Council would then be to base it upon exactly this very specific characteristic of climate change. Irrespective of its consequences currently being experienced on the domestic or international levels, the body responsible for the maintenance of international peace and security must arguably be competent to address the issue, given that both the cause ('prisoner's dilemma on the global scale') and the only possible solution ('international cooperation, trust and reciprocity') are inevitably international. This line of argument suggests shifting the focus from the 'effects' of the problem to its 'cause' and its 'solution' when determining what is 'international'. Along these lines, a problem constitutes not only a threat to international peace and security, if its consequences are experienced internationally. A threat to international peace and security could under this reasoning also be assumed, if a problem is caused by the international sphere and can also only be addressed there too. Thus, even if the consequences of climate change currently are largely experienced in national or domestic security, this would not prevent the Security Council from dealing with the issue.

In some ways, this is a way of assuming a competency via the 'implied powers' doctrine accepted by the International Court of Justice for the United Nations: a body that has a certain task to fulfil, must also have the competency to do so in order not to produce contradictory results and to ensure it can fulfil its own mandate.[73]

The advantage of this approach to justify the Security Council's competence lies in its acknowledgement of the very special nature of climate change. Even if its

[71] E. Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action, Cambridge 1990.

[72] Admittedly, this "international" level would not necessarily have to be "global" or "universal". Much can also be said for regional and sectoral approaches, see for instance K. H. Engel, Mitigating Global Climate Change in the United States: A Regional Approach, in: New York University Environmental Law Journal 14 (2005), p. 54; I. Whitehead, Climate Change in Southeast Asia: Risk, Regulation and Regional Innovation, in: Asia Pacific Journal of Environmental Law 16 (2013), p. 141; IPCC, supra note 29, Chapter 14.

[73] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, ICJ Reports 1949, pp. 174, 180. See N. M. Blokker, International Organizations or Institutions, Implied Powers, 2008, in: Max Planck Encyclopedia of Public International Law, at www.mpepil.com; K. Skubiszewski, Implied Powers of International Organizations, in: Y. Dinstein (ed.), International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne, Dordrecht 1989, p. 855; for an "implied powers"-approach to environmental protection, also see C. Voigt, Security in a 'Warming World': Competence of the UN Security Council for Preventing Dangerous Climate Change, in: C. M. Bailliet (ed.), Security: A Multidisciplinary Normative Approach, Leiden 2009, pp. 291, 298; for a critique of using the doctrine for expanding the Security Council's mandate, see K. E. Boon, Coining a New Jurisdiction: The Security Council as Economic Peacekeeper, in: Vanderbilt Journal of Transnational Law 41 (2008), pp. 991, 1011.

consequences are currently largely experienced domestically, the problem is caused mainly internationally and can only be solved by the international community. It gives the Security Council the competence to deal with individual cases (as under the first and the third introduced approach), but also to deal with the topic of climate change on a general level (as under the second approach). This line of argument also avoids overly relying on human rights and their contested extra-territorial application. While it is clear that the effects of climate change can have severe human rights implications, extending the applicability of human rights has often created an ideologized debate which has produced few effective outcomes. In this way, it might be more appropriate to emphasize the unifying element that climate change holds: it is caused jointly and can only be solved together.

The main disadvantage of the approach is the risk of its abuse. I have emphasized in this article the unique nature of climate change, described by an exceptional international prisoner's dilemma. One must be most careful when attempting to extend this "cause and solution"-based approach that I have depicted to other policy fields. If done, very strict criteria must apply: are both the cause and the solution of a security threat truly inevitably international? This is not to say that the approach cannot apply to any other security problem, but it will certainly only apply to few. Taking the two previously explained examples of HIV/Aids and terrorism, for instance, the same logic would not apply to either of them. Both phenomena hold part of their causes and possible solutions clearly in the domestic sphere. In this way, climate change is unique to the extent that its effects occur largely in the national sphere while its cause and solution are found in the international domain.

One should, however, keep in mind that the suggested approach constitutes yet another extension of the Security Council's competence. To be precise, the word "international" peace and security is re-interpreted to include also domestic threats that are rooted in the international sphere and for which solutions can only be found on the international level. Certainly this stretching on the conditions of the norm ("*Tatbestandsebene*") should be balanced by a highly restrictive interpretation on the possible legal consequences ("*Rechtsfolgenseite*"). In this way, we can imagine the Security Council to act with measures not involving the use of armed force (Article 41 UN Charter), ranging from economic sanctions to requiring changes in domestic laws on greenhouse gas emissions, while the use of armed force (Article 42 UN Charter) will regularly, or even categorically, remain excluded.[74] It is at least hard to imagine how States can be compelled through military means to comply with environmental obligations—and how this could be a fruitful path for the maintenance of international peace and security.

[74] T. Ng, Safeguarding Peace and Security in our Warming World: A Role for the Security Council, in: Journal of Conflict & Security Law 15 (2010), pp. 275, 297; C. Voigt, supra note 73, p. 306.

4 Conclusion

This article has shown in a first step that climate change and the mandate of the Security Council do not sit as easily together as is sometimes assumed. The main problem is that the Security Council is responsible for the maintenance of international peace and security; many effects of climate change today, however, show effects within State borders, not necessarily transcending them. Two good examples for this fact are the cases of climate migration and water scarcity.

On the one hand, climate change induced migration is increasing and will continue to increase in the future. Rising sea levels and increased droughts force people to relocate. However, research also shows that migration currently occurs largely within borders (e.g. from an arid region within a country to a more fertile one) rather than migration of people from one country to another. This has cultural and linguistic reasons. Further, climate change-induced migration does not provide a currently recognized ground for refugee status under the Geneva Refugee Convention. Climate change-induced migrants are thus often refused admission into another country. Altogether, the climate change-induced migration we witness today is—both for legal and factual reasons—internal, not international.

The case of conflict over increasing water scarcity is similar. While politicians and diplomats have over many years warned of the possibility of 'water wars', research suggests that we have hardly ever witnessed a war between States over access to water. Struggles over water appear much more often between different groups within one State. Some scientists even dispute there is a higher risk of armed conflict (internal or international) in the case of water scarcity, given that that resource scarcity can also make cooperation necessary and possible. In this way, water scarcity can potentially not only provoke conflict—but also peace. If such conflict nevertheless erupts, it is much more likely to occur on the national, rather than on the international level.

Thus, many of the important consequences of climate change, as experienced today, have a national rather than an international character. *Prima facie*, they often do not constitute as much a threat to *international* peace and security, but are rather national or domestic security problems. However, with temperatures continuing to increase, more extreme scenarios (like entire island States drowning in the sea or indeed military conflicts between States over drying up watercourses) might lead to direct threats to *international* peace and security—but that lies in the future.

In a second step, this paper has suggested different ways of how to nevertheless justify a competence for the Security Council for issues of climate change already present today. The paper pre-supposes the political will to engage the Security Council with the issue of climate change. Whether this is politically desirable—as assumed, for instance, by the German and the United Kingdom governments in the past[75]—or

[75] See, for example, the statements of H. Wieczorek-Zeul (Germany) and M. Beckett (United Kingdom), in: Security Council, Press Release: Security Council Holds First Ever Debate on Impact of Climate Change on Peace, Security, Hearing over 50 Speakers, UN Doc. SC/9000 (2007); as well as those of P. Wittig (Germany) and M. L. Grant (United Kingdom), in: Security

rather undesirable—as emphasized on many occasions by the Russian and Chinese governments[76]—lies outside the scope of this analysis.

This political will pre-supposed, the first option to engage the Security Council with the issue of climate change, is to limit its competence to those concrete extreme cases where an effect of climate change has reached an international dimension. I call this an 'individual case'-based approach. This could be, for instance, assumed in the drowning island scenario where migration necessarily will have to involve another country. It can also be assumed in the case of a drying river where the different upstream and downstream States begin to mobilize militarily against each other. I dismiss this approach mainly because it would limit the competence of the Security Council to an absolute minimum: the issue of climate change *in abstracto*, not connected to a particular situation, would be excluded. This approach would also not add much new to the debate: whenever in a given situation there is a concrete threat to international peace and security, the Security Council is competent anyway—irrespective of what the reason for the threat is. In this way, climate change lies already within the mandate of the Council, if the threat to peace and security is evidently international in a concrete situation.

A second option would be to emphasize that climate change inherently carries a risk of an imminent fulmination. I call this an 'imminent threat'-based approach. The argument goes that climate change, just like other cross-cutting issues the Security Council has addressed before, might currently not constitute a problem within State borders. However, given the explosive nature of the problem, the effects of climate change could from one moment to the next develop into a serious threat to international peace and security. I dismiss this approach mainly as it is not in line enough with the nature of climate change, which is a slowly and steadily progressing problem. This approach that relies on the volatility and the unpredictability of a problem seems appropriate for previous issues that have been discussed by the Council (such as terrorism or epidemics such as HIV/AIDS), but much less so for the case of climate change.

A third approach would be to emphasize that the effects of climate change can hinder the realization of human rights. I call this a 'human rights'-based approach. It is increasingly accepted that the domaine réservé of a State ends where gross human rights violations occur. Very serious violations of human rights, so it is argued, concern every State, not only the one that carries the main responsibility to respect and ensure human rights within its own territory and jurisdiction. Where

Council, Press Release: Security Council, in statement, Says 'Contextual Information' on Possible Security Implications of Climate Change Important When Climate Impacts Drive Conflict, UN Doc. SC/10332 (2011).

[76] See statements of V. Churkin (Russian Federation) and F. Amil (Pakistan, speaking on behalf of the Group of 77 and China), in: Security Council, Press Release: Security Council Holds First Ever Debate on Impact of Climate Change on Peace, Security, Hearing over 50 Speakers, supra note 75; as well as those of V. Churkin (Russian Federation) and M. L. R. Viotti (Brazil, speaking on behalf of the Group of 77 and China), in: Security Council, Press Release: Security Council, in statement, Says 'Contextual Information' on Possible Security Implications of Climate Change Important When Climate Impacts Drive Conflict, supra note 75.

individuals or groups lose their home or cannot sustain themselves anymore because of changing climate conditions, the respective State has shown unwilling or unable to sufficiently protect its people's human rights so that the international community, e.g., through decisions of the Security Council, could step in. I have sympathized with this approach, but have also emphasized that climate change poses different problems from those human rights violations that are accepted as triggering international responsibility (such as genocide, war crimes or crimes against humanity). The Security Council has in the past also not accepted human rights as a sufficient factor to trigger its competency, but rather held that other factors would need to be present.

A fourth approach is to accept that the *effects* of climate change currently pose threats to national or domestic peace and security, but to acknowledge at the same time that climate change is an internationally caused problem for peace and security that cannot be solved by one State alone. Both cause and solution are uniquely international. I have called this a 'cause and solution'-based approach. We can learn from Elinor Ostrom's work on the 'tragedy of the commons', of which planet earth's atmosphere is certainly one, that only international cooperation can address the problem of climate change. Each individual State has the incentive to free-ride, and if all States do so, the collective action problem is inevitable. In this way, the problem of climate change is a case in which we should reconsider what is meant by a 'threat to international peace and security'. It could be looked at from the angle of the effects (as is currently done): only if an entire region's security is at stake, do we call this a threat to international peace and security. One could, however, also look at the cause of the problem and its possible solution instead: even if the effects are currently felt rather within State borders than beyond them, the problem might be rooted in an international dilemma which can only be solved by an international approach of communication, trust and reciprocity. This is exactly how the case of climate change is best characterized. It is in this way that climate change can most convincingly be understood as a threat to *international* peace and security.

Environmental Migration as a Humanitarian Challenge

Kerstin Rosenow-Williams

1 Introduction

For the last decade environmental migration has received increasing attention in political and legal debates[1] and in empirical research.[2] In all three contexts, the complexity of the topic and the difficulties in addressing it adequately have been

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[1] E. Ferris, Protection and Planned Relocations in the Context of Climate Change, Legal and Protection Policy Research Series, 2012, at http://www.unhcr.org/5024d5169.html (accessed on 21 August 2014); D. Hodgkinson/L. Young, In the Face of Looming Catastrophe: A Convention for Climate Change Displaced Persons, 2012, at http://www.ccdpconvention.com/documents/Climate%20change%20displacement%20treaty%20proposal.pdf (accessed on 2 February 2014); W. Kälin/N. Schrepfer, Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches, Legal and Protection Policy Research Series, February 2012, at http://www.unhcr.org/4f33f1729.html (accessed on 17 April 2014); V. Kolmannskog, The Point of No Return: Exploring Law on Cross-Border Displacement in the Context of Climate Change, Refugee Watch 34 (2009), pp. 28–41; V. Kolmannskog/F. Myrstad, 'Environmental Displacement in European Asylum Law', in: European Journal of Migration and Law 11 (2009), pp. 313–326; M. Leighton, Climate Change and Migration: Key Issues for Legal Protection of Migrants and Displaced Persons, June 2010, at http://www.ehs.unu.edu/file/get/7102 (accessed on 19 August 2011); J. McAdam, Climate Change, Forced Migration, and International Law, Oxford 2012; J. McAdam, Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010–2013, in: Refuge 29 (2013), pp. 11–26; United Nations High Commissioner for Refugees (UNHCR), Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective, 23 October 2008, at http://www.unhcr.org/4901e81a4.html (accessed on 19 February 2014); UNHCR, Climate Change and Statelessness: An Overview, 15 May 2009, at http://www.unhcr.org/4a1e50082.html (accessed on 17 April 2014); UNHCR,

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emphasized. Humanitarian organizations work closely with vulnerable populations, and are often among the first groups responding to local needs in their projects and relief operations. Their engagement with the topic of environmental migration both in their advocacy work and in relief and recovery situations, forms the centre of this article. The aim is to analyse both the challenges and opportunities in addressing the needs of climate-induced migrants from a humanitarian perspective.

The study focuses on the positions developed within the International Red Cross/Red Crescent (RC/RC) Movement, particularly within the International Federation of the RC/RC (IFRC). The International RC/RC Movement has become a key player in the humanitarian field in addressing environmental migration as a humanitarian challenge. This article begins with a threefold overview on the state-of-the-art academic, political and legal debates on environmental migration, outlining the main points of departure and remaining gaps. Secondly, the research framework will be introduced. Thirdly, the position of the IFRC towards environmental migration, and its historical developments within the organization, is outlined. Finally, the conclusion summarizes opportunities, challenges and future paths for addressing environmental migration from the perspective of humanitarian organizations.

Forced Displacement in the Context of Climate Change: Challenges for States under International Law, 20 May 2009, at http://www.unhcr.org/4a1e4d8c2.html (accessed on 17 April 2014); A. Williams, Turning the Tide: Recognizing Climate Change Refugees in International Law, in: Law & Policy 30 (2008), pp. 502–529.

[2] T. Afifi/J. Jäger, Environment, Forced Migration and Social Vulnerability, Berlin/Heidelberg 2010; E. Ferris/M. Cernea/D. Petz, On the Front Line of Climate Change and Displacement: Learning From and With Pacific Island Countries, 2011, at http://www.brookings.edu/~/media/research/files/reports/2011/9/idp%20climate%20change/09_idp_climate_change.pdf (accessed on 17 April 2014); F. Gemenne/P. Brücker/J. Glasser (eds.), The State of Environmental Migration 2010, Paris 2011; V. Kolmannskog, Climate Change, Disaster, Displacement and Migration: Initial Evidence from Africa. New Issues in Refugee Research, December 2009, at http://www.unhcr.org/4b18e3599.html (accessed on 17 April 2014); J. Morrissey, Environmental Change and Forced Migration: A State of the Art Review. Oxford 2009; A. Oliver-Smith, Sea Level Rise and the Vulnerability of Coastal Peoples: Responding to the Local Challenges of Global Climate Change in the 21st Century, Intersections No. 7, July 2009, at http://d-nb.info/102969186X/34 (accessed on 6 February 2014); Foresight, Migration and Global Environmental Change – Future Challenges and Opportunities. Final Project Report: Executive Summary, London 2011; F. G. Renaud et al., A Decision Framework for Environmentally Induced Migration, in: International Migration 49 (2011), e5; K. Warner et al., Where the Rain Falls: Climate Change, Food and Livelihood Security, and Migration. An 8-Country Study to Understand Rainfall, Food Security and Human Mobility, Bonn 2012; K. Rosenow-Williams/F. Gemenne (eds.), Organizational Perspectives on Environmental Migration, London 2015.

2 Academic, Political and Legal Debates: Framing the Challenges

> I believe that humanitarian actors have much to contribute to these discussions because of their commitment to and experience with working with refugees and displaced people.[3]

The above observation from Ferris, speaking from her position as the Co-Director of a Project on Internal Displacement, underlines the starting point of the following analysis. How have humanitarian organizations such as the RC/RC movement used their knowledge gained from their proximity to the most vulnerable populations to contribute to the discussion on environmental migration? And has the increasing political and legal attention on environmental migration influenced the IFRC's agenda? To situate the analysis of the IFRC within the wider context of ongoing debates the following section briefly summarizes the academic, political and legal debates on environmental migration.

2.1 Academic Debates on Environmental Migration

Various empirical studies in the field have been conducted proving the impact of changing climate patterns on local responses, with migration as a possible adaptation strategy that can be observed across the globe.[4] The latest International Panel on Climate Change report of Working Group II came to the following conclusion concerning the future development of environmental migration:

> Climate change over the 21st century is projected to increase displacement of people (medium evidence, high agreement). Displacement risk increases when populations that lack the resources for planned migration experience higher exposure to extreme weather events, in both rural and urban areas, particularly in developing countries with low income. Expanding opportunities for mobility can reduce vulnerability for such populations. Changes in migration patterns can be responses to both extreme weather events and longer-term climate variability and change, and migration can also be an effective

[3] E. Ferris, Humanitarian Silos Climate Change-Induced Displacement, 2011, at http://www.brookings.edu/research/papers/2011/11/01-climate-change-displacement-ferris (accessed on 17 April 2014), p. 1.

[4] E. Ferris, A Complex Constellation: Displacement, Climate Change and Arctic Peoples, 2013, at http://www.brookings.edu/~/media/Research/Files/Papers/2013/1/30%20arctic%20ferris/30%20arctic%20ferris%20paper.pdf (accessed on 17 April 2014); E. Ferris/M. Cernea/D. Petz, supra note 2; F. Gemenne/P. Brücker/J. Glasser (eds.), supra note 2; V. Kolmannskog, supra note 2; E. Rasmusson, Climate Changed: People Displaced, Oslo 2009; United Nations Environment Programme, Livelihood Security: Climate Change, Migration and Conflict in the Sahel, Châtelaine/Geneva 2012; K. Warner et al., (2009) In Search of Shelter. Mapping the Effects of Climate Change on Human Migration and Displacement, May 2009, at http://www.careclimatechange.org/files/reports/CARE_In_Search_of_Shelter.pdf (accessed on 25 August 2014); K. Warner et al., supra note 2.

adaptation strategy. There is low confidence in quantitative projections of changes in mobility, due to its complex, multi-causal nature.[5]

While the figures on the extent of environmental migration are highly 'contentious' and 'not satisfactory'[6] the known numbers especially for IDPs have been steadily increasing. By the end of 2013, 51.2 million people were forcibly displaced worldwide including 16.7 million refugees and 33.3 million IDPs.[7]

The literature has generally stressed the need to differentiate between national and international environmental migration, temporary and permanent environmental migration, and environmental migration caused by sudden onset weather related extremes, i.e., heat-waves, floods, and cyclones, or by slow onset deterioration of the environment such as rising sea levels, desertification and permafrost melt.[8] Displacement has also been identified from conflicts over scarce resources following environmental change or through development projects.[9]

The degree of urgency of environmental migration depends on the combination of factors described above. Accordingly Renaud et al.[10] differentiate between *environmental emergency migrants*, e.g. due to floods or cyclones, *environmentally forced migrants*, e.g. due to deteriorating environments such as coastal erosions or sea level rise, and *environmentally motivated migrants*, who might leave a deteriorating environment, e.g. in cases of desertification or salinification of water supplies, to pre-empt the worst case scenario. Similarly Brown and McLeman[11] distinguish *distress migration* and *adaptive or amenity seeking migration* patterns

[5] Intergovernmental Panel on Climate Change, Climate Change 2014: Impacts, Adaptation, and Vulnerability. Summary for Policymakers. WGII AR5 Phase I Report Launch 1, 31 March 2014, p. 20.

[6] F. Gemenne, Why the Numbers Don't Add Up: A Review of Estimates and Predictions of People Displaced by Environmental Changes, in: Global Environmental Change: Human and Policy Dimensions 21 (2011), pp. 41–49; World Bank, Guidelines for Assessing the Impacts and Costs of Forced Displacement, Washington, D.C. 2012, at www.worldbank.org/forced-displacement (accessed on 25 August 2014).

[7] UNHCR, Global Trends 2013, 20 June 2014, at http://www.unhcr.org/5399a14f9.html (accessed on 25 July 2014), pp. 2–3.

[8] A. Williams, supra note 1, pp. 502–529; O. Brown/R. McLeman, Climate Change and Migration: An Overview in: I. Ness (ed.), The Encyclopedia of Global Human Migration, New York/Oxford 2013; Intergovernmental Panel on Climate Change, Climate Change 2014: Impacts, Adaptation, and Vulnerability. Summary for Policymakers. WGII AR5 Phase I Report Launch 1, 31 March 2014; V. Kolmannskog/L. Trebbi, Climate Change, Natural Disasters and Displacement: A Multi-Track Approach to Filling the Protection Gaps, in: International Review of the Red Cross 92 (2010), pp. 713–730; K. Warner et al., Changing Climate Moving People: Framing Migration, Displacement and Planned Relocation, Policy Brief No. 8, June 2013, at http://www.ehs.unu.edu/file/get/11213.pdf (accessed on 5 March 2014).

[9] J. Drydyk, Unequal Benefits: The Ethics of Development-Induced Displacement, in: Georgetown Journal of International Affairs 8 (2007), pp. 105–113; V. Kolmannskog/L. Trebbi, supra note 8, pp. 713–730; E. Ferris, Climate Change and Internal Displacement: A Contribution to the Discussion, 2011; E. Ferris, supra note 1.

[10] G. Renaud et al., supra note 2.

[11] O. Brown/R. McLeman, supra note 8.

which also include movements to regions that have become more habitable due to climatic changes such as in the Arctic tundra.

Researchers furthermore agree that most migration caused by climate change takes place within nation States.[12] Moreover, climate and environmental change is often just one driver for migration among many,[13] and has a limited direct role, but a strong effect on various other drivers of migration.[14] 'Environmental change will influence migration outcomes through affecting existing drivers of migration. This influence is most pronounced for economic, environmental and, to a lesser degree, political drivers.'[15] In this context, McAdam states: 'Arguably, an approach which views climate change as one of a multitude of possible drivers of movement-and which advocates for solutions to those wider problems-opens up more opportunities for solutions, institutional knowledge, and capacity.'[16]

The interrelationship between the varieties of changing climate-related factors and the possible human responses creates a continuum of scenarios that have been summarized under the umbrella term environmental migration. Although freedom of choice as a factor is hard to measure empirically,[17] the term environmental migration also encompasses voluntary migration patterns that pre-empt forced displacement due to natural or manmade causes. Overall, 'migration can be seen as a form of adaptation and an appropriate response to a variety of local environmental pressures'.[18] The most often cited definition by IOM on environmental migrants also encompasses both aspects, thus, posing a challenge for adequate legal responses as outlined below:

> Environmental migrants are persons or groups of persons who, for compelling reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.[19]

Within the environmental migration research arena, the concepts of vulnerability and resilience of the local populations affected by climate change have received

[12] J. McAdam, Climate Change Displacement and International Law: Complementary Protection Standards, Legal and Protection Policy Research Series, May 2011, at http://www.unhcr.org/4dff16e99.html (accessed on 17 April 2014).

[13] V. Kolmannskog, Future Floods of Refugees: A Comment on Climate Change, Conflict and Forced Migration, Oslo 2008.

[14] Foresight, Migration and Global Environmental Change. Future Challenges and Opportunities, London 2011, pp. 43 ff.

[15] Foresight, supra note 2, p. 8.

[16] J. McAdam, supra note 1, p. 38.

[17] G. Renaud et al., supra note 2.

[18] World Bank 2013, supra note 6, p. 132.

[19] International Organization for Migration, Discussion Note: Migration and the Environment, 94th session, Doc. No. MC/INF/288, 1 November 2007, pp. 2–3.

increasing research attention.[20] According to Brown and McLeman[21] populations are vulnerable to *biophysical conditions* due to their geographic location, e.g. flood or drought prone areas. Secondly, vulnerability is affected by the level of household *sensitivity*, i.e. particular social, economic and livelihood practices. Thirdly, the individual and community *capacity* to adapt or cope with the changes impacts the level of vulnerability. Taking these conditions into account, the level of vulnerability differs considerably with, for example, elderly and handicapped people being more vulnerable in emergency evacuations, while poorer households are often less capable in adapting their livelihoods to changing climate patterns. This knowledge is of importance to provide targeted assistance and protection.

In their comparative study of changing rainfall patterns in eight countries across several continents, a research team from the United Nations University's Institute for the Environment and Human Security (UNU-EHS) in Bonn observed four different migration patterns in the context of changing climate conditions.[22] On the one hand, migration takes place as a positive risk management strategy that can improve the resilience of households, e.g., through remittances or through new livelihood options in the destination area. On the other hand, migration can be less successful, or even not possible at all due to the lack of resources that allow for relocation. As in many forced migration contexts the people left behind might require as much humanitarian attention as those migrating due to environmental stress.[23]

Overall, the main challenges outlined in the academic debates comprise the need for more research, and reaching consensus on common definitions allowing for a comparative approach between different global case studies. Moreover, since the first studies proved the increasing relevance of environmental migration in a globally warming world, calls have been made for policies that adequately address the challenges of environmental migration including the issues of legal protection and individual rights in cases of displacement.[24]

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[20] C. Boano/R. Zetter/T. Morris, Environmentally Displaced People: Understanding the Linkages between Environmental Change, Livelihoods and Forced Migration, Oxford 2007; T. Afifi/J. Jäger, supra note 2; F. Laczko/C. Aghazarm (eds.), Migration, Environment and Climate Change: Assessing the Evidence, Geneva 2009; A. Oliver-Smith, supra note 2; K. Warner et al., supra note 2.

[21] O. Brown/R. McLeman, supra note 8.

[22] K. Warner et al., supra note 2.

[23] Foresight, supra note 2, p. 6.

[24] Climate Service Center, The Hamburg Conference: Actions for Climate-Induced Migration, The Hamburg Conference Declaration, 18 July 2013, at http://www.climate-service-center.de/imperia/md/content/csc/workshopdokumente/hamburgconference/hamburg_declaration_final.pdf (accessed on 18 February 2014).

2.2 Political Debates on Environmental Migration

International politics has addressed the topic of environmental migration since the mid-1990s. The United Nations Environmental Program (UNEP) commissioned a report on 'Environmental Refugees' in 1985[25] referring to 'those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life'. Since then, the use of the refugee terminology in the context of climate change has been controversially discussed.

The United Nations High Commissioner for Refugees (UNHCR) underlines that the Geneva Convention on Refugees provides no basis for claims of climate induced migrants. UNHCR and the RC/RC Movement therefore oppose the term 'climate refugee' because of its potential to undermine the existing refugee protection system.[26] Consequentially, the term 'environmental migration' or 'environmental displacment' have gained acceptance in international policy debates.

Throughout the first decade of the twenty-first century, UNHCR strengthened its advocacy work on environmental migration.[27] It asked the international community of nation States to tackle the issue and to add it to the official UNHCR mandate. One of the tangible outcomes of this advocacy work was the Cancun Outcome Agreement in 2010 at the Conference of Parties to the Kyoto Protocol. It was the first time that the international community of nation States recognized 'climate change-induced migration, displacement and planned relocation' as an adaption challenge and agreed 'to enhance [their] understanding, coordination and cooperation' on the issue.[28]

In December 2011, however, at the UNHCR Ministerial Conference, the international community of nation States refused to extend the UNHCR mandate to address environmental migration at the United Nations (UN) level.[29] As a response the Nansen Initiative was established under the leadership of Switzerland and

[25] E. El-Hinnawi, Environmental Refugees, Nairobi 1985.

[26] UNHCR, supra note 1; IFRC, World Disasters Report 2012: Focus on Forced Migration and Displacement, 2012, at http://www.ifrcmedia.org/assets/pages/wdr2012/resources/1216800-WDR-2012-EN-FULL.pdf (accessed on 17 April 2014).

[27] UNHCR, Forced Displacement in the Context of Climate Change, supra note 1; UNHCR, Climate Change and Statelessness, supra note 1.

[28] United Nations Framework Convention on Climate Change, Report of the Conference of the Parties on Its Sixteenth Session, Cancun, 29 November – 10 December 2010, UNFCC/CP/2010/7/Add.1, para. 14 (f).

[29] N. Hall, Moving Beyond its Mandate? UNHCR and Climate Change Displacement, in: Journal of International Organizations Studies 4 (2013), pp. 91–108; Ministerial Communiqué, Intergovernmental Event at the Ministerial Level of Member States of the United Nations on the Occasion of the 60th Anniversary of the 1951 Convention relating to the Status of Refugees and the 50th Anniversary of the 1961 Convention on the Reduction of Statelessness, HCR/MINCOMMS/2011/6, 7–8 December 2011; J. McAdam, Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010–2013, in: Refuge 29 (2013), pp. 15–16.

Norway who pledged to address disaster-induced cross-border displacement.[30] The first Nansen Conference on Climate Change and Displacement was held in Oslo in June 2011 and the Nansen Initiative was officially launched in October 2012. With a projected duration of 3 years, five sub-regional consultative groups from the most affected regions (i.e. Pacific, Central America, Horn of Africa, South Asia and South-East Asia) have taken place leading up to a global consultative meeting in October 2015.

The main goal of the Nansen Initiative is to find new ways to strengthen the international cooperation among States in protecting displaced people. The envisioned protection agenda is based on three pillars 'i) international cooperation and solidarity; ii) standards for admission, stay and status; and iii) operational responses, including funding mechanisms and responsibilities for international humanitarian and development actors'.[31] The Nansen Initiative therefore points to key legal and policy gaps concerning the international responsibility of States to accept migrants crossing their borders due to sudden onset or slow onset natural disasters.

At the same time, the Inter-Agency Standing Committee (IASC) has also addressed the issue through various subsidiary bodies. A former IASC Task Force on Climate Change established in 2008 addressed the topic of environmental migration when outlining the general challenges posed to humanitarians by a changing climate:

> Climate change increases the frequency, intensity and uncertainty of weather and climatic hazards such as floods, tropical cyclones, heat waves and droughts. It can also lead to ecosystem degradation, reduced availability of water and food, increase of insect plagues and health threats such as malnutrition and diseases like malaria, diarrhoea and dengue, impact on livelihoods, and may provoke conflict and migration and displacement. Few people will be unaffected by climate change, with the poorest and most vulnerable populations most at risk.[32]

A sub-committee of the IASC Task Force entitled 'Climate Change and Migration' was also established. Its goal was to develop a joint position in order to best influence the UNFCCC negotiations in Poznan (2008), Copenhagen (2009), and Cancun (2010), identifying for example existing legal protection gaps for those 'directly affected by the effects of climate change'.[33]

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[30] The Nansen Initiative, About Us, 2014, at http://www.nanseninitiative.org/ (accessed on 18 February 2014).

[31] The Nansen Initiative, Strategic Framework and Work Plan 2014–15: Nansen Initiative, 29 January 2014, at http://www.nanseninitiative.org/sites/default/files/Nansen%20Initiative%20Work%20Plan%202014%20%2829%20January%202014%29.pdf (accessed on 11 February 2014), p. 1.

[32] Inter-Agency Standing Committee, Quick Guide to Climate Change Adaptation, 2010, at http://www.humanitarianinfo.org/iasc/downloaddoc.aspx?docID=5436&type=pdf (accessed on 25 July 2014), p. 1.

[33] Inter-Agency Standing Committee, Climate Change, Migration and Displacement: Who Will be Affected? Working Paper Submitted by the Informal Group on Migration/ Displacement and

2.3 International Legal Debates on Environmental Migration

The third context in which environmental migration has been debated is within the framework of international law.[34] Legal protection mechanisms for environmental migration are discussed in the context of national legislations, regional frameworks and international treaties such as the Geneva Convention on Refugees and its additional protocols[35] or international human rights law.[36]

> Human rights law, as a general matter, obligates States to safeguard the life and property of those within a State's territory against threats of disaster and foreseeable harm. It requires States to mitigate the negative impacts of disaster when these occur, including through legal and administrative mechanisms, evacuation and possible temporary or permanent relocation of affected persons consonant with the right of freedom of movement. It further obligates governments to be particularly sensitive to the needs of vulnerable groups, such as women, children, minorities and indigenous peoples.[37]

As outlined in the policy debates, gaps in the legal framework mainly concern environmental migrants crossing international borders. Climate change as a ground for 'well-founded fear of persecution' is not included in the 1951 Geneva Convention for Refugees or its additional protocols.[38] The Refugee Convention only applies to people being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.[39] It only applies to victims of natural disasters if a person flees because a government consciously withholds assistance following the natural disaster because of the person's race, religion, etc.[40]

Refugee law is therefore clearly linked to the State's responsibility either for the act of persecution, the failure to prevent such persecution, or the failure to provide adequate protection for victims.[41] In the context of climate change it is not possible to assign a single State the responsibility for a certain extreme weather event. Moreover, the logic to provide refugee status in industrialized countries would be:

Climate Change of the IASC, 31 October 2008, p. 1; N. Hall, A Catalyst for Cooperation? The Inter-Agency Standing Committee and the Humanitarian Response to Climate Change, forthcoming.

[34] W. Kälin/N. Schrepfer, supra note 1; J. McAdam, supra note 1; J. McAdam, supra note 12; V. Kolmannskog, supra note 1; V. Kolmannskog/F. Myrstad, supra note 1.

[35] UNHCR, Convention and Protocol Relating to the Status of Refugees, Geneva 2010.

[36] UNHCR, Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions, Geneva 2011.

[37] M. Leighton, supra note 1, p. 2.

[38] UNHCR, supra note 35.

[39] Ibid.

[40] UNHCR, Forced Displacement in the Context of Climate Change, supra note 1.

[41] Ibid.

> A complete reversal of the traditional refugee paradigm: whereas Convention refugees flee their own government (or private actors that the government is unable or unwilling to protect them from), a person fleeing the effects of climate change is not escaping his or her government but rather is seeking refuge from—yet within—countries that have contributed to climate change.[42]

This position has also been taken by the High Court in New Zealand in 2013 when rejecting the appeal of Mr Teitiota, who claimed asylum as an environmental refugee from Kiribati under the Geneva Convention for Refugees.[43]

With regards to the international human rights doctrine, it has been agreed that climate change will negatively affect various human rights such as civil and political rights,[44] and economic, social and cultural rights, e.g. the right to adequate food, water and the highest attainable level of health.[45] Therefore, while there is no recognised right to a safe and healthy environment, UN Conventions recognize the intrinsic link between a healthy environment and the realization of rights.

Generally, human rights apply differently to migrants being displaced within or across national borders. With regard to internal displacement, human rights and State obligations have been summarized in the 1998 Guiding Principles on Internal Displacement.[46] These principles are a soft law instrument and the implementation of national protection measures against arbitrary and forced displacement, provisions for housing and restitution, and for the freedom of movement lie in the power of national executives.

People moving across borders also enjoy general human rights protection, but human rights law does not regulate their admission to foreign territories. Currently, climate change is not perceived as activating non-refoulement obligations through State complimentary protection mechanisms in domestic refugee law, normally triggered when the right to life and the right not to be subjected to cruel, inhuman or degrading treatment are threatened.[47]

Legal discussions on progressing environmental migration protection mechanisms have suggested the establishment of new conventions: internationally, in the form of a new UN convention for persons displaced by climate change both internally and across State borders[48]; regionally, e.g. in the form of protection

[42] J. McAdam, supra note 12, pp. 12–13.

[43] New Zealand High Court, Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment, NZHC 3125, 26 November 2013.

[44] United Nations General Assembly, International Covenant on Civil and Political Rights, Opened for Signature 16 December 1966, 999 UNTS 171, entered into force 23 March 1976.

[45] United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, entered into force 3 January 1976; Office of the United Nations High Commissioner for Human Rights, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc. A/HRC/10/61, 15 January 2009.

[46] United Nations, Guiding Principles on Internal Displacement, Geneva 2004.

[47] J. McAdam, supra note 12; J. McAdam, supra note 1; V. Kolmannskog/F. Myrstad, supra note 1.

[48] D. Hodgkinson/L. Young, supra note 1.

mechanisms such as those established in the European Union,[49] the African Union,[50] and in Latin America; or nationally, as in the case of Finnish and Swedish legislation on temporary protection for people affected by serious environmental disruptions, or the Danish law that expands protection for victims and their families seeking humanitarian asylum from drought disasters.[51]

3 Research Framework

To outline the role of humanitarian organizations in the context of environmental migration and its implications, this research exemplarily analyses the positioning of the RC/RC Movement on environmental migration. The research results are based on different methods of data gathering. 11 expert interviews were conducted between 2012 and 2014 with representatives of the RC/RC Climate Centre and the German Red Cross staff in Germany and abroad. In addition, background interviews with international scientists engaged in environmental migration research, German humanitarian affairs policy makers, and humanitarian practitioners from German NGOs were conducted.

Moreover, a qualitative analysis was conducted on the IFRC organizational documents on environmental migration, comparing their frames of argumentation to the interview data. Furthermore, the insights from secondary studies help to situate the observations on the RC/RC Movement in the wider context of the academic, political and legal debates outlined above.

The data set was analysed summarizing the interviewees' perspective on the topic of environmental migration while outlining the factors that impact on the organization's role and position towards the topic within the field of humanitarian action for people being displaced due to environmental or climatic changes.

[49] European Union, Council Directive 2001/55, in: Official Journal of the European Communities (2001), L.212/12.

[50] African Union, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). Adopted by the Special Summit of the Union held in Kampala, Uganda, 22 October 2009, at http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_FOR_THE_PROTECTION_AND_ASSISTANCE_OF_INTERNALLY_DISPLACED_PERSONS_IN_AFRICA(KAMPALA_CONVENTION).pdf (accessed on 24 March 2014).

[51] M. Leighton, supra note 1, pp. 6–7.

4 The IFRC's Position on Environmental Migration

The International RC/RC Movement was chosen as an empirical case study because of its strong and multifaceted engagement in environmental migration. The Movement consists of 189 national RC/RC Societies, the IFRC and the International Committee of the Red Cross (ICRC). The 189 national RC/RC Societies have a special status as auxiliaries to the public authorities in the humanitarian field.[52] According to the Seville Agreement from 1997, the ICRC acts as lead agency 'in situations of international and non-international armed conflicts, internal strife and their direct results', while the IFRC has this role for 'natural or technological disasters and other emergency and disaster situations in peace time which require resources exceeding those of the operating National Society'.[53] The supreme deliberative body is the International Conference of the RC/RC Movement. Every 4 years, it brings together representatives of the ICRC, the IFRC, the 189 national RC/RC societies and representatives of the 196 State Parties to the Geneva Conventions.[54]

At the 27th International Conference of the RC/RC Movement in 1999, the participants agreed for the first time to 'undertake a study to assess the future impact of climatic changes upon the frequency and severity of disasters and the implications for humanitarian response and preparedness'.[55] This initiative marked the beginning of an organizational reorientation towards an active engagement with the topic of climate change as a humanitarian issue.

Consequently, an important structural change occurred after the turn of the century—the RC/RC Climate Centre was founded in The Hague by the Dutch Red Cross in cooperation with the IFRC. The Climate Centre provides information and education activities about climate change and extreme weather events, supports climate adaptation activities within the existing frameworks of DRR programmes, analyses climate change risk reduction issues, and is engaged in advocacy work to

[52] ICRC/IFRC, Handbook of the International Red Cross and Red Crescent Movement, Geneva 2008, p. 830.

[53] ICRC, The Seville Agreement – Council of Delegates, Sevilla, 25–27 November 1997, in: International Review of the Red Cross 322 (1997).

[54] ICRC, International Conference of the Red Cross and Red Crescent, 09 November 2011, at http://www.icrc.org/eng/who-we-are/movement/international-conference/overview-international-conference-of-the-red-cross-and-red-crescent.htm (accessed on 19 February 2014); IFRC, The International Red Cross and Red Crescent Movement, 2014, at http://www.ifrc.org/en/who-we-are/the-movement (accessed on 19 February 2014).

[55] ICRC, 27th International Conference 1999: Resolution 1, Adoption of the Declaration and the Plan of Action, 06 November 1999, at http://www.icrc.org/eng/resources/documents/resolution/27-international-conference-resolution-1-1999.htm (accessed on 19 February 2014), annex 2, final goal 2.1 (3).

inform about the impacts of climate change on vulnerable people and experiences with DRR and CCA programmes.[56]

In 2007, the RC/RC Climate Centre published the seminal *Climate Guide*—a handbook to prepare the RC/RC movement for the humanitarian implications of climate change. The issue of migration is not yet particularly prominent (mentioned 16 times). It appears mainly as an example of the impact of climate change in regards to economic vulnerability or to case studies from Africa where extreme droughts impact on migration patterns. At the same time, the report reiterates the concerns raised by academics concerning the complex causes underlying environmental migration.[57]

Further, a leading RC/RC Climate Centre scientist also emphasized the challenges of identifying the complex push-factors of environmental migration:

> We have been very cautious in claims that have directly allocated or attributed migration to a climate change signal. Having said that it is pretty clear that especially small island development States and so on, they have to think about migration very carefully and it is complicated.[58]

At the same time, the struggle to position the topic of environmental migration vis-à-vis other humanitarian challenges caused by global warming, which are also linked to the mandate of humanitarian organizations, becomes evident. This is connected to the issue of scarce resources and the related need to prioritize organizational activities:

> I agree that it [migration] can be a major thing, it can be massive. Should we treat it as the only thing or the most important thing? I do not know because there are many other things as well including health, including disaster preparedness, including development and so on. So I am not saying do not do migration. I am saying migration is a problem, those who speak about it as a problem make a compelling argument that it is very important, but like everything else there are trade-offs. So if we do mostly migration then we are going to fail to do other things that also need to be done.[59]

In 2009, the key document, Climate Change and Human Mobility: A Humanitarian Point of View, was published in which the RC/RC movement's mandate to address the topic was established: 'As displaced persons and migrants often encounter situations of need, vulnerability, and distress, the impact that climate change may have on human mobility is also of concern to the Red Cross Red Crescent Movement'.[60] The three page statement repeats the argument that mobility patterns are mostly influenced by factors not directly related to climate change,

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[56] Red Cross/Red Crescent Climate Centre, About Us, 2014, at http://www.climatecentre.org/site/about-us (accessed on 18 February 2014).

[57] Red Cross/Red Crescent Climate Centre, Climate Guide, The Hague 2007, p. 18.

[58] Interview RCCC staff, 26 September 2013.

[59] Ibid.

[60] IFRC, Climate Change and Human Mobility: A Humanitarian Point of View, 22 April 2009, at https://www.ifrc.org/Global/Publications/disasters/climate%20change/climate_change_and_human_mobility-en.pdf (accessed on 17 April 2014), p. 1.

such as economic, social and political factors. The IFRC stresses that migration is a viable, often proactive, adaptation strategy. At the same time, the needs of people who do not want, or will not be able, to migrate in the face of environmental change also must be addressed. With regard to the legal gaps, it is highlighted that the populist term of 'climate refugees' is profoundly misleading and that extending the 1951 Convention Relating to the Status of Refugees is not the right strategy. Instead, the IFRC calls for temporary protection mechanisms for those fleeing disaster. It supports the establishment of regional conventions and the innovative 'Nansen process', while encouraging national governments to embed rights-based initiatives for people being displaced due to climate change.

The humanitarian perspective on the issue includes the need to respond flexibly, i.e., taking action here and now and responding to needs and vulnerabilities as they evolve. A second goal is to protect populations through DRR. This includes preventive work at the local and regional levels to protect populations while also focusing on return options. The third goal to 'contribute to people's resilience at community level' shall be reached in cooperation with governments through improved services and sustainable development.[61]

Overall, the underlying aim to prevent migration is clearly established 'By strengthening the resilience of people at community level, RC/RC National Societies are contributing most effectively to the reduction of migratory pressures'.[62] The IFRC thus follows the logic of the political discourse that also aims at reducing global migration pressures through investments in the countries of origin.[63] Finally, with regards to resource conflicts, humanitarian advocacy is called for to reduce tensions over resources before conflict breaks out.

In 2012, the official IFRC approach to environmental migration was further accentuated in the *Word Disaster Report 2012*.[64] *The report* focused on forced migration and displacement, concluding 'Of all the emerging challenges, perhaps the largest and the most problematic is the impact of climate and environmental change on population mobility'.[65] In regards to the question 'climate change and displacement – what must humanitarians do', the following points are stressed.[66] The IFRC advocates international coordination on the issue with an emphasis on UNHCR's protection role. Coordination with national governments and their civil societies should be enhanced through capacity building projects on CCA, DRR, and inclusive resettlement projects that do not compromise people's rights and entitle-

[61] Id., p. 3.

[62] Ibid.

[63] United Nations Conference on Trade and Development, Fact-Sheet on Contribution of Migrants to Development: Trade, Investment and Development Links, Geneva 2010.

[64] IFRC, supra note 26.

[65] Id., p. 231.

[66] Id., pp. 231–237.

ments. In this context, local and national DRR strategies and post-disaster relief recovery should be coordinated.

Special attention is called for the still unknown impacts of slow-onset disasters on environmental migration: 'This is where most needs to be done, but where the scope to innovate and confront existing norms and practices is greatest'.[67] Slow-onset disasters, such as increasing desertification or environmental degradation, often do not receive the public and media attention received by sudden-onset climate related disasters such as hurricanes, floods, or landslides. At the same time, the potential of adequate preparedness initiatives is much higher in this context, which requires advance coordination involving multiple stakeholders, such as local communities, governments, meteorological departments and local and international NGOs active in the affected area. In this context the expertise of locally connected organizations, such as the International RC/RC Movement or other NGO networks, can become a key factor in advocating successfully for preparatory measures that might prevent displacement due to slow-onset disasters.

The success of such preparatory measures requires a shift from short term relief to long term development. Long-term development is needed to address the multiple causes of environmental migration, as well as the large numbers of people being affected as outlined by Professor Dirk Salomons from Columbia University, New York:

> Humanitarians jump into the game when there is a trigger event like a war or an earthquake or something or floods or something telegenic fascinating that hits the media and then we all march in. We increasingly see how a lot of migration is due not to headline type crisis but to slow burning, the coming together of climate issues and political issues. And when you see that whole populations because of climate change and population pressure are no longer able to maintain the lifestyle they had and migrate, and migrate in large numbers to cities or to vast camps like the millions of people who live in the Dadaab Camp on the Kenyan side of Somalia, when you look at that, you suddenly realise that the people migrate because climate change has made their lifestyle impossible. They are no longer the 100,000 or 800,000 that we are happy with as humanitarians they suddenly become vast vast populations.[68]

In line with the concerns raised by Professor Dirk Salomons about adequate humanitarian responses for those displaced by climate change and related triggers, the IFRC report acknowledged that a humanitarian–disaster discourse has to be merged with a development and human rights perspective in order to meet the multiple needs of environmental migrants:

> Over many decades, displacement triggered by violence, conflict and disasters has been framed as a humanitarian crisis underscored by a funding regime whose vocabulary – 'emergency funds', 'consolidated' and 'flash appeals' – echoes this approach. But forced displacement is also a development challenge.[69]

[67] Id., p. 237.

[68] Interview, 4 September 2013.

[69] IFRC, supra note 26, p. 201.

The focus on livelihood impacts for forced migrants, and related challenges for human security, need to be addressed and measured adequately in order to design appropriate response mechanisms. The IFRC introduces the World Bank[70] toolkit *Guidelines for Assessing the Impacts and Costs of Forced Displacement* in this context,[71] while stressing the need to focus on livelihood support for displaced populations:

> Responding to migration as a 'crisis' often restricts the migrants' movement, employment and access to basic services and rights, ultimately constraining their ability to pursue livelihood options. It is not sufficient to focus solely on saving lives and consider livelihood support only when the situation has stabilized, especially in protracted displacement. Even in emergencies, the displaced continue striving to protect and recover their livelihood activities and adapting to new circumstances.[72]

5 Conclusions: Opportunities and Challenges for a Humanitarian Perspective on Environmental Migration

The International RC/RC Movement, most notably the IFRC, is one of the key international humanitarian actors that have increasingly focused on environmental migration in its rhetoric and advocacy work over the last decade. This coincides with the academic, political, and legal debates that have also received increasing attention in the last 5 years. The IFRC *World Disasters Report 2012* is particularly noteworthy as it clearly linked the topic of environmental migration with the humanitarian obligation to help the most vulnerable.

While IFRC's focus lies mainly on prevention of displacement through DRR and CCA mechanisms, which are increasingly supported by national RC/RC societies in cooperation with national governments, the IFRC has also strongly advocated the issue of protection for displaced persons.[73] The IFRC and the national RC/RC societies in their roles as auxiliaries to national authorities have continuously demanded changes at the political level for environmental migrants either through cooperation and capacity building mechanisms in affected countries or through direct public advocacy work, internationally and nationally. Most advocacy campaigns on environmental migration focus on promoting solutions through international law. To what extent decisions to migrate because of natural disasters will receive legal protection, especially in cases of international border-crossing, remains a political and legal challenge. However, this challenge is currently

[70] World Bank, supra note 6.

[71] IFRC, supra note 26, pp. 202–204.

[72] Id., p. 190.

[73] Ibid.

being addressed by the intergovernmental Nansen Initiative, which is also consulting civil society organizations at its regional meetings.[74]

At the same time, it also becomes clear that while migration is an important topic for the International RC/RC Movement, the decision to broaden its agenda to address environmental migration has raised some practical questions concerning the feasibility of the engagement in light of limited financial and structural resources and increasing numbers of refugees and IDPs. Especially in the context of slow onset disasters, the reduction of pressures leading to migration requires more humanitarian and development attention to prevent forced environmental migration.

In summary, one can conclude that the issue of environmental migration requires a holistic approach that links the humanitarian perspective to other perspectives such as the development agenda or the human rights point of view.[75] Humanitarian organizations have various advantages in this regard: they are often already engaged in advocacy work for displaced populations and embedded in multi-level organizational coordination networks that allow them to raise attention to those being displaced by man-made or natural environmental changes. This includes resettlement issues as well as immediate and flexible responses to the occurrence of new environmental displacements and related needs that might exceed national coping capacities.

In addition, humanitarian organizations have increasingly developed their expertise in the areas of DRR and CCA stressing the need for a preventive agenda that could be linked to the issue of environmental migration. Their contacts to vulnerable populations and related organizational knowledge of their needs, often acquired during or after disasters, such as natural extreme events or wars, also enables humanitarian organizations to advocate for programmes that could prevent environmental migration in the future through the improvement of local living conditions and basic needs.

6 Notes

1. ‘The Inter-Agency Standing Committee (IASC) is a unique inter-agency forum for coordination, policy development and decision-making involving the key UN and non-UN humanitarian partners. The IASC was established in June 1992 in response to United Nations General Assembly Resolution 46/182 on the strengthening of humanitarian assistance’.
2. The EU Council Directive 2001/55 provides temporary protection status in ‘situations of a mass influx due to armed conflict and where the disruption prevents return to the country of origin or the persons would be subject to serious

[74] Cf. The Nansen Initiative, supra note 30.

[75] IFRC, supra note 26, p. 237.

human rights violations and would not qualify otherwise under the 1951 Convention'.[76]

3. The AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa ('Kampala Convention')[77] recognizes that climate change may cause internal displacement and provides a detailed description of government obligations.
4. The 1968 OAU Convention (Africa) and the Organization of American States (OAS) 1984 Cartagena Declaration (Latin America) have already extended refugee definitions, which include flight from aggression, conflict, situations seriously disturbing public order, generalized violence and massive human rights violations. These extended grounds provide significantly more definitional space for environmentally-induced displacement. The Cartagena Declaration is non-binding and has to be implemented in national laws. Cf. San José Declaration on Refugees and Displaced Persons[78] and Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America.[79]

[76] European Union, supra note 49.

[77] African Union, supra note 50.

[78] Cf. International Colloquium in Commemoration of the 'Tenth Anniversary of the Cartagena Declaration on Refugees', San Jose Declaration on Refugees and Displaced Persons: Conclusions and Recommendations, San José, 5–7 December 1994, at http://www.refworld.org/pdfid/4a54bc3fd.pdf (accessed on 29 March 2014).

[79] Organization of American States, Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, Mexico City, 16 November 2004, at http://www.oas.org/dil/mexico_declaration_plan_of_action_16nov2004.pdf (accessed on 29 March 2014).

Part IV
New Forms of Warfare and Weaponry

Drones in International Law: The Applicability of Air and Space Law

Stephan Hobe

1 Introduction

One of the most interesting recent technologies is the use of unmanned aviation systems, which are commonly denominated as drones. Because of their dual use—so-called 'drones' can obviously be used for military purposes—as well as, even more often but less sensationally, for civilian purposes, and it is interesting to observe the level of fascination these vehicles inspire.[1] This fascination stems from two definite factors: on the one hand, there is obviously the fact that remotely piloted aviation systems (RPAS) or Unmanned Aviation Systems (UAS), to use the official designation of these objects, allow for the future possibility of flying airplanes without a pilot on board.[2] On the other hand, which is more commonly known to the wider public, is the use of drones in the military sphere, which opens up a completely new avenue of warfare.[3] This certainly contributes significantly to the current attraction of examining the use of RPAS.

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[1] Taking into account that already the Chicago Convention of 1944 includes the idea of unmanned Aerial systems, this current excitement can only be explained by the fact that the realization of this idea seems to be quite close to come; moreover, the usage of drones in armed conflict may considerably contribute to this excitement, see in this respect K. Schmalenbach, Der Rechtsstaat und sein Henker, in: P. Häberle (ed.), Jahrbuch des öffentlichen Rechts der Gegenwart. Neue Folge, Vol. 60, Tübingen 2012, pp. 251 f.

[2] See for a description of this technology P. van Blyenburgh, Study on Unmanned Aviation Systems, 2009, pp. 164–168.

[3] See K. Schmalenbach, supra note 1.

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This article looks into the applicability of air law, which is largely oriented towards civil use of remotely piloted aviation systems. Only in few cases I will thus make reference to what the title of this panel seems to ascertain namely that so-called drones can be considered as "new obstacles for International Humanitarian Law and Disaster Response Law". And no reference will be made to outer space law since the incriminated activities which shall be discussed in this paper all take place in the air space and practically never in outer space.

I will therefore, and in the following order, first briefly report on the functioning of unmanned or, more precisely, remotely piloted aviation systems, which, in regard to their civil application, allows a wider picture of the legal framework to be drawn. Secondly, I shall briefly discuss the military uses of remotely piloted aviation systems. In both areas it is the purpose of this paper to highlight some of the legal challenges that must be mastered in the future with regard to these systems.

2 Technological Requirements

Remotely piloted aviation systems (RPAS), also called unmanned aircraft systems (UAS), consist of three different components: the flying component, which is the bulk of the system, is the so-called unmanned aircraft vehicle (UAV). Secondly, there is the data link which constitutes the communications link; and thirdly, we find an Earth control station with the pilot.[4] Moreover, other special components like specific take-off and landing systems, crews on Earth, relay stations for the data link to an UAS and other technical requirements can be added.[5]

It is interesting that the variety of these systems is rather large: one finds rather big remotely piloted aviation systems of the size of an airplane on the one hand, and very small nano drones of a few centimeters on the other.[6] Airplanes, helicopters, multi-rotors as well as airships have all been remotely piloted aviation systems. The smallest unmanned remotely piloted aviation systems, the so-called nano systems, have a reach of less than one kilometer, rise one hundred meters above ground level, have a flight duration of less than one hour, and have a launch or take-off mass of 22 g—an example would be the HORNET 3 A.[7] On the other end of the scale, the so-called High-Altitude Long Endurance (HALE) UAS or RPAS have a range of more than 2000 km, a flight height of approximately 20,000 m, can last between 24 and 48 h in the air, and have a critical take-off mass of 2000 kg.[8] Not many RPAS of the Global Hawk type exist: so far we can count only 43 worldwide.

[4] P. van Blyenburgh, supra note 2, p. 163.

[5] Id., p. 164.

[6] Id., p. 165.

[7] Ibid.

[8] Ibid.

As to the possible uses of these systems, we have, on the one hand, clearly the military use which can aid in attacking long-range targets. For example, the German Airforce uses RPAS of the High Altitude Long Endurance, so-called HALE and the Medium Altitude Long Endurance (MALE) category, for the long range detection of signals. Moreover, the United States of America, for example, has used weaponed RPAS, particularly in Pakistan, to kill certain individuals who were identified as terrorists.

With regard to possible civilian uses, such systems can be observed as public tools for observation, documentation and surveillance, or for the protection of objects and persons, and as traffic arrangement measures, in the area of catastrophe prevention, as well as in the field of water and environmental surveillance plus the surveillance of traffic and streets. Finally, the systems can be used for the surveillance of borders, as is currently done by the German Federal Police through the RPAS of the models ALADIN and FANCOPTER.[9] In addition, RPAS can also be used for commercial and other private purposes, such as cartography, photo and video, surveillance of critical infrastructure, surveillance of water pollution, research purposes and surveillance for insurance purposes.

3 Legal Regulations

3.1 Civilian Uses

Article 8 of the Chicago Convention of 1944 had already anticipated at that early time (1944) that RPAs might be developed. It stipulates that those RPAS may only enter the airspace of another State with specific permission of the respective subjacent State. At the 37th ICAO General Assembly of 2010, ICAO Circular 328 was published.[10] In Circular 328, the International Civil Aviation Organization (ICAO) had—again—recognized that RPAS are airplanes and that they are subject to the provisions of the Chicago Convention of 1944. It can thus be expected that ICAO will develop with some amendments or changes to the annexes to the Chicago Convention if RPAS are used on a broader scale in the future. Such recommendations with regard to the use of unmanned aviation systems are covered by the Working Group on unmanned aircraft systems of ICAO.

At the regional European level, European Regulation No. 216/2008 of the European Parliament and of the Council[11] has given the competence for the admission of all unmanned remotely piloted aviation systems of a take-off mass of more than 150 kg to the European Aviation Safety Agency (EASA) in Cologne. EASA has centered its working force in the Rulemaking Directorate for the

[9] Ibid.

[10] ICAO Doc. CIR 328/AN/190, 2011.

[11] Regulation 216/2008 of 31 October 2008, EU OJ 31 October 2008, L 293/3.

establishment of rules for RPAS in the time frame of 2013–2017. In June 2011 the European Commission initiated some worldwide research on the competitive situation of RPAS, its most important responsibilities and possible obstacles. Germany and all other member States of the European Union may regulate RPAS with a take-off mass of less than 150 kg. Consequently, Germany has introduced this new category of RPAS into the German Aviation Code (§ 1 para. 2 of the German Luftverkehrsgesetz).[12]

Any kind of surveillance or taking of data is, however, confronted at the international level with the principle of State jurisdiction over airspace. Thus, on the one hand any intrusion of RPAS into foreign airspace with the aim of taking pictures within that jurisdiction, is *prima facie* in tension with international law. On the other hand, however, any kind of surveillance activity from the international common spaces like outer space or the High Seas it not prohibited with regard to the data.[13]

On the domestic level the surveillance activities of RPAS raises considerable concerns with regard to data protection. If RPAS are used for civilian surveillance purposes, then such initiatives must be in line with the Federal Data Protection Act and other laws concerning data protection.

3.2 Military Uses

Conversely, if RPAS are used for military purposes the Chicago Convention is not, in principle, applicable, according to its article 3 para (a). Moreover, any definite use of so-called drones can engage international humanitarian law. So far the use of such drones, e.g. by the United States of America, has led to more than 3000 deaths since 2009.[14] Such killing of persons could arguably be justified in an international armed conflict, but only if the victims were members of the armed forces, thus rendering them so called 'combatants'. However, the indispensable prerequisite for such situation is the existence of an armed conflict.

The United States asserts that the killing or persons in Pakistan is undertaken in the context of its battle against international terrorism. It is, however, doubtful whether the self-proclaimed "War on Terror", as it was declared by former US

[12] §1 Abs. 2 LuftVG reads: "Ebenfalls als Luftfahrzeuge gelten unbemannte Fluggeräte einschließlich ihrer Kontrollstationen, die nicht zum Zwecke des Sports oder der Freizeitgestaltung betrieben werden (unbemannte Luftfahrzeuge)." In English (translation from the author): "Equally considered as aviation vehicles are such unmanned aviation vehicles including their control-station which are not just used for purposes of sports of leisure".

[13] See for an analogy to remote sensing of the earth by satellite F. Lyall/P. Larsen, Space Law, Aldershot 2009, pp. 411, 418 et seq.

[14] International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School of Law, Living under Drones: Death, Injury, and Trauma from US Drone Practice in Pakistan, September 2012.

President George W. Bush, or the currently declared war against Al Qaida, are really wars in the sense of the Hague Conventions.

Moreover, even if one could agree on the possibility of designating the combat against the terrorist network of Al Qaida as a "war", some considerable concern has still been raised with regard to the human rights protection of individuals within the academic literature.[15] Except for very rare cases of public necessity and situations of emergency, any current attack against the life and bodily integrity of a person is subject to the principle of proportionality.[16] It is questionable whether such killing, without first allowing the victims to be convicted by a court, can be considered as following appropriate legal procedures. All relevant human rights covenants clearly demand for judicial proceedings before a person can be executed.[17] The sudden killing through a drone, certainly leaves no possibility for such judicial proceedings—it shall evidently occur as an unpredictable surprise.

Even in the case of a non-international armed conflict, the possible designation of a person as an unlawful combatant (or enemy combatant/irregular fighter) must be in accordance with legal prerequisites. These persons must belong to organized, Non-State armed groups or to parts of the armed forces who no longer obey military command orders.

So in any case, while justifications for the killing of people through weaponed drones may look attractive at first glance because of the non-involvement of humans on the battlefield,[18] they still meet with severe legal concerns.

Finally, it should be mentioned that it is doubtful whether in the foreseeable future a European drone will fly because the RPAS Euro Hawk, as has become evident to the wider public since May 2013,[19] is not equipped with the so-called "Sense and Avoid technique", which is indispensable for obtaining a license for the European air space. Such a drone can thus fly only over the oceans, Alaska or Greenland (which it did on the 20th and 21st July 2011 on its way from the US to Bavaria since the United States did not issue a permit for the passage of Euro Hawk though its airspace).[20]

[15] K. Schmalenbach, supra note 1, pp. 257–258.

[16] See inter alia H. Schmitz-Elvenich, Targeted Killing – Die völkerrechtliche Zulässigkeit der gezielten Tötung von Terroristen im Ausland, Frankfurt/M. 2008.

[17] K. Schmalenbach, supra note 1, p. 254.

[18] Dazu R. Frau, Reicht das geltende Völkerrecht für Drohneneinsätze aus?, in: Humanitäres Völkerrecht – Informationsschriften 26 (2013), pp. 130–131.

[19] See Hohe Kosten trotz gescheiterten Kaufs, Frankfurter Allgemeine Zeitung, 14 May 2013, p. 1; R. Beste et al., Das Millionengrab, Der Spiegel, Nr. 23, 3 June 2013, pp. 18 f. (25).

[20] See Hohe Kosten trotz gescheiterten Kaufs, supra note 19, p. 1.

4 Summary

The use of Remotely Piloted Aviation Systems (RPAS) is characterized by its dual use character. Such systems can be used for civilian motivated surveillance purposes as well as for military objectives, such as the deliberate killing of combatant forces.

In Europe, all civilian uses are characterized by the 150 kg take-off mass threshold, which makes regulators at the European level competent to act. In any case, there exists considerable concern with regard to data protection, which makes it legally safer to obtain data from the international commons.

In armed conflicts, the use of RPAS for the killing of people raises concerns at least with regard to the human rights of the combatants.

In conclusion, three main legal problems may be considered with regard to the use of RPAS in the future: the scope of the applicability of international humanitarian law; the necessity and possible logic of the 150 kg take-off weight threshold before national or European regulations come into force, and, finally, particularly with regard to domestic uses, the protection of fundamental rights through respective data protection legislation.

‘Humanitarian Bombardments’ in *Jus in Bello*?

Robert Kolb

1 Introduction

Let us assume that there is an international armed conflict between State A and State B. In the context of that conflict, some military operations take place according to the traditional belligerent practices consisting in the weakening of the military assets of the adverse party. However, State B also commits various war crimes and crimes against humanity. Thus, for example, State’s B forces deport civilians in extermination camps, similar to the German forces during World War Two. Auschwitz-like camps are erected in the country. The deportation, we may assume, takes place by train. The railway lines lead directly to the camps. The question may now arise as to whether the aviation of State A may bombard these railway lines in order to disrupt or at least to slow down the deportation and extermination process.

Certain additional assumptions must be made. First, there is no definite ‘military advantage’ gained from bombarding the railway lines. In other terms, these lines do not serve any other purpose than that of the deportation. They do not make any contribution to the military action of State’s B armed forces. If it were otherwise, a bombardment would pose no particular problems under *jus in bello*, the rule of article 52(2), of Additional Protocol I of 1977 to the Geneva Conventions (‘AP I’) being plainly applicable. Second, we also assume that the bombardment of the railway lines has a distinctive effect on the deportation process. Clearly it is

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possible to argue, in a specific context, that the forces of State B could simply revert to busses in order to transport the persons to the extermination camp, so that the bombardment of the lines could appear to be useless, or deprived of sufficient efficacy. In other words, a distinctive advantage (a 'humanitarian advantage' rather than a 'military advantage') could be open to discussion. However, we shall here assume that the bombardment of the lines provides a humanitarian advantage. It must be confessed that in real conditions such an assumption would not be all too easily possible; difficult issues of real usefulness will occur. Third, we also assume that the information about the deportation and extermination of people in the camp is safe and clear. In other words, no problems of evidence arise. Again, in real circumstances the position will be most often less certain. Governments do not frequently indulge in openness with regard to such atrocious conduct. We will presently also assume that article 52(2), of AP I (1977) applies, be it as a matter of conventional law or as a matter of customary international law. It is not contested that this provision reflects modern customary law on the issue of targeting.[1] This assumption is therefore not far-fetched.

It may be noticed that this question is today retroactively debated in the context of events of World War Two. President F.D. Roosevelt is criticized, in certain circles, for not having bombarded the railway lines leading to Auschwitz, despite the information the US forces had on what was happening there.[2] Plainly, the law of armed conflicts was at that time more liberal in allowable bombings, if only by the fact that it did not contained detailed regulation on that matter,[3] as it does today.

Having said all this, what is the legal position on the question at stake?

2 The Legal *Sedes Materiae*: Article 52(2) of AP I (1977)

The applicable law on the selection of targetable objects during warfare is formulated in article 52(2) of Additional Protocol I of 1977 to the four Geneva Conventions of 1949. This key provision reads as follows:

> In so far as objects are concerned [i.e. not persons], military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

[1] See I. Henderson, The Contemporary Law of Targeting, Leiden/Boston 2009, pp. 41 ff. As to the customary status in particular, see J. M. Henckaerts/L. Doswald-Beck, Customary International Humanitarian Law, Vol. I, Cambridge 2005, pp. 25 ff.

[2] See e.g. S. G. Erdheim, Could the Allies have Bombed Auschwitz-Birkenau?, in: Holocaust and Genocide Studies 11 (1997), pp. 129 ff.; R. H. Levy, The Bombing of Auschwitz Revisited, in: Holocaust and Genocide Studies 10 (1996), pp. 267 ff.

[3] ICRC (ed.), Commentary on the Additional Protocols of 8 June 1977, Geneva 1987, p. 631.

The point is not, in the present note, to offer a fully-fledged analysis of that fundamental provision, which is replete with interesting legal issues.[4] We may note a certain number of points, directly related to our subject matter.

First, article 52(2) of AP I purports to exhaustively regulate the selection of allowable targets during the armed conflict. In other words, in order to be compatible with the law of armed conflicts, the attack of an object must fulfil the conditions set out in this provision. If the provision were not exhaustive, that would mean that a belligerent would be allowed to attack other objects according to discretionary criteria. The protective value of the restrictive criteria contained in article 52 (2) would be lost. Indeed, the provision would become largely pointless, since it would indicate only optional and not mandatory conditions for the attack of objects during warfare. This exhaustive nature is borne out by the text of the provision. It reads: 'Military objectives are *limited* to those. . .' (italics added). This part of the sentence has to be read in conjunction with the first sentence of article 52(2), stating explicitly: 'Attacks shall be limited strictly to military objectives'. Hence, attacks may take place only against military objectives; and military objectives are only those, which fulfil the criteria indicated in the second sentence of article 52(2). This double limitation shows that no attack which fails to fulfil the conditions of § 2 could be considered as lawful under *jus in bello* as it stands today. The question of lawfulness under *jus ad bellum*, for example through mandates of the UN Security Council, is a distinct one (see below).[5] It does not alter the position under the law of armed conflict outside the context of the Security Council mandate, due to the separation of *jus in bello* and *jus ad bellum* requirements.

Second, it stands to reason that according to the assumptions we made, the bombardment of the mentioned railway lines is not compatible with the conditions under article 52(2) of AP I. The point need not be argued at length. It is apparent that an object becomes a military objective (and may thus be targeted) only if it makes a *military* contribution and if there is a *military* advantage in destroying or neutralizing it by an attack. As is rightly stressed by the ICRC,[6] the interpretation of the military contribution and advantage should be strict: if political, economic,

[4] For such an analysis, see e.g. I. Henderson, supra note 1; ICRC (ed.), supra note 3, pp. 629 ff., particularly pp. 635 ff.; and the complementary explanations of the ICRC, in: ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Doc. 03/IC/09, Report by the ICRC to the 28th International Conference of the Red Cross and Red Crescent, Geneva 2003, p. 11; M. Bothe/K. J. Partsch/W. Solf, New Rules for Victims of Armed Conflicts, The Hague/Boston/London 1982, pp. 318 ff.; for the views of the present author: R. Kolb, Ius in Bello, Le Droit International des Conflits Armés, 2nd ed., Basle/Brussels 2009, pp. 247 ff. See also M. Sassoli/A. Bouvier/A. Quintin, How Does Law Protect in War?, 3rd ed., Vol. I, Geneva 2001, pp. 252–254.

[5] The correct argument is that it should not interfere with the law of armed conflict requirements, cf. G. Bartolini, L'operazione 'Unified Protector' e la Condotta delle Ostilità in Libia, in: Rivista di Diritto Internazionale 95 (2012), pp. 1012 ff., 1042 ff.

[6] ICRC, supra note 4, p. 11. See also discussions on the tendency to enlarge the allowable targets in L. Vierucci, Sulla Nozione di Obiettivo Militare nella Guerra Aerea: Recenti Sviluppi della Giurisprudenza Internazionale, in: Rivista di Diritto Internazionale 89 (2006), pp. 693 ff.

social or psychological advantages become relevant, the assessment becomes speculative and the objects attacked are virtually unlimited; what military forces would attack an objective without *some* advantage? A military contribution and a military advantage suppose an impact on the war-fighting capacity of the enemy. But that impact cannot be designed in general terms or obtained by indirect chains of causality: what must be hit is the war-fighting capacity by a weakening of military forces and assets. In other words, the attack directly bears on the capacity of the enemy to conduct offensive or defensive military action. If an object participated in that context and if its destruction or neutralization weakens the capacity of the enemy armed forces, it is a military objective. Were one to take a larger position, any consequential military advantage would be sufficient: e.g., civilian goods are hit, but by that the State loses tax income, therefore it can invest less in the war effort, hence there is a military advantage. If that were enough, virtually everything could be attacked.

However, in our case, the bombardment has a humanitarian purpose. It does not weaken the armed forces of the enemy; the railway lines do not contribute to any extent to the adverse military action. Under article 52(2) of AP I, they do therefore not constitute a military objective. Hence, under modern IHL, they may not be attacked.

This result may seem shocking to some observers. It may not be morally obvious to conclude that a bombing of such railway lines would be an unlawful attack under IHL. This is true despite the fact that law and morality do not coincide. There are two aspects, which must be keenly considered at this juncture. *First*, the regulation in article 52(2) must be understood as a limitation of destructive attacks. In the past, there was no clear or constraining rule for belligerents with respect to targeting. The result was a series of arbitrary attacks and an amount of destruction that modern IHL wishes to avoid. To this end, only a restrictive rule can be useful. It provides clear and limiting criteria for targeting, and thereby assures some legal certainly and the overall containment of destructive forces. In most contexts, this restriction works with satisfactory results. That a general and abstract rule cannot fit all highly particular circumstances is evident. The acid test must however be how the overall performance is. If we weaken the degree of prohibition in the provision to take account of highly exceptional contexts, such as the one of 'humanitarian bombardments', how much do we gain by the new flexibility, but how much do we lose on other destructive attacks which might become arguable and possibly lawful? Could the net result not be that we lose more than we gain? Is that not particularly probable in a context such as the one we are dealing with here? Two States are pitted against each other in a situation of highest psychological strain, due to a struggle for 'survival'? Is not the tendency to self-serving, arbitrary and escalating interpretations particularly prone to arrive in such contexts? *Second*, a reflection is still warranted about how a reconciliation of moral necessity with the law could be obtained. Are there ways to interpret international law as a whole in a way the tension in these Auschwitz-like situations, highly exceptional as they are, could be at least to some extent released? The danger remains to open the Padora's Box and collaterally to weaken article 52(2). Each 'exceptional' argument is a loaded gun; it

invites others to mount other exceptional arguments. Moreover, all situations are not morally evident as the one presented here, with its clear-cut *reductio ad Hitlerum* as the evil *per se*. Thus, if the most varying human rights violations could lead to a bypassing of article 52(2) the result obtained would hardly be commendable. But once again, a reflection on ways out of the potential quagmire may be conducted. Before venturing into various arguments of this type, a preliminary question relates to State practice. Are there useful precedents for the problem presented? We will limit ourselves to some recent precedents, under the realm of article 52(2) of AP I, without projecting back to the older régimes of the law of armed conflicts.

3 Elements of State Practice

There are not many instances where the problem of a 'humanitarian bombardment' has come to be an issue, but there are some and these deserve to be shortly studied. The common point of the precedents is the question as to what extent military force can be used during an armed conflict (international or non-international) in order to stop or prevent the commission of (international) crimes of a certain gravity or magnitude.

The question arose first in the context of the situation in Rwanda, during the genocide of 1994 (there was at that time a non-international armed conflict). There were some media (notably *Radio Mille Collines*) heavily inciting hatred and calling for the commission of genocidal acts and war crimes. A similar situation arose some years later with the RTS (Serbian Radio-Television) during the Kosovo conflict of 1999 (which was an international armed conflict). Can a media become a lawful target if it is used to instigate such crimes? The Final Report to the Prosecutor by the Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia (13 June 2000)[7] suggests that if media is used to instigate international crimes, 'then it is a legitimate target'. This may be true under *jus ad bellum*, i.e., mandates by the UN Security Council, calling for neutralization 'by all necessary means' such a broadcasting station. Conversely, it manifestly cannot hold true under IHL, since it ignores the conditions of article 52(2). Moreover, the terminology of the Report is vague and quite revealing: it speaks of 'legitimate' target, which places the accent on the plane of moral and political considerations, and not of a 'lawful' target under *jus in bello* requirements. The impression is that the Report is not based on expertise or on a thorough analysis of IHL.

[7] www.un.org/icty/pressreal/natoo61300.htm (accessed on 2 October 2014).

If some authors concurred with the view of the Committee,[8] many legal writings rejected this approach as incompatible with the rules of IHL.[9] A different response would suppose that article 52(2), is either not exhaustive (we have shown that this is untrue), or that it can be derogated from by contrary agreements (but that would not account for a unilateral violation), or that it can be set aside by a mandate of the UN Security Council, necessity, belligerent reprisals or other norms (see below). The net result of these two precedents is that there are voices for such an enlargement of the lawful (or legitimate?) targets, but that in the literature the doubts and the negative attitude prevail. It also stands to reason that the NATO-led experts take liberal positions when the targets are situated in Rwanda and in Yugoslavia—the 'other' is always the bad one, and exceptional rules against that 'other' are thus acceptable. However, if the rule as proposed by these experts were accepted, it would become generally applicable. However, if Yugoslav or Rwandan forces bombarded US media, during a supposed armed conflict, for making the apology of Guantanamo or inciting to some aggressive war (as was Iraq in 2003), it is hardly imaginable that those experts would find the rule very commendable or indeed even applicable. These latter examples may seem to one or the other reader far-fetched or even ludicrous, but that would reveal only his staunch Western bias. States are equally sovereign under international law (article 2(1) of the UN Charter); and consequently each one may have its own views and appreciation of reality. There are thus many reasons to remain circumspect with regard to 'exceptional' reasoning, when it is hardly to be squared with the general rules of IHL.

Overall, there are currently too few elements in State practice in order to accept a customary evolution of the criteria of article 52(2) towards a more relaxed standard of targeting, notably in order to prevent or punish the commission of international crimes. Even assuming that NATO-close States would accept such a position (which is all but proven), a rule of universal customary international law would

[8] See N. Ronzitti, Is the Non Liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia Acceptable?, in: International Review of the Red Cross 82 (2000), pp. 1017 ff.; see also W. J. Fenrick, Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia, in: European Journal of International Law 12 (2001), p. 496; W. J. Fenrick, Attacking the Enemy Civilian as a Punishable Offense, in: Duke Journal of Comparative and International Law 7 (1997), p. 544. This is also the position of the majority of NATO-invited experts in the context of the Tallinn Manual on Cyber Warfare, M. Schmitt (ed.), Tallinn Manual on the International Law applicable to Cyber Warfare, Cambridge 2013, p. 222. Some authors just quote this passage without taking a personal stance: cf. e.g. E. David, Principes de Droit des Conflits Armés, 4th ed., Brussels 2008, pp. 309–310.

[9] Cf. I. Henderson, supra note 1, pp. 106, 137–139; A. Laursen, NATO, the War over Kosovo, and the ICTY Investigation, in: American University International Law Review 17 (2002), pp. 785–786; M. Sassoli/L. Cameron, The Protection of Civilian Objects – Current State of the Law and Issues de Lege Ferenda, in: N. Ronzitti/G. Venturini (eds.), Current Issues in the International Humanitarian Law of Air Warfare, Utrecht 2006, pp. 56–57, note 83; G. Bartolini, supra note 5, pp. 1044–1045, 1048; see also the expert discussion at the University Center for International Humanitarian Law (now Academy), Report on the Expert meeting 'Targeting Military Objectives', 12 May 2005.

need to be based on the assent of a significant number of States of the different regional groupings of the world. There is no evidence for such a development. It is even highly improbable that most States (especially in the Group of 77) would accept such a construction of the military objective.

4 Possible Legal Arguments

The time has come to turn to possible legal arguments whose aim is to soften the tension between the strict requirements of IHL and the spontaneous sense of equity, which may consider it to be unacceptable not to try to slow down deportations and exterminations by aerial targeting. There are different avenues that can be explored. Some are based on *lex lata*, and are more or less credible or promising. Others straddle between *lex lata* and *lex ferenda*. Some are neatly situated within the *lex ferenda*. We will concentrate on the first two ones, since the others suppose a new legislation upon which discussion could be endless. In other words, it is not as a potential legislator, having the applicable law at its disposal, that I wish to formulate reflections, but within the cradle of the applicable law of today. This task is more exacting: it stands to test to what extent article 52(2) or indeed the interplay of different areas of international law, can leave or introduce some crack or opening into the clear-cut rule of IHL already exposed. It is obvious that many of the arguments presented cannot be strong and decisive ones, lest the conclusion we reached under article 52(2) would *a posteriori* be cast into foundational doubt. However, it is possible at least to colour the wings of the article 52(2)-driven interpretation in order to see if there is some allowance imaginable.

We may test seven arguments. There are certainly more avenues, which could be explored, but the narrow compass of this article does not allow venturing into each and every possible solution. A perusal of the following passages may stimulate the legal imagination of the reader so as to reflect on further constructions. If that happened, this article would already have performed a useful contribution.

Argument 1: can a 'state of necessity' under article 25 of the Articles on State responsibility be raised? As is known, article 25 of the Final Articles on State Responsibility for Internationally Wrongful Acts (2001) allows the 'state of necessity' as a circumstance precluding wrongfulness under general international law. The actual conduct of the State must be the 'only way for the State to safeguard an essential interest against a grave and imminent peril'. However, the successful invocation of a state of necessity supposes the fulfillment of a series of conditions, specified in the various paragraphs of the quoted provision. It is not necessary to dwell into the matter further here, since the argument of necessity under general international law cannot be invoked in order not to apply obligations under IHL. Indeed, the exception clause of 25(2), letter a, applies: 'In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: a) the international obligation in question excludes the possibility of invoking necessity'. As the Commentary of the ILC rightly states, this is the case namely for IHL

provisions.[10] The law of armed conflicts is already designed for a highly exceptional situation of 'necessity', namely warfare; it therefore has its own concept of 'military necessity'; and it is accepted in the primary law of IHL that military necessity to suspend the application of a rule of IHL can be invoked only if the concrete IHL rule makes explicit allowance for it.[11] A plea of necessity under general international law could therefore not legally serve to displace the injunction of article 52(2) of AP I (or related customary law), since that provision contains itself no military necessity-exception. It may perhaps be added that the circumstances precluding wrongfulness are designed to guide the law of State responsibility, i.e., to determine when a State owes reparation to another or when certain consequences (such as countermeasures) may ensue. The aim of these secondary rules is not to alter the primary bodies of law by introducing new lawful conducts by the backdoor. On all of those accounts, the argument of necessity fails in our context.

Argument 2: the Security Council could provide a mandate, under Chapter VII of the UN Charter, to bombard such railway lines. The argument is that the UNSC could issue a binding resolution under Chapter VII of the Charter and allow such a bombardment. This resolution would be binding (article 25 of the Charter) and take precedence over contrary conventional law (article 103 of the Charter) and over non-peremptory customary international law (*lex specialis* principle). The UNSC could in this context found itself also on the notion of the 'responsibility to protect'.[12] This legal analysis is basically sound. The targeting of the lines would here be based on a *jus ad bellum*-mandate. The UNSC may consider that in order to maintain or restore international peace, some egregious IHL violations must be stopped, even by using force. The attacks flown against the lines must then comply with the other IHL requirements, namely proportionality (article 51(5)(b) of AP I) and precautions (article 57 of AP I). It stands to be stressed that this legal argument does not wrongfully confuse *jus ad bellum* and *jus in bello*-issues, contrary to the principle of separation of both.[13] Objects may have to be neutralized by military force under *jus ad bellum*-considerations, for which the UNSC is the sole master. IHL is not intended to limit the powers of the UNSC to indicate which objects must

[10] See J. Crawford, The International Law Commission's Articles on State Responsibility, Cambridge 2002, p. 185.

[11] On the whole question, see R. Kolb, La Nécessité Militaire dans le Droit des Conflits Armés – Essai de Clarification Conceptuelle, Colloque de Grenoble de la Société Française de Droit International, Paris 2007, pp. 151 ff.; see also Y. Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict, Cambridge 2001, pp. 16 ff.; J. Gardam, Necessity, Proportionality and the Use of Force by States, Cambridge 2004, p. 59 ff.; G. Venturini, Necessità e Proporzionalità nell'uso della Forza Militare in Diritto Internazionale, Milan 1988, pp. 123 ff.; P. A. Pillitu, Lo Stato di Necessità nel Diritto Internazionale, Perugia 1981, pp. 347 ff.

[12] On this concept, see I. Winkelmann, Responsibility to Protect, in: Max Planck Encyclopedia of Public International Law, Vol. VIII, Oxford 2012, pp. 965 ff.; see also the contribution of a former UN under-secretary of legal affairs, N. Michel, La Responsabilité de Protéger – Une vue d'ensemble Assortie d'une Perspective Suisse, in: Revue de droit suisse 131 (2012), p. 5 ff.

[13] On this principle, see the clear words of M. Sassoli/A. Bouvier/A. Quintin, supra note 4, pp. 117 ff.

be neutralized under such 'maintenance or restoration of peace'-considerations. In other words, article 52(2) is certainly exhaustive concerning IHL targeting; but it is not exhaustive in the sense that the UNSC, under its Chapter VII powers, could indicate for destruction or neutralization only military objectives according to that provision. The two sets of norms run parallel and do not limit each other. The question could be raised to what extent this position would amount to an unlawful derogation from IHL. This body of the law is often qualified as peremptory law from which no derogation is permitted.[14] But even assuming that article 52(2) of AP I were a peremptory norm in dealings between States, it would not necessarily be one with regard to the competence of the UNSC. This is not as surprising as it may seem at first sight: article 2(4) of the UN Charter is often styled as a norm of peremptory law for States[15]; and yet it is uncontroversial that the UNSC may use force in a quite discretional way (article 42 UN Charter and customary international law). The better view is in any case that there is no derogation at all. The two sets of provisions work each one *in ordine suo*. The UNSC does not interfere in an armed conflict between States by allowing one or the other of them to take liberties with the targeting provision applicable *in bello*. It rather has its own agenda and asks for the destruction of an object under the 'maintenance and restoration of peace'-logic. *Jus ad bellum* and *jus in bello* therefore remain perfectly separated, each one pursuing its own aims.

Argument 3: Human Rights Law and Responsibility to Protect without the Security Council; article 1 of the Geneva Conventions of 1949? An attempt could be made to read some other norms of international law as allowing action which article 52(2) AP I would otherwise prohibit. A first potential argument is that human rights law may carry an obligation to act. The argument would rest e.g., on the positive duties a State incurs under the 'right to life'-guarantee, enshrined in all the relevant human rights instruments as one if not the most basic right.[16] A second potential argument would be to use the already mentioned concept of the 'responsibility to protect' in order to postulate some duty of action, even aloof from the Security Council. A third potential avenue would be to rely on common article 1 of the Geneva Conventions of 1949. This provision stipulates that the 'High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances'.[17] However, none of these arguments is really solid from a legal point of view. The first two rights mentioned may imply positive

[14] E. David has argued in this sense already in the first editions of his monograph on IHL, cf. E. David, supra note 8, p. 86 ff.

[15] See the precise argument in O. Corten, Le Droit Contre la Guerre, Paris 2008, pp. 295 ff.

[16] See e.g. D. Korff, Le Droit à la Vie – une Guide sur la Mise en Oeuvre de L'article 2 de la Convention Européenne des Droits de L'homme, Strasburg 2007; G. Gaggioli, L'influence Mutuelle Entre les Droits de L'homme et le droit International Humanitaire à la Lumière du Droit à la Vie, Geneva 2010.

[17] For a thorough analysis of this provision, see A. Frutig, Die Pflicht von Drittsaaten zur Durchsetzung des humanitären Völkerrechts nach Art. 1 der Genfer Konventionen von 1949, Basle 2009.

obligations, but not obligations which would violate the non-use of force rule under article 2(4) of the UN Charter or IHL provisions. It would be hard indeed to claim that the right to life under human rights law is *lex specialis* with regard to the relevant IHL provisions for the protection of life during warfare, when the ICJ has emphasized exactly the opposite.[18] As to article 1 of the GC of 1949, it stands to reason that the aim of this article is not allow a belligerent to selectively put to rest any other applicable provision of the body of IHL. The aim of the provision is to strengthen the application of IHL, not to be taken as a basis to literally assassinate other provisions of IHL. It is thus legally impossible to justify the bombardment of the railway lines on such bases. There being a clear prohibition to attack—under IHL—other objects than military objectives, there is also no room for a balancing-up process, e.g., as to the relative importance of the prevention of international crimes and the sacrifice of the targeting provision under article 52(2).

Argument 4: Subsequent practice modifying article 52(2) of AP I? It has already been suggested in section III that a belligerent might try to argue for some elements of State practice showing a customary law modification of article 52(2) of AP I. A treaty can indeed be modified by concordant subsequent practice of the treaty parties.[19] However, the threshold for admitting such a modification binding all parties to a convention (or all States under customary international law) is quite high. There must be a significant practice and a shared *opinio juris* (in principle of all the parties to the convention, or at least almost all), expressed either by doing or by not opposing the new practice. In view of the Rwandan and Kosovo precedents discussed above, it would be completely adventurous to claim that such a modification of article 52(2) has taken place. Thus, subsequent practice may modify that provision in future, but for the time being, a modification on the lines of an allowance for 'humanitarian bombardments' has not taken place.

Argument 5: Countermeasures (armed reprisals) in bello? An argument might be attempted that the deportations and exterminations are a grave breach of IHL and that therefore an armed reprisal *in bello* is allowable.[20] True, there are a series of conditions before the belligerent reprisal can be taken,[21] such as a prior warning, a decision on the highest command/government level, respect for necessity and proportionality, means of last resort, etc. But these conditions could be fulfilled; it is not impossible to satisfy them in the context of our railway lines bombardment. Article 52(2) of AP I does not belong to the provisions which cannot be set-aside under the law of reprisals. This is true at least as long as protected persons are not attacked.[22] As has been said, in our case only the railway line is attacked. The

[18] International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996-I, pp. 240, 25.

[19] See e.g. G. Distefano, La pratique subséquente des Etats Parties à un Traité, in: AFDI 40 (1994), pp. 41 ff.; R. Y. Jennings/A. Watts (eds.), Oppenheim's International Law, Vol. I, London 1992, pp. 1264–1265.

[20] For a thorough analysis of the law of reprisals in times of armed conflict, see J. Hebenstreit, Repressalien im humanitären Völkerrecht, Baden-Baden 2004.

[21] See J. M. Henckaerts/L. Doswald-Beck, supra note 1, pp. 513 ff.

[22] See article 51, § 6 of AP I.

difficulty flowing from the fact that the initial violation of the law does not relate to the legal rights of the State bombarding the railway lines can possibly be overcome if the violation, because of its object and its gravity, is seen as a violation of *erga omnes* obligations or rights.[23] It would then also be a violation of the rights of the attacking State, amongst all the other States. A forcible answer would here be possible because the non-use of force rule does not apply *in bello*, between the belligerents. Thus, the fact that the reprisals are 'armed' would not pose any particular problem. It is true that in peacetime, armed reprisals are prohibited under article 2(4) of the UN Charter. However, in times of armed conflict there is already a basic license to use force. The armed reprisals fit into this general legal scheme, which they do not subvert. There remains however the unpalatable fact that belligerent reprisals are meant to set aside rules of IHL and that they have a dark historical record. Taking liberties with IHL-rules under reprisals law is opening the gates to dangerous precedents and to a constant downward spiral. In World War One, the whole law of maritime warfare collapsed under the weight of reprisals and counter-reprisals.[24] This is not to say that the argument could not be tried in the extreme circumstances we are envisaging here. But it is fraught with its own dangers of multiple 'loaded guns', and must be at least mistrusted from that point of view. One knows where one starts, one never knows where one ends.

Argument 6: A teleological expansion of article 52(2) AP I? Another potential argument runs as follows. The object and purpose of article 52(2) of AP I is to protect the target State, its civil society and the civilians from excessive belligerent destruction. However, in the present case, the normative injunction of article 52 (2) works to the opposite effect: it heavily harms civilians, who are deported and massacred. Hence, in order to realize the main aim of the provision, which is protective of the civilians, the limitation could be dropped in our context. This teleological argument has sometimes been applied for setting aside contextually inequitable IHL provisions. The most famous example is the transfer of prisoners of war aboard ships in the Falkland/Malvinas war of 1982. The ships were the safest and warmest place to hold these prisoners in the circumstances occurring at the time. But article 22 of GC III prohibits the transfer of prisoners of war on ships.[25] This provision was set aside under a teleological argument (effective maximum protection), with the agreement of the ICRC.[26] The dangers and difficulties of such an argument are quite clear: under the guise of interpretation, a provision is to some extent 'refashioned'. It may not always be as obvious as in the Falkland/Malvinas case what is the more protective régime for the concerned persons and what is thus

[23] Article 48 of the Articles of State Responsibility of the ILC (2001).

[24] E. G. Trimble, Possible Restatement of the Law Governing the Conduct of War at Sea, in: American Society of International Law (ed.), Proceedings of the ASIL, Washington, D.C. 1930, pp. 119 ff.; see also J. A. Hall, The Law of Naval Warfare, 2nd ed., London 1921.

[25] The reason is that ships are considered less safe places than land locations. Moreover, in the past, since the Napoleonic Wars, prisoners transferred on ships disappeared.

[26] F. Bugnion, Le Comité International de la Croix-Rouge et la Protection des Victimes de la Guerre, Geneva 1994, p. 754.

compatible with the gist of articles 6/6/6/7 and 7/7/7/8 of the GC of 1949 (no diminution of the rights of protected persons by special agreements among the belligerents; no renunciation of protections by the protected persons themselves). However, *in extremis*, even such an argument—problematic as it is—could be tried. The danger is to damage the whole system of IHL by taking liberties in single situations. A very careful and cautious assessment has to take place in these contexts.

Argument 7: A violation of article 52(2) to be accepted? Respect for the law is essential if a complex society is to function and to prosper. But respect of the law is not the only duty or indeed the absolute duty. There are circumstances when the putting aside of a legal injunction may be necessary. The legal philosophers discuss this issue in the loaded context of radically unjust laws.[27] The question has however a more general reach. It stands to reason that if I find an injured person I would rush to hospital by car (if I had learned to drive, indeed) without respecting the traffic limitation signs. This is true notwithstanding that a plea of necessity was or was not available to me, since I would probably not even think of that issue in the situation. I would obviously try to be particularly attentive not to put into danger other persons, by my rule-free driving. Thus, there are highly exceptional situations where the respect for the letter of the law might be excessive: *summum jus, summa injuria*. In such cases, a subject has to make a careful assessment and take a position that might carry a moral risk.[28] The other members of society may then accept the highly exceptional conduct breaching the law. They may condone it in the circumstances, e.g., by renouncing attributing to it the consequences of unlawful behaviour. The other members of society might however also do not share the arguments of the actor and condemn its conduct as being illegal. Such a choice of conduct under moral risk should be made only in the most highly exceptional circumstances of life, lest the legal order becomes a sort of pick and choose-option. At the end of the day, in our example of deportation and mass destruction, such a highly exceptional situation might occur. A general and abstract rule is workable in the greatest amount of factual situations. But it cannot perform equitably in every single and perhaps highly atypical set of circumstances. The general prohibition must continue to stand, since it is convenient for the bulk of real circumstances. An exceptional liberty under moral risk can be attempted in the most extreme fringes of circumstances—but to remain 'just', such a behavior has to test itself as against the strictest standards and to check in particular any self-serving or self-righteous deviations.

[27] Sometimes the issue is discussed under the heading of a right to civil resistance: cf. A. Kaufmann, *Rechtsphilosophie*, 2nd ed., Munich 1997, pp. 207 ff.

[28] The present writer has argued on similar lines in R. Kolb, Note on Humanitarian Intervention, in: International Review of the Red Cross 85 (2003), pp. 119 ff., emphasizing clearly that humanitarian intervention without the mandate of the United Nations Security Council resolution is today illegal under positive international law.

5 Conclusion

Each legal rule of some clarity has its own blind spot in which it does not operate satisfactorily. The question as to what to do in such situations is as old as the law itself and quite difficult to solve. The whole branch of equity in eternal contrast with formal legal rules is rooted in such situations. In out present context, it is certainly better to keep the restrictive rule under article 52(2) and to exclude 'humanitarian' or 'criminal-prevention'-bombardments. The gaps opened by an exception would be more harmful than the good concurrently gained. There are however two ways by which the problem can be pragmatically approached, without too heavily damaging the system.

First, there may be a mandate of the UN Security Council under *jus ad bellum*, i.e., Chapter VII of the UN Charter. The Security Council could ask willing member States, carrying out an operation under its mandate, to take all necessary measures to stop a broadcasting station or a deportation, including by using force. This stance could be buttressed by the 'responsibility to protect'-doctrine. Such a mandate is not unlawful simply because it does not fit into *jus in bello*-criteria. Indeed, *jus ad bellum* remains a separate body of law. The mandates of the Security Council are self-contained with respect to *jus in bello*. In particular, they may indicate particular objects to be removed or destroyed. The attacks themselves must obviously be carried out in respect of *jus in bello*, which here means essentially the proportionality-rule and precautions in attack, i.e., articles 51 and 57 of AP I.

Second, failing such a Security Council mandate, a State could weigh up the stakes and decide to give prevalence to its moral duty over the legal one (or argue reprisals). It will then violate article 52 (2) of AP I. At the same time, it might state the precise reasons and dilemmas it faced. Confronted with such a concrete situation and its related discourse, the rest of the community of States will have to take position. Either they condone the violation, finding that the circumstances of the individual case warranted such a course. At the same time, they will certainly be at pains to insist on the maintenance of the general rule. Or they condemn the violation, finding that the arguments put forward in its defense were not convincing in the circumstances. In short, there are situations in life when a violation of the law may be contemplated. It however stands to reason that such a course should be chosen only as an *ultima ratio* in the most exceptional circumstances, since each precedent in that sense weakens the essential fabric of international law-rules, so paramount in our violent, anarchic and restless world.

The Applicability of Article 51 UN Charter to Asymmetric Wars

Peter Hilpold

1 Introduction

Academic interest in the applicability of Article 51 of the UN Charter to asymmetric wars, is, at least in its present dimension and terminology, of rather recent origin.

The term "asymmetric war", as it is known, is not a formal legal term in international law. In its broadest sense it denotes situations of war where there is a disparity between the factual and the legal situation applying to the various actors.[1] In this sense a divide in the power between the participants would suffice to qualify a situation of war as "asymmetric". In the present context, however, this term clearly relates to the legal qualification of the actors, i.e., to the question whether one or more Non-State actors are participating and therefore, whether Article 51 of the Charter applies at all. Again, this question could be posed in respect to a broad range of subjects but due to constraints of space exclusive consideration shall be given to one category, to which most attention is paid to in theory and practice, to that of terrorists.

As no legal definition for terrorism exists in international law this article shall use the "working definition" for this phenomenon, drafted by the former UN Secretary General Kofi Annan, which now enjoys broad recognition. According to Annan, "any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a

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[1] See generally on asymmetric wars, W. Heintschel von Heinegg, Asymmetric Warfare, 2010, in: Max Planck Encyclopedia of Public International Law, at www.mpepil.com (all accessed on 14 November 2014).

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population or compelling a government or an international organization to do or abstain from doing any act".[2]

2 Self-defense in UN Law and Resolution 1368 of 2001

Self-defence refers to an exception to the prohibition on the use of force which is probably the single most important rule within the entirety of UN law. In view of the constitutional importance of this prohibition for the order created in 1945 and in consideration of the fact that self-defense is seen as an exception to this prohibition, the right to self-defense is usually construed narrowly. On the other hand, however, the right to self-defense forms a jus cogens norm, as stated by Hans Kelsen in his 1950 commentary of the UN Charter.[3]

The prohibition on the use of force was an important step in the history of human mankind, but believing such an interdiction would be respected all the time is utopian. Through the prohibition, States lost what had previously been one of their most important instruments for unilateral law enforcement or, respectively, for the enforcement of their will. Thus, it stands to reason that States' would be highly tempted to resort to the concept of self-defence as the only meaningful exception to the prohibition of the use of force at the disposal of individual States at any time a State had difficulties to respect Article 2(4).[4]

Therefore, few provisions of the UN Charter have become so deeply enmeshed within the discussion about the inner limits and the danger of abuse of charter norms.

In this context, reference to self-defence against Non-State actors, in the more distant past, was an absolute rarity. In the first decades following the drafting of the UN Charter it mostly concerned cases of colonial countries fighting against insurgents (qualified as criminals or terrorists by the colonial rulers) or by the apartheid regimes of South Africa and Rhodesia.

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[2] K. Annan, In Larger Freedom. Towards Development, Security and Human Rights for All, Report of the Secretary-General, UN Doc. A/59/2005, para. 91; on this report as well as on the various attempts to define terrorism see P. Hilpold, Reforming the United Nations: New Proposals in a Long-Lasting Endeavour, in: Netherlands International Law Review 52 (2005), pp. 389–431; UN Doc. A/Res/60/288; on the various attempts to define terrorism in international law, see C. Walter, Terrorism, in: Max Planck Encyclopedia of Public International Law, at www.mpepil.com.

[3] See H. Kelsen, The Law of the United Nations, London 1950, p. 791.

[4] See A. Bianchi, The International Regulation of the Use of Force: the Politics of Interpretative Method, in: L. van den Herik/N. Schrijver (eds.), Counter-Terrorism Strategies in a Fragmented International Legal Order, Cambridge 2013, pp. 283–316, at p. 301 referring to ICJ, Armed Activities in the Territory of the Congo, Judgment of 19 December 2005. See on this judgment R. Uerpman-Wittzack, Armed Activities on the Territory of the Congo Cases, in: Max Planck Encyclopedia of Public International Law, at www.mpepil.com.

Israel has also regularly referred to its right to use self-defence against Palestinian insurgents even though most members of the international community have flatly rejected this justification each time it was made.[5]

On 11 September 2001 the situation changed radically after a group of Taliban-sponsored Al Qaeda terrorist attacked the Twin Towers in New York. For the first time, terrorists demonstrated the ability to perpetrate acts that are comparable in effect to an armed attack by a State. The Security Council reacted accordingly. In Resolution 1368 of 12 September 2001, the Security Council qualified the terrorist attacks committed the day before as a "threat to the peace". While it is true that the Security Council had used similar qualifications in the past,[6] it should be highlighted that the respective passage in Resolution 1368 of 2001 is preceded by the clause "like any act of international terrorism". Such a strong and sweeping condemnation of international terrorism was new and marked the beginning of a new era. Admittedly, the Security Council did not use the exact formula contained in Article 51 of the Charter as no mention was made of an "armed attack", the key foreseen by the Charter to unleash measures of self-defence. Nonetheless, Resolution 1368 refers to the "inherent right to individual and collective self-defence", leaving no doubt as to the option for reaction open to the US and possibly to all States victims of international terrorism.

Without doubt, Resolution 1368 of 2001 was a watershed in the sense that it opened the door for acts of self-defence by States against Non-State actors in situations of a "threat to the peace". But was this an interpretative extension of Article 51 of the Charter, possibly applicable to all future terrorist attacks constituting a "threat to the peace", or had this been a one-time exception in view of a particularly abhorrent attack hopefully never to occur again?

The subsequent practice is inconclusive in this respect as the UN organs have demonstrated an extreme reluctance to depart from the existing cautious and restrictive approach in the interpretation and application of Article 51.

[5] See A. Cassese, Terrorism is also Disrupting some Crucial Legal Categories of International Law, in: 12 European Journal of International Law (2001), pp. 993–1001 (996) and C. Stahn, Nicaragua is Dead, Long Live Nicaragua – the Right to Self-defence Under Art. 51 UN Charter and International Terrorism, in: C. Walter et al. (eds.), Terrorism as a Challenge for National and International Law: Security Versus Liberty?, Berlin 2004, pp. 827–877 (832). National Courts were more likely to accept the contention that asymmetric conflicts by their country's government against insurgents, often characterized as terrorists, were to be qualified as "armed conflicts". This was the case for Peru's National Criminal Chamber as to the Shining Path, the US Supreme Court with regard to Al Qaeda (in Hamdan v. Rumsfeld) and Israel's Supreme Court. See A. Bianchi/Y. Naqvi, International Humanitarian Law and Terrorism, Oxford 2011, p. 28.

[6] This is the case with regard to the attacks against aircraft at Lockerbie and Flight UTA 772 attributed to Libyan-sponsored terrorists, A. Bianchi/Y. Naqvi, supra note 5, p. 14.

3 The UN Organs and the Application of Art. 51 of the Charter

3.1 The Security Council

For a long time the Security Council had difficulties in facing the problem of terrorism squarely. This stemmed from a range of reasons: Terrorism was mainly a national phenomenon and international terrorism had not yet assumed the dimension we are confronted with today. In particular, Al-Qaeda-style terrorism was totally unknown. Further, the Security Council was considered to lack competence for intervention in this area. And finally, the cold war had been a strong deterrent to the Security Council acting in general and also on politically charged subjects such as terrorism.

The Twin Towers attack caused a general change of mind within the Security Council. From then on the Security Council, together with the UN General Assembly, vigorously took up the lead in the fight against this "scourge of mankind".

In this, however, the Security Council focused on "non-forcible" measures,[7] as set out in SC Res 1373 (2001) and further elaborated upon by the Counter-Terrorism Committee established by the SC. Res. 1373, and referred, in particular, to the following measures:

- Criminalization of the financing of terrorism;
- Freezing without delay of any funds related to persons involved in acts of terrorism;
- Denial of all forms of financial support for terrorist groups;
- Suppression of the provision of safe haven, sustenance or support for terrorists;
- Sharing of information with other governments in the investigation, detection, arrest, extradition and prosecution of those involved in such acts; and
- Criminalization of active and passive assistance for terrorism in domestic law and bringing violators to justice.[8]

Resolution 1624 (2005), which also determined the activity by the SC Counter-Terrorism Committee, called on UN Member States to prohibit incitement for terrorism by law, to prevent such conduct and deny safe haven to anyone "with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct."[9]

The establishment of an individual sanctions regime against terrorist by the "Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaeda and the Taliban and Associated Individuals and Entities"

[7] See M. Wood, The Role of the UN Security Council in Relation to the Use of Force against Terrorists, in: L. van den Herik/N. Schrijver (eds.), supra note 4, pp. 317–333 (319).

[8] See the mandate of the Security Council Counter-Terrorism Committee as described on its homepage at http://www.un.org/en/sc/ctc.

[9] Ibid.

has attracted most public attention. Further, this regime caused considerable irritation when individual sanctions were imposed, which clashed with compulsory human rights standards within the European Union's jurisdiction.[10]

As of yet, the Security Council has not authorized any forceful measures against terrorist activities and it is rather doubtful whether it will do so in the future, even if in theory, it could.[11] The measures adopted against piracy[12] and in the field of non-proliferation do not indicate preparedness by the Security Council to use forceful measures against terrorism, as they apply under very narrow and specific circumstances, free from delicate ideological or religious contexts, and on the basis of an almost universal consensus.

3.2 The International Court of Justice

The stance taken by the International Court of Justice ('ICJ') with regard to this subject has been both hesitant and cautious, if not contorted and short-sighted. The ICJ admitted that an armed attack, engendering the right to self-defence, can also be committed by Non-State actors, but in the Nicaragua case,[13] relevant here, the court considered such Non-State actors only when instruments of a State. The ICJ examined whether the acts of insurgents and armed bands in the Nicaragua conflict were ultimately attributable to the State parties involved. However, the Court rebuked this allegation, not being convinced there was "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries".

This formula was taken from the UN General Assembly definition of Aggression of 1974,[14] and it can do well for a judgment on the specific conflict the ICJ was

[10] See with regard to this subject N. Lavranos, UN Sanctions and Judicial Review, in: J. Wouters/P. A. Nollkaemper/E. de Wet (eds.), The Europeanisation of International Law, The Hague 2008, pp. 185–204; N. Lavranos, The Impact of the Kadi Judgment on the International Obligations of the EC Member States and the EC, in: P. Eeckhout/T. Tridimas (eds.), Yearbook of European Law 2009, Oxford 2010; P. Hilpold, EU Law and UN Law in Conflict: The Kadi Case, in: A. von Bogdandy/R. Wolfrum (eds.), Max Planck Yearbook of United Nations Law, Vol. 13, Leiden/Boston 2009, pp. 141–182; P. Hilpold, UN Sanctions Before the ECJ: the Kadi Case, in: A. Reinisch (ed.), Challenging Acts of International Organizations Before National Courts, Oxford 2010, pp. 18–53 and G. de Búrca, The European Court of Justice and the International Legal Order After Kadi, in: Harvard International Law Journal 51 (2010), pp. 1–50.

[11] See M. Wood, supra note 7, p. 322.

[12] By SC Resolution 1816 (2008) of 2 June 2008, States co-operating with the Transitional Federal Government of Somalia were authorized to enter the territorial sea of Somalia for the purpose of repressing acts of piracy and armed robbery at sea and to use, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress such acts.

[13] International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986, Judgment of 27 June 1986.

[14] UN Doc. A/Res/3314 (XXIX).

seized with in the mid-1980s even though also in that specific context strong criticism was voiced against the restrictive attitude taken by the Court.[15]

When the General Assembly requested an advisory opinion in 2003 about the legality of the wall being built by Israel in the Occupied Palestinian Territory, Israel had grounds to believe it could rely on an argument of self-defence, particularly given the strong statements contained in SC Resolution 1368, which states that terrorism gives rise to a right to self-defence. The ICJ, however, missed the opportunity to give guidance on this delicate subject and instead rejected Israel's plea in a short but highly contorted passage, where it maintained that the right to self-defence mentioned in Article 51 of the Charter applied only in case of an attack by one State against another State.[16] As the attacks referred to by Israel did not originate in another State but in the occupied territories Article 51 was found to be inapplicable.

This statement left most commentators puzzled as Article 51 of the Charter does not contain such a limitation, and the ICJ did not explain why the State community should abide by a restrictive interpretation of self-defence, particularly given the events of 2001.

Soon after, in Armed Activities on the Territory of the Congo (2005), the ICJ had the opportunity to clarify this subject. Again, the ICJ by-passed this highly contentious matter by stating on the one hand that the attacks by armed groups operating from the Democratic Republic of Congo ('DRC') and entering into Uganda could not be attributed to the DRC and therefore the Nicaragua-formula for self-defence against Non-State actors did not apply. On the other hand, the Court did not feel the need to answer the question whether self-defence applies against "large-scale attacks by irregular forces".[17] If one is to take an optimistic view it can be stated that at least the respective question was left open by the ICJ.

Additionally, it is interesting to note that ICJ's position was rejected in 2011 by the Secretary-General's Panel of Inquiry on the Israel attack on the Turkish flotilla near Gaza.[18]

[15] International Court of Justice, supra note 13, Dissenting Opinion by Judge Sir Robert Jennings, p. 533.

[16] International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, para. 139. Also see Judge Higgins, Separate Opinion as well as Judge Buergenthal, Declaration.

[17] Id., paras. 146–147.

[18] Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, July 2011, Annex I, para. 41, 93, cited according to St. R. Ratner, Self-defence against Terrorists: the Meaning of Armed Attack, in: L. van den Herik/N. Schrijver (eds.), supra note 4, pp. 334–355, at p. 337.

4 Approaching the Issue of Self-defence from the "Ivory Tower" and by the Civil Society

As we have seen, neither a binding agreement nor an official statement by the Security Council or the ICJ has provided detailed guidance on the issue of self-defence against Non-State actors. The Security Council is not prepared to play the international policeman and to adopt forcible measures to this end. It would be wrong to accuse the ICJ of narrow sightedness or incompetence for its handling of this issue, despite its material outcome being totally unsatisfactory. The ICJ is conscious of the limits of its authority and powers and is wary not to overstretch them.

What should be done in a situation where those primarily responsible for the development and the interpretation of the law have their hands tied and their voices muted?

It may be said that these are ideal preconditions for academics and members of civil society to intervene and in fact, in the last years, three highly sophisticated papers have been prepared and presented to this end:

- The Chatham House Principles of International Law on the Use of Force by States in Self-Defence of 2005
- The Leiden Policy Recommendation on Counter-Terrorism and International Law of 2010; and
- The Principles on "Self-Defense against an Imminent or Actual Armed Attack by Non-State Actors" presented by Daniel Bethlehem in 2012.[19]

These documents have different origins but bear considerable resemblance in the way they have come to life. The Chatham House principles are the result of an intense dialogue between several eminent British academics and practitioners. The Leiden Policy Recommendations also ensued from a process of several steps and rounds of dialogue between academics and practitioners, based at the Grotius Centre of Leiden University and with the involvement of Dutch and international experts.

The Bethlehem principles, finally, evidence most clearly the signature of one single expert, Daniel Bethlehem who, however, reports that his document is also the result of an intense dialogue with other experts.

Although none of these papers can claim authority to give a definite and uncontestable answer to the questions treated, but when considered conjunctively they give a good impression of the prevailing opinion among leading experts in academia and practice.

[19] See D. Bethlehem, Principles Relevant to the Scope of a State's Right of Self-defense against an Imminent or Actual Armed Attack by Non-State Actors, in: American Journal of International Law 106 (2012), pp. 770–777.

- The role of the Security Council for the maintenance of international peace and security is emphasized and (unilateral) armed action in self-defense should be a measure of last resort.
- In clear contrast to the ICJ but in conformity with a broad majority in literature it is affirmed that Article 51 of the UN Charter applies also to attacks by Non-State actors "even when not acting on behalf of a State".[20] In fact, as in the commentary to the Chatham house principle n. 6 is explained "the right to use force in self-defence is an inherent right and is not dependent upon any prior breach of international law by the State in the territory of which defensive force is used."[21]
- In such case, however, the attacks must be of a large scale. As the Leiden Policy Recommendations explain, "[t]he heightened threshold stems from the critical role of the State(s) on whose territory terrorists operate and the primary responsibility of such State(s) for the prevention and suppression of such acts".[22]
- It suffices that a State is unwilling or unable to prevent attacks against another country. The Leiden Policy Recommendations remember that self-defence is "an inherent right" and therefore it does not "require that armed attacks by terrorists be attributable to the territorial State under the rules of States responsibility".[23]
- All documents accept the so-called "accumulation theory" according to which, in assessing the scale of the attacks, account may be taken not only of individual, discrete acts but also of a series of attacks emanating from the same territory and the same terrorist groups. It has to be mentioned that this accumulation theory meets with considerable opposition in theory and practice.[24]
- Finally, they all accept a right to self-defence not only against an actual attack but also if an attack is imminent (so-called "anticipatory measures"). Pre-emptive or preventive measures are not considered to be legal if not authorized by the Security Council. This question was, however, never addressed by the ICJ.[25]

[20] L. van den Herik/N. Schrijver, Leiden Policy Recommendations on Counter-terrorism and International Law, 2010, para. 38; E. Wilmshurst, The Chatham House Principles of International Law on the Use of Force in Self-Defence, International & Comparative Law Quarterly 55 (2006), principle 6.

[21] E. Wilmshurst, supra note 20, p. 12.

[22] Id., p. 13.

[23] Id., para. 42; D. Bethlehem, supra note 19, principle no. 12.

[24] Several authors supported the accumulative theory, even though usually strict conditions were attached. See for example A. Cassese, The International Community's "Legal" Response to Terrorism, in: International & Comparative Law Quarterly 38 (1989), pp. 589–608, at p. 596.

[25] Anticipatory measures require that "the threat should be real, verifiable and leaving no choice of other means to deflect it. Only then may the use of force in anticipatory self-defence within the strict limits of proportionality be justified." See N. A. Shah, Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism, in: Journal of Conflict and Security Law 12 (2007), pp. 95–126, at p. 103.

5 Conclusions

The documents shortly analyzed here, at least with regard to some essential elements, cannot and also do not purport to give a definite answer to the questions examined but the reaction among experts at least with regard to the first two sets of principles were overwhelmingly positive.

Of course, the discussion will continue. Some aspects remain highly contentious. Maybe it can be said that while the ICJ sticks too closely to the Nicaragua judgment, the principles mentioned above have abandoned the approach adopted in 1986. At any rate, these endeavours have to be appreciated. A large community of academics and practitioners have been brought together to discuss a subject that seemed to be too delicate to be further developed by the officially responsible institutions. While these attempts can, of course, not be considered as rule-making in the proper sense, they give evidence of the extraordinary flexibility of international law when it comes to sorting out what international consent at a certain moment in time is. And from a purely academic point of view they have furnished plenty of new elements for discussion that tight-lipped and over-cautious UN institutions were not willing or not in the position to provide.

Part V
The Changing Role of the Individual in the Law of Peace and Armed Conflict

The Role of the Human Security Perspective

Wolfgang Benedek

1 Introduction

The concern with the humanization of war is an old one, but human security as a concept did not emerge until the 1990s, when the collapse of the Berlin wall 25 years ago and the end of the East-West conflict with it, allowed for a period of softening of national sovereignty, and shifting of focus from national or State security to the security of the people and the individual person. People then became recognized as the rights-holders. States derive their authority from servicing their people. The development of human rights since 1948 has been the major development in humanizing international law. Since the early 1990s, UNDP speaks of human development, and since 2003 the UN has adopted a human rights-based approach. It increasingly uses the concept of human security for discussions on the post-Millennium development goals. This correlates with the increased standing of individuals as subjects of international law.[1]

By focusing the attention on the security of the individual and personal security needs, human security is contributing to the humanization of international law and international relations. However, the concept of human security is not only of relevance at the international level, but can be usefully employed at all levels.

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[1] See M. C. Kettemann, The Future of Individuals in International Law, Utrecht 2013 and A. Peters, Jenseits der Menschenrechte, Die Rechtsstellung des Individuums im Völkerrecht, Tübingen 2014 und.

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It has strengthened the position of the individual in international law,[2] which itself contributes to the humanization of international relations.[3]

2 Development of the Concept of Human Security

The concept of human security, which in 2014 reached 20 years of age, can be considered as a paradigm shift because of its focus on the individual and individual wellbeing and livelihood. In 1994, with the publication of the Human Development Report, the UNDP started its focus on the human person and launched the concept of human security, identifying economic, environmental, political, communal, personal, food and health threats as major threats to the security of the person.[4] According to the definition of the Commission on Human Security of 2003 the objective is "to protect the vital core of all human lives in ways that enhance human freedoms and human fulfilment from critical and pervasive threats".[5] It follows a two-pronged approach based on the freedom from fear and the freedom from want as the two pillars of human security, and thus widens the concept of security to non-traditional areas like food security or social security and development. At the same time it provides for a deepening of the concept of security, as any security measure, including armed conflict, can be assessed against the criteria of what they mean or contribute to the security of the individual.

For example, the Ottawa Convention Banning Anti-Personnel Landmines of 1997, which has been one of the defining events of the human security movement, was a break-through as it gave preference to addressing the threats to the individual versus the military benefits in armed conflict. Since its implementation, as well as the enforcement of the Convention on Cluster Munitions of 2008,[6] the world has become a safer place, in particular for children, who were most affected by these weapons. On similar lines, the UN Treaty on Arms Trade, adopted in 2013 by the UN General Assembly, should restrict arms exports which could lead to human rights violations, terrorism and organized crime.[7] International law thus has been

[2] See A. A. Cancado Trindade, International Law for Humankind, Towards a New Jus Gentium, 2nd ed., Leiden 2013.

[3] See also W. Benedek, Challenges of Humanization of International Relations by International Law, in: M. Pogačnik (ed.), Challenges of Contemporary International Law and International Relations. Liber Amicorum in Honour of Ernest Petrič, Nova Gorica 2011, pp. 81–92.

[4] See UNDP, New Dimensions of Human Security, Human Development Report 1994, New York 1994.

[5] See Commission on Human Security, Human Security Now, Protecting and Empowering People, New York 2003, p. 4.

[6] See B. Docherty, Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law, in: Human Rights Quarterly 31 (2009), pp. 934–963.

[7] See N. MacFarquhar, U.N. Treaty is First Aimed at Regulating Global Arms Sales, The New York Times, 2 April 2013; UN Doc. A/CONF. 217/2013/L.3, 27 March 2013.

called the "tool box" for realizing, operationalizing and institutionalizing the concept of human security.[8]

The political process towards the Ottawa Landmines Convention in 1998 led to the creation of the so-called "Human Security Network" (HSN), a group of 12 like-minded States from North and South and South Africa as an observer. The HSN developed a broad agenda,[9] including—on the initiative of Austria—human rights education, but lost momentum in the period of re-sovereignization after 9/11. Canada, which had been a main proponent, left the group after internal political changes and became a main proponent for the concept of the responsibility to protect, in which the government again in the meantime seems to have lost interest. The Netherlands also left the network, while Costa Rica and Panama joined. The group today is mainly active at the United Nations in New York and does not even have a common website any more. However, the annually changing chairs are still reporting on the activities of the HSN group.[10]

In the meantime, the "Friends of human security" group in New York, under Japanese and later also under Mexican leadership, gained greater importance. The Outcome Document of the United Nations reform process of 2005 contained a commitment to clarify the concept further,[11] which has been done by a subsequent Working Group on Human Security and several reports by the Secretary General. Of particular relevance is the report of 2010, according to which "human security is a practical approach to the growing interdependence of vulnerabilities focusing on people and communities" and which recommends taking the added value of the human security concept into account and discussing "how best to mainstream human security in UN activities".[12] Furthermore, in 2012 the General Assembly, based on a further report of the UN Secretary General,[13] adopted a common understanding on the notion of human security according to which "Human Security calls for people-centred, comprehensive, context-specific and prevention-

[8] See G. Oberleitner, Human Security: Idea, Policy and Law, in: M. Martin/T. Owen (eds.), Routledge Handbook of Human Security, Abingdon 2013, pp. 319–330, at p. 327.

[9] This agenda ranged from issues like the protection of women and children in armed conflict and the promotion of humanitarian law to fighting HIV/Aids (Thailand) and promoting food security (Chile).

[10] See Chile, on Behalf of the HSN, in: Press Release of Chilean Ministry of Foreign Affairs of 26 September 2013 and Permanent Mission of Austria to the United Nations in New York, High-level Meeting of the Human Security Network, 26 September 2014, Press Release, at http://www.bmeia.gv.at/fileadmin/user_upload/bmeia/media/Vertretungsbehoerden/OV_New_York/Press_release_HLM_HSN_as_adopted.pdf (accessed on 30 January 2015).

[11] See UN Doc. A/RES/60 (2005), 24 October 2004, para. 143.

[12] See Report of the UN Secretary General, UN Doc. A/64/701, 8 March 2010, para. 72 (b).

[13] See Report of the Secretary General, Follow-up to the General Assembly Resolution 64/291 on Human Security, UN-Doc. A/66/763 of 5 April 2012.

oriented responses that strengthen the protection and empowerment of all people and all communities."[14]

The relevance of the concept for other non-European regions can be seen for example in the African Union's Non-Aggression and Common Defence Pact, adopted in Abuja in 2005, which defines human security as "the security of the individual in terms of satisfaction of his/her basic needs", including the creation of social, environmental and cultural conditions for the survival and dignity of the individual, the protection and respect for human rights, good governance etc.[15] Certainly, practice has still to live up to these objectives.[16]

The concept of human security and its application in practice has also been the focus of research by numerous academic institutions in countries ranging from Canada and the UK to Austria, Serbia and Germany. For example, for several years a Human Security Report has been issued by Andrew Mack, now at Simon Fraser University in Canada, which looks at issues of violence, but also health, education and sexual violence (including domestic violence) in war time.[17] The Human Security Institute, also based in Canada, has issued a university textbook on human security.[18] The initiative of a Human (In-)Security Index, run by a team from the Institute for Development and Peace (INEF) at the University of Duisburg/Essen[19] and the Center for Human Security located at the Faculty of Security Studies, University of Belgrade, which follows a broad approach to the topic of human security, should also be mentioned.

The Human Security Network has always pursued a multi-stakeholder approach, which is also a result of the campaign for the Landmines Convention, in which civil society groups played a major role. This approach continued with the campaign for an International Criminal Court, a Cluster Munitions Convention and the Arms Trade Treaty. Accordingly, civil society organizations had a major role in promoting a bottom-up concept of human security. In this context, the Civil Society Network for Human Security needs to be highlighted. It considers itself as a "global collaborative civil society platform working towards more effective and inclusive measures for countering violent extremism".[20] In 2013, the Human Security

[14] See Resolution on the Follow-up to para. 143 on Human Security of the 2005 World Summit Outcome, UN Doc. A/RES/66/290, 25 October 2012, para. 3.

[15] See African Union Non-Aggression and Common Defence Pact, at http://www.au.int/en/sites/default/files/AFRICAN_UNION_NON_AGGRESSION_AND_COMMON_DEFENCE_PACT.pdf (all accessed on 25 April 2014).

[16] See also R. D. Sharamo/C. Ayangafac (eds.), The State of Human Security in Africa. An Assessment of Institutional Preparedness, Addis Abeba 2011.

[17] See Human Security Report Project, Human Security Report 2012: Sexual Violence, Education, and War: Beyond the Mainstream Narrative, Vancouver 2012.

[18] See A. Lautensach/S. Lautensach (eds.), Human Security in World Affairs: Problems and Opportunities, Vienna 2013.

[19] See S. Werthes/C. Heaven/S. Vollnhals, Assessing Human Insecurity Worldwide, The Way to a Human (In)Security Index, INEF-Report 102/211, Duisburg 2011.

[20] See at www.humansecuritynetwork.net; the network has more than 40 members.

Network, under the chairmanship of Chile, committed itself to more systematically integrating civil society organizations and academia into its work. With the support of Japan, the UN Trust Fund for Human Security (UNTFHS) was established in 1999 and has since supported more than 200 projects in a wide range of areas.[21]

The human security perspective is particularly relevant for humanitarian actors, whether States, international governmental or non-governmental organizations or other Non-State actors. Some actors follow a human security perspective without labelling it as such, while others, including certain States and international organizations, are hesitant referring to it explicitly because their military is afraid of additional obligations, which may be too burdensome or not fully clear, or may limit their legal and operational space. The OSCE prefers to speak of "comprehensive security", bringing together military and civilian elements, a language sometimes also adopted by the European Union.[22]

However, several guidelines have been elaborated for EU Crises Management Operations as part of the European Security and Defense Policy, which deal with core human security concerns, such as the protection of civilians (2003), on children in armed conflict (2003/2008), on international humanitarian law (2005), on the protection of women in armed conflict (2005), on generic standards of behaviour for ESDP operations (2006), on human rights gender mainstreaming (2005) and on violence against women and girls (2008). These tools should contribute to meeting the challenge of moving the concept from standard-setting to operationalization.[23]

3 Potential and Areas of Research

While the tragic events of 2001 resulted in a "chilling effect" on the use of the concept by States and international organisations, research continued in several places. With regard to the EU, several reports have been produced by a London School of Economics (LSE)-led study group on operationalizing the concept, including the Barcelona-Report on a "Human Security Doctrine" for Europe and the Madrid-report on a "European Way of Security", which defined criteria for a Human Security Approach in the Common Security and Defence Policy of the EU,

[21] United Nations, Human Security Unit, OCHA, Lessons from the Field, Applying the Human Security Approach through the United Nations Trust Fund for Human Security, New York 2013.

[22] See, for example, M. Reiterer, The EU's Comprehensive Approach to Security in Asia, in: European Foreign Affairs Review 19 (2014), pp. 1–22.

[23] See the guidelines at http://eeas.europa.eu/human_rights/guidelines/index_en.htm and the handbook, which was produced under the German EU Presidency, Mainstreaming Human Rights and Gender into European Security and Defence Policy, 2008, at http://eeas.europa.eu/csdp/documents/pdf/news144_en.pdf.

including Human Rights, legitimate political authority, a bottom-up approach and clear and transparent objectives.[24] At the 15th anniversary of the concept in 2009 there was talk of a second generation of human security[25] mainly based on the reception within the EU. A threshold approach was suggested to better identify situations of human security. However, such approach is difficult to apply in practice. Anyway, at the 20th anniversary a revival of the concept was noted also in the United Nations.[26]

Several other research projects dealt with human security issues from different perspectives. For example, studies undertaken at the Institute of International Law and International Relations at the University of Graz on "Mainstreaming human security in UN peace operations and EU crises management" have shown that both in UN peace-keeping as well as in European crises management operations, the human security approach can contribute to a better operationalization of human rights and gender concerns in such missions.[27] Strangely enough, the Capstone Doctrine of 2008 does not mention human security explicitly, which can be seen as demonstrating a certain ambivalence towards the concept, typical for the United Nations, but also the EU, where some member States seem to avoid using the concept. Another project dealt with the relevance of human security for the peace-building-process in the Western Balkans.[28] A further research project looked at the Human Security and Human Rights Agenda with regard to the EU policy and practice in crises management operations and the European Security and Defence Policy, ranging from conflict prevention and humanitarian aid to protection of civilians, control of potential abuses and rebuilding democratic institutions.[29]

The advantage of a human security perspective is that it allows focusing on the interest of the human person in all decisions that are to be made, similar to the "best interest of the child". State or national interests have to be brought in conformity with human interests and not vice-versa.[30]

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[24] See Study Group on Europe's Security Capabilities, A Human Security Doctrine for Europe, Barcelona 2004 and Study Group on Europe's Security Capabilities, A European Way of Security, Madrid 2007; See also M. Martin/M. Kaldor (eds.), The European Union and Human Security: External intervention and Missions, London 2009 as well as G. Oberleitner, supra note 8, pp. 319–330.

[25] See M. Martin/T. Owen, The Second Generation of Human Security: Lessons from the UN and EU Experience, in: International Affairs 86 (2010), pp. 211–224.

[26] See M. Martin, Back to the Future for "Human Security", openDemocracy, 13 July 2013, at https://www.opendemocracy.net/mary-martin/back-to-future-for-%E2%80%98human-security%E2%80%99.

[27] See W. Benedek, Mainstreaming Human Security in UN and EU Peace and Crises Management Operations, Policies and Practice, in: W. Benedek/M. C. Kettemann/M. Möstl (eds.), Mainstreaming Human Security in Peace Operations and Crises Management, Policies, Problems, Potential, London/New York 2011, pp. 13–31.

[28] See W. Benedek/C. Daase/V. Dimitrijevic/P. van Dyne (eds.), Transnational Terrorism, Organized Crime and Peace Building. Human Security in the Western Balkans, Basingstoke 2010.

[29] See T. Hadden (ed.), A Responsibility to Assist, Human Rights Policy and Practice in European Union Crises Management Operations, Oxford/Portland 2009.

[30] See M. C. Kettemann, supra note 1, p. 3.

One important aspect of human security is the relevance of human rights for the concept.[31] One author has characterized their relationship as "porcupines in love".[32] Freedom from want and freedom from fear, as the two pillars of human security, can be seen as standing for economic, social and cultural as well as civil and political rights and the third pillar, the empowerment of the human person, can be associated with human rights literacy. The Institute of International Law and International Relations and the ETC Graz have been involved in the Ministerial Conference of the Human Security Network in Graz in 2003. A Manual on Human Rights Education entitled "Understanding Human Rights" was elaborated for that purpose, which identifies the human security aspects of all major rights treated and has been endorsed by the HSN and translated into 15 languages to-date.[33] Human rights education empowers people through knowledge of their rights and ability to claim them, which in turn contributes to their human security. Since 2008, the European Training and Research Centre for Human Rights and Democracy (ETC) Graz together with the Institute has organized an Annual Conference on the Future of Security, the contributions to which are regularly published in the electronic journal "Human Security Perspectives", with the most recent being on the African spring from a human security perspective.[34]

A human rights-based approach to security and humanitarian action corresponds to the emergence of a human rights approach in development cooperation or with regard to international humanitarian law (IHL), as shown by a recently presented habilitation-thesis at the Institute of International Law and International Relations of the University of Graz.[35] This is confirmed by Security Council Resolutions and by the EU-Guidelines on Women and Children in Armed Conflict. Accordingly, a human rights-based approach to IHL is suggested, which corresponds to a human security perspective.

Another pertinent project, with the involvement of the ETC Graz, was about "'Multi-Stakeholder Partnerships' in post-conflict reconstruction: The Role of the EU" with case studies on Afghanistan, the Democratic Republic of Congo and Kosovo, which looked more specifically at the role of actors involved and found evidence that an inclusive approach towards all relevant actors in post-conflict situations contributes to peace-building and improves the human security of people at stake. The quality of these hybrid partnerships is decisive for the results achieved,

[31] See W. Benedek, Human Security and Human Rights Interaction, in: M. Goucha/J. Crowley (eds.), Rethinking Human Security, Oxford 2008, pp. 7–18 and W. Benedek/M. C. Kettemann, Menschliche Sicherheit und Menschenrechte, in: C. Ulbert/S. Werthers (eds.), Menschliche Sicherheit, globale Herausforderungen und regionale Perspektiven, Baden-Baden 2008, pp. 94–109.

[32] See G. Oberleitner, Porcupines in Love, The Intricate Convergence of Human Rights and Human Security, in: European Human Rights Law Review 6 (2006), pp. 588–606.

[33] See W. Benedek (ed.), Understanding Human Rights, Manual on Human Rights Education, 3rd ed., Vienna/Antwerp 2012, and the language versions, at www.manual.etc-graz.at.

[34] See Human Security Perspectives, at http://www.etc-graz.at/typo3/index.php?id=853.

[35] See G. Oberleitner, Human Rights in Armed Conflict: Law, Practice, Policy, Cambridge 2015.

i.e., a cooperative bottom-up approach, inclusive of the main actors and focusing on their human security needs, could prevent the failure of many well-meaning projects.[36] The findings show that freedom from fear and freedom from want are often related, and in practice the latter is also crucial for the sustainability of the measures undertaken. Empowerment often means capability-development, also called capacity building of local partners. Among the common characteristics of success are the principles of inclusiveness in involving all relevant stakeholders, in particular vulnerable groups, the principle of sustainability, which can be met by institutionalization, and the principles of efficiency and of legitimacy, which can conflict with, but also reinforce each other.

In November 2009, the Security Council, on the initiative of Austria which was chairing the Security Council during that month, adopted Resolution 1894 on the protection of civilians in armed conflict.[37] This resolution contains the most comprehensive set of rules on the protection of civilians in armed conflict to-date. The emphasis on the protection of civilians, especially vulnerable groups like IDPs and refugees, women and children in peace-keeping and crises missions, zero tolerance on sexual exploitation and health programs associated with a mission, reflect the concerns of the human security approach. Although non-binding, similar to other resolutions of the Security Council under Chapter VI of the UN Charter in that field, it is authoritative and provides orientation for all humanitarian actors. In 2010, eight UN peace keeping missions had an explicit mandate "to protect civilians under imminent threat of physical violence". Accordingly, a study of the Department of Peace-Keeping Operations (DPKO) and the Office for the Coordination of Humanitarian Affairs (OCHA) found a need to give this concern more (consistent) attention in the planning of missions.[38]

A recent project of CLEER, the Centre for the Law of EU External Relations, deals with human security as a new operational framework for enhancing human rights protection in the Security and Migration Policies of the EU. The purpose is to facilitate the establishment of a comprehensive and operational framework for the assessment of the role of the EU in addressing emerging crises situations. The interdisciplinary approach should enable the EU to show respect for global security and better address issues of humanitarian aid, development and migration.[39] The Red Cross, which is committed to the principle of humanity, has used the concept of human security in the context of the safety of refugees and migrants

[36] See A. de Guttry/O. Green/W. Benedek (eds.), Peace-Building and Human Security After Conflicts: The Significance of Multi-Stakeholder Partnerships, to be published, as well as the multipart website, at http://www.multi-part.eu/index.php?option=com_content&task=view&id=72&Itemid=121.

[37] See UN-Document S/RES/1894 (2009) of 11 November 2009.

[38] See V. Holt/G. Taylor/M. Kelly, Protecting Civilians in the Context of UN Peace Keeping Operations, Successes, Setbacks and Remaining Challenges, New York 2009.

[39] See Human Security as a New Operational Framework, at http://www.asser.nl/Default.aspx?site_id=26&level1=14462&level2=14464.

arriving in Lampedusa. This further raises issues such as the relationship between European citizenship and human security.

A grassroots approach can be found in a project entitled "Citizen's Network for Peace, Reconciliation and Human Security (Claim!)", which, in close cooperation with the London School of Economics, works along three thematic axes, i.e., social inclusion and peace, conflict transformation and inter-communal reconciliation, and good governance with regard to forms and spaces of violence in the context of youth, workplace and community displacement.[40]

4 Conclusions and Challenges for the Future

There are several challenges for the concept of human security, such as the questions of conceptual clarity and focus. A broad concept faces the danger of dilution, while an overly narrow approach may reduce the relevance of the concept. Further, the relationship between human security, human rights and human development needs more research. Human security and human development are mainly political concepts, which can be strengthened and operationalized by legally binding human rights. A second generation of human security, or human security 2.0, has been proposed to address deficiencies of the past and to meet new challenges.[41]

There are new areas which need to be analysed and addressed by the concept of human security, including extra judicial killings by drones or large scale surveillance practices through the Internet, while human trafficking, climate change and public health might also benefit from greater attention. Among the challenges is the need to apply the concept on the local level, for example in the context of human rights cities or communities. New forms of vulnerabilities and deprivation need to be identified and addressed, as is happening in the project of the Helsinki Citizen's Assembly. Human Security requires an interdisciplinary approach to address all its aspects.

The findings of several projects show that the common elements of a human security approach include its holistic nature and uniting freedom from fear and from want as well as empowerment. Human security also stands for a transparent, participatory, inclusive and preferably bottom-up approach based on common values like human dignity and human rights and on common principles like rule of law, good governance, democracy and accountability. If properly applied, it can also serve as a preventive approach, which helps to anticipate threats and to empower vulnerable persons and groups to mitigate them. Because of its holistic approach, which includes civil and political as well as economic, social and cultural

[40] See on the project and the conference on "Humanizing Security", at http://cn4hs.org/istanbul-regional-conference-humanizing-security-31-january-1-february-2014.

[41] See M. Martin/T. Owen, supra note 25 and The Human Security Network, Fifteen Years On, at http://cips.uottawa.ca/the-human-security-network-fifteen-years-on.

rights, human security does not contribute to a tendency of securitization, which has emerged in particular since 2001, but rather highlights the security dimension of concern to individuals and groups often neglected in a State security or national security approach. In all cases, the human security perspective of looking after the security needs of the human person must be maintained. In conclusion, there is a "policy imperative" for all actors to follow the human security approach, a duty to take the "best interest of the individual or the group" as the main concern, to focus on human dignity as freedom from fear and want and to empower it as much as possible to enjoy its rights.

Certainly, this approach needs to be operationalized by mainstreaming guidelines and institutionalization in crises management operations and other relevant activities and policies. Local ownership should be strengthened by transparency and inclusiveness and partners should be treated on the basis of rule of law and good governance as expected from them. From these principles, a human security methodology can be derived, which can be applied to a broad range of issues, always starting from a focus on the security needs of the individual or groups with regard to significant threats towards their livelihood.

After 20 years, the development of the concept of human security has not yet been completed and its potential in particular for areas beyond traditional security issues still needs to be experimented with and further researched. A mapping done by UNESCO some years ago has shown a wide area of applicability of the human security concept. However, political forces have put a hold on this area of UNESCO activities. Human security is also under attack, in particular from State and sovereignty-oriented forces. Accordingly, there are several challenges for the concept of human security, one being academic in developing the concept, one being practical and political in applying it to a wider variety of issues in spite of criticisms against a dilution of the concept, and finally by mobilizing adequate support for a meaningful human security concept. All in all, human security remains an inspiring concept for many scholars and actors.

Access to Victims and Humanitarian Assistance

Hans-Joachim Heintze

1 Introduction

The issue of access to victims of natural disasters has been on the agenda of the International Law Commission since 2006. One of the focal points of the codification project is the question of a duty on States to accept offers of external assistance in the event of natural disasters. This problem has given rise to fierce debates in the UN-General Assembly.[1] Many countries consider such a duty as the entry point for interference in internal affairs of the affected State and reject such an approach.[2]

Disasters frequently occur in all regions of the world and affect large numbers of individuals. They may have a disruptive impact on people, infrastructure and economies. Disasters in times of peace or war endanger life, health and the physical integrity of human beings. They have disproportional consequences in vulnerable poorer societies because they deepen their poverty. In 2006, the UN counted 227 natural disasters resulting in over 23,000 deaths worldwide.[3] The 2004 Indian Ocean Tsunami was one of the worst disasters of the last century. It manifested the shortcomings of the international reaction concerning international protection of persons in critical situations. Disasters, such as cyclone Nargis that

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[1] UN-Doc. A/CN.4/590, para. 8.

[2] S. E. Davies, Natural Disasters and the Responsibility to Protect, in: K. Odendahl/N. Matz-Lück, German Yearbook of International Law, Vol. 55, Berlin 2013, p. 150.

[3] UN Doc. A/62/323, para. 3.

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struck Myanmar in 2008 or the earthquake in Haiti in 2010, exposed a range of problems relating to domestic and international response. The legal dimension depends on the severity of the humanitarian crises that the disaster has caused. However, there is no international consent "on how great a catastrophe has to be in order to be considered a disaster for legal purposes, nor is there any agreement on what criteria should be used to measure its scale".[4] Thus, the topic has given rise 'to fierce debates' on the issue of "the potential imposition of a duty on States to accept offers of external assistance".[5]

The imposition of such a duty has important consequences because the question arises whether there is an obligation or entitlement for the international community to have access to the victims and to offer or even enforce humanitarian assistance. Some authors argue that humanitarian assistance is "nowadays. . .a necessary element to reach, in the words of the UN Secretary General, 'Global Peace', which requires the solution of social, economic, cultural and humanitarian problems. Therefore, any obstacle to the delivery of aid is correctly considered a danger to international peace and security".[6]

Even if one does not share Giuffrida's far-reaching interpretation of the UN practice concerning obstacles to the delivery of humanitarian assistance, there is no doubt that the victims of natural and man-made disasters need immediate help. Thus, their protection has been a subject of concern since time immemorial. De Vattel observed as early as 1758 that all those who have provisions to spare should assist nations suffering from famine as an instinctive 'act of humanity'.[7] This humanitarian assistance covers both the help provided from the affected State itself as well as the assistance coming from abroad. The non-action of States can, in such emergency situations, amount to a violation of international law, the principle of humanity and fundamental human rights. Therefore, very often the question of an international involvement arises which entails fundamental legal problems. The assistance to victims of disasters occurs according to the principle of humanity and the lack of a major multilateral treaty on this issue is somewhat contradictory since there is an extensive body of international humanitarian law applicable to victims of armed conflicts. Several codification attempts were made in the 1980s without success. In 1990 the UN assessed that donors, recipient governments and international organizations to have expressed their opinion 'on the desirability of new legal instruments in order to overcome the obstacles in the way of humanitarian

[4] C. Focarelli, Duty to Protect in Cases of Natural Disasters, 2013, para. 7, in: Max Planck Encyclopedia of Public International Law, at www.mpepil.com (all accessed on 3 September 2014).

[5] S. E. Davies, supra note 2, p. 150.

[6] R. Giuffrida, Humanitarian Assistance to Protect Human Rights and International Humanitarian Law, in: R. Kolb/G. Gaggioli (eds.), Research Handbook on Human Rights and Humanitarian Law, Cheltenham 2013, pp. 294–319, at p. 294.

[7] E. de Vattel, Le droit des gens ou principes de la loi naturelle, Paris 1758, reprinted by Carnegie Institution, Washington 1916, Book II, Chapter I, paras. 4–5.

assistance'.[8] However, some non-governmental organizations argued that such an initiative carries the risk of weakening the progress already achieved over the years in providing humanitarian assistance. These organizations assumed that some governments would reinforce the insistence on the concept of national sovereignty and thus render codification counterproductive.[9] The proposal of a convention on the deployment and utilization of urban search and rescue teams was subsequently drafted, but in 2002 it was replaced by the General Assembly Resolution A/57/150, which contains the Guidelines for the International Search and Rescue Advisory Group. Thus, the entire discussion on the issue has been dominated by the insistence of some governments on the principle of non-interference in their internal affairs. The work of the private International Law Association in the 1980s also did not tackle the big problems of sovereignty, especially the question as to whether States have a duty to undertake or accept relief.[10] Recent developments in the field of human rights law, such as R2P pose challenges to the principles of State sovereignty and non-interference and raise the question as to whether States are entitled to refuse to admit and facilitate international assistance despite severe human suffering.

Against this background the Codification Division of the Office of Legal Affairs of the United Nations Secretariat submitted proposals on 'International Disaster Relief Law' (IDRL) to the International Law Commission (ILC) in 2006. The UN identified the need for the systematization of international law in the context of disaster relief for responding to such tragic calamities and to overcome obstacles to the provision of effective assistance. The ILC is an organ of the UN General Assembly and its Statute provides that the 'Commission shall have for its object the promotion of the *progressive development* of international law and its codification'.[11] Progressive development means the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States, and codification includes the more precise formulation and systematization of rules of international law, in fields where there already has been extensive State practice, precedent and doctrine. The ILC represents the latest attempt to define the obligations of States 'to accept disaster relief without going so far as to justify forced humanitarian intervention'.[12]

[8] UN Doc. A/45/587, para. 41.

[9] Id., para. 44.

[10] International Law Association, Report of the Fifty-Ninth Conference Held in Belgrade 1980, London 1980, p. 530.

[11] UN Doc. A/CN.4/325, para. 102.

[12] J. Benton, Health, Disaster Relief, and Neglect: The Duty to Accept Humanitarian Assistance and the Work of the International Law Commission, in: International Law and Politics 43 (2011), pp. 419–477, at p. 423.

2 Framework of the Codification by the International Law Commission (ILC)

The ILC decided in 2007 to include the topic in its current program of work and appointed Eduardo Valencia-Ospina as Special Rapporteur.[13] Upon his appointment, the Special Rapporteur undertook efforts to establish contacts with interested governmental and non-governmental organizations, including the Representative of the Secretary-General on the human rights of internally displaced persons, the Assistant Secretary-General for Humanitarian Affairs and Deputy Emergency Relief Coordinator, Office for the Coordination of Humanitarian Affairs and officials of the Disaster Response Laws, Rules and Principles Program of the International Federation of Red Cross and Red Crescent Societies (IFRC).

The Commission requested the UN-Secretariat to prepare a background study, initially limited to natural disasters, on the topic, 'Protection of persons in the event of disasters'.[14] The detailed study provides an overview of existing legal instruments and texts applicable to a variety of aspects of disaster prevention and relief assistance. Furthermore, the study analyses the rules on the protection of persons in the event of disasters and confirms that no generalized multilateral treaty exists on the topic. The only universal multilateral treaty directly related to disaster response was the Statute of the International Relief Organization of 1927, which is no longer in force.[15] However, a number of relevant rules have been codified in some specialized multilateral treaties as well as in over 150 bilateral treaties and memorandums of understanding. Among them the *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations* of 18 June 1998,[16] which is significant because it provides legal rules on the use of telecommunication for humanitarian assistance activities during disasters. The Convention deals with the coordination of the assistance and especially with the overcoming of bureaucratic restrictions. The second treaty to be mentioned in that connection is the *Framework Convention on Civil Defence Assistance*, which entered into force in 2001. From other sources of law, there are over 100 national laws directly concerning the topic.[17]

The UN has often addressed humanitarian assistance. In 1971 the Secretary-General emphasized in a report on Assistance in Cases of Natural Disaster that the primary responsibility of the affected government was to protect the life, health and property of people within the frontiers and to maintain essential public services. Humanitarian assistance from the international community can only be supplementary. The concept of 'primary responsibility' was endorsed in several UN General

[13] UN-Doc. A/62/10, para. 375.

[14] UN Doc. A/CN.4/590 para. 1–3.

[15] UN Doc. ECOSOC Res. 1268 (XLIII) of 4 August 1967.

[16] UNTS 2296, No. 40906.

[17] See the list of these documents in the annex of UN Doc. A/CN.4/590/Add.2.

Assembly Resolutions.[18] The UN General Assembly discussed the issue again in 1991 and adopted Resolution 46/182, which reflects the conservative approach of the world organization.

The document underlines that:

- Humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality;
- The sovereignty, territorial integrity and national unity of States must be fully respected. Thus, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country;
- Each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organisation, coordination, and implementation of humanitarian assistance within its territory; and
- The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws.

The UN resolution concludes by emphasizing its central and unique role in providing leadership and coordination of the efforts of the international community to support the affected countries.

Other documents deal with measures to expedite international relief. The body of these instruments justifies the assessment of an expanding regulatory framework. In the centre are the principles of sovereignty and non-intervention. Therefore, any disaster relief carried out by assisting actors is subject to the consent of the receiving State and that the receiving State has the primary responsibility for the protection of persons on its territory or subject to its jurisdiction or control during a disaster. A relatively recent development is the recognition of the need for disaster prevention, mitigation and preparedness.

3 Challenge of the 'Sovereignty' Concept and Politicization

Sovereignty is a cornerstone of international law. The sovereign State exercises exclusive jurisdiction over matters within its territory.[19] Other States are not allowed to interfere in the internal affairs of sovereign States. If they intervene they commit a violation of international law and the affected State can react with

[18] Res. A/36/225 of 17 December 1981.

[19] E. E. Kuijt, A Humanitarian Crisis: Reframing the Legal Framework on Humanitarian Assistance, in: A. Zwitter et al. (eds.), Humanitarian Action, Cambridge 2014, p. 55.

proportional sanctions. However, intervention to protect human beings in emergencies from their own sovereign is an old concept first mentioned by the father of modern international law, Hugo Grotius.[20] The recent discussions about humanitarian interventions and the concept of the Responsibility to Protect (R2P) seek to offer a solution in cases of massive human rights violations and the sovereignty claim of a State. The access to victims in disasters may also involve conflicts with the sovereignty entitlements of the affected State because the respect for State sovereignty is a central principle applicable to relief actions. However, sovereignty is subject to the obligation to comply with international law. Therefore the principle of sovereignty does not constitute a legal barrier inhibiting international humanitarian assistance, but 'a necessary pre-condition for the exercise of meaningful cooperation within the community of States'.[21] Indeed, international humanitarian assistance describes the new law of cooperation and solidarity among nations, which means also a kind of rediscovery of the ethical and religious foundations of public international law. Solidarity is a value-driven principle with a strong ethical underpinning.[22] Human rights as well as humanitarian assistance are parts of that ethical underpinning. Thus, the questions arise in which way these rights can be implemented in the event of natural disasters. Practice and theory offer different answers.

In the 1980s some French health practitioners, who founded Médecins Sans Frontiers in 1971, and other experts introduced the concept of the right of interference or even the duty of interference. The central tenet was that humanitarian actors have a right to access to victims of humanitarian emergencies, whether man-made or natural, including a right to innocent passage through humanitarian corridors. The duty of interference was understood as a moral obligation of third parties to provide assistance to victims. The duty should be applied if the affected State proves unable or unwilling to supply adequate protection to its own people: 'It was assumed that in humanitarian crises the focus should shift from classical reciprocal Inter-State obligations to the right of the victims themselves to be assisted, from within or from without if need be'.[23]

However, this new approach was only reflecting a concept of some non-governmental organizations with some support from the French government. However, the international community was reluctant, as Resolution 43/131 proves. The UN General Assembly adopted Resolution 43/131 on 8 December 1988 upon a proposal by France. The Resolution on humanitarian assistance to victims of natural disasters and similar emergency situations repeats the sovereignty-friendly

[20] So P. Valek, Is Unilateral Humanitarian Intervention Compatible with the U.N. Charter?, in: Michigan Journal of international Law 26 (2005), p. 1223.

[21] P. Macalister-Smith, International Humanitarian Assistance, Dordrecht 1985, p. 56.

[22] K. Wellens, Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections, in: R. Wolfrum/C. Kojima (eds.), Solidarity: A Structural Principle of International Law, Heidelberg 2010, p. 5.

[23] C. Focarelli, supra note 4, para. 2.

approach that the first and foremost obligation of the State is to take care of the victims of natural disasters occurring on its territory. The original French draft went much further by mentioning the right to assistance as a right of any individual. The majority of States did not accept this approach because of its neo-colonialist implications. Thus, the final text of the resolution only mentioned that 'the abandonment of the victims of natural disasters. . .without humanitarian assistance constitutes a threat to human life and an offence to human dignity'.

This statement allows different interpretations and some uncertainty in legal terms. Nevertheless, some commentators argue that the primary role of the affected State amounts to an obligation to respect and protect certain fundamental rights, such as the right to life and to implement other basic needs. Focarelli argues that the failure of the affected State to do so has been assumed to entitle third parties to exercise their right of interference and of access to victims and he supports his argument with reference to the practice of the UN Security Council.[24] Paragraph 3 of Resolution 688 (1991) reads: 'The Security Council. . .insists that Iraq allows immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq and make available all necessary facilities for their operations'.

The UN Security Council followed suit, but exclusively in respect to armed conflict situations because humanitarian assistance in armed conflicts is guided by the, so-called, humanitarian principles of impartiality and neutrality, which have their legal basis in article 70 of Additional Protocol I to the Geneva Conventions (1977)[25] and respective customary international law.[26] This legal basis is only applicable in armed conflicts and not in cases of natural or man-made disasters. Therefore, it is at least controversial to use this obligation in armed conflicts as a justification to enforce humanitarian assistance in situations outside the application of the international humanitarian law. In the case of the cyclone Nargis that struck the southern part of Myanmar with devastating force on 2 May 2008, the UN Security Council failed to take action under Chapter VII of the UN Charter, despite a French proposal for a resolution authorizing the delivery of aid to the people in Myanmar without the government's consent.[27] Frustrated by the Myanmar Government's refusal to accept international assistance, the French government invoked R2P as the basis to impose the delivery of aid. However, the international community was able to find non-coercive ways for a co-ordinated humanitarian response.[28]

[24] Id., para. 3.

[25] 1125 United Nations Treaty Series, p. 3.

[26] H. Spieker, Humanitarian Assistance, Access in Armed Conflict and Occupation, 2013, in: Max Planck Encyclopedia of Public International Law, at www.mpepil.com.

[27] C. Focarelli, supra note 4, para. 28.

[28] R. Barber, The Responsibility to Protect the Survivors of Natural Disasters: Cyclone Nargis, a Case Study, in: Journal of Conflict & Security Law 14 (2009), pp. 3–34, at p. 4.

The example of the cyclone Nargis and the French attempt to enforce humanitarian assistance reflects that aid is not divorced from politics. After all, besides the humanitarian organizations, a range of other actors such as government representatives, UN organizations or multinational forces are also involved in the provision of aid, all of who pursue political interests.

A key factor in the politicization of humanitarian aid is that when major disasters occur, cooperation between the aid agencies and assisting countries is unavoidable. In such cases, the mandate governing the operation, which is decided at political level, invariably clashes with the principles of independence, impartiality and neutrality that govern the work of humanitarian non-governmental organizations.

Furthermore, the mass media also have a politicizing effect, since politicians and non-governmental organizations are keen to show themselves in a good light. Aid agencies are heavily dependent on donations to carry out their relief operations and rely on the media to broadcast their appeals and reach their target audience. Indeed, humanitarian assistance is popular with the general public in countries that provide relief, and the public offers generous emotional and financial support for 'humanitarian' operations. When it comes to securing a share of the available funds, however, there are no holds barred: all the humanitarian agencies attempt to exert influence and compete to raise their profile via the mass media. This makes it almost impossible to present a more detailed, critical and nuanced picture.

Natural disasters in States governed by military dictatorships should not be seen as an opportunity to voice criticism of conditions in these countries. The cyclone, which caused devastation in Myanmar,[29] for example, became a vehicle for a political campaign against the country's leaders, who had brutally crushed opposition to the regime the previous year. After the cyclone, the country's military leaders refused to allow international aid organizations to operate freely in the country. This prompted sharp criticism from the Western countries, with French Foreign Minister Bernard Kouchner even calling for the R2P to be invoked as the basis for the delivery of humanitarian aid, if necessary against the will of the military government. As a consequence of this campaign, the real issue, namely the relief operation itself, largely faded from view. In fact, humanitarian organizations were able to deliver their aid as far as the—albeit completely overstretched—airport in Rangoon. From there, it was transported into the affected areas by local staff, with whom the aid agencies had been cooperating very effectively for many years.[30] Humanitarian aid workers from Australia said that local staff in Myanmar

[29] OCHA evaluated that 2.4 million people had been directly affected by the cyclone. See USAID, Burma Cyclone – Facts Sheet Number Two, Washington 2008, p. 1.

[30] See concerning the involvement of local specialists the overview by the IFRC, Myanmar: Cyclone Nargis 2008, Facts and Figures, 3 May 2011, at http://www.ifrc.org/en/news-and-media/news-stories/asia-pacific/myanmar/myanmar-cyclone-nargis-2008-facts-and-figures/.

were getting some aid through to people but complained that western specialists and cargo planes had been unable to land and to unload supplies.[31]

The Western political approach did not encourage the Myanmar military leaders to warm to the idea of external assistance. Moreover, the colonial history of the West and their intervention in Iraq did not improve its credibility in the eyes of the paranoid dictators.[32] The politically motivated campaign against Myanmar's leaders tended to disrupt the provision of aid. The fact that the country's leaders used the relief operation to gain the goodwill of the people and therefore concealed the actual origin of the goods by re-labelling them[33] did not alter the fact that aid did arrive in the country and that it was inappropriate to use the crisis as an opportunity to voice criticism of its leaders. The outcome of the political campaign against the military leaders was a regrettable decline in the willingness to donate on the part of the public in the donor States, who had gained the impression that the aid was not reaching the victims.

Politicians must resist the temptation to link humanitarian aid for victims of a natural disaster with political demands for regime change or improvements in the human rights situation. Access to the media must be used solely to draw attention to the humanitarian crisis and thus encourage the general public to give the requisite support to the relief operation. However, besides the issue of politicization one must also take into consideration that a natural disaster, such as Nargis, would be extremely difficult for even the most prepared States to respond to effectively.[34]

4 Right to Humanitarian Assistance

Disasters have a human rights dimension because their consequences can influence the enjoyment of rights by the inhabitants. Disasters have effects on the right to life and on social and cultural rights. Issues like the access to assistance, relocation and property restitution arises. The most important question is that of the right to humanitarian assistance.

The UN considers the right to humanitarian assistance to be part of a new international humanitarian order.[35] The authors of a UN study argue that reference to the right to humanitarian assistance is made in article 25 of the Universal Declaration of Human Rights of 1948 (UDHR) as well as in article 11 of the

[31] See A. McLachlan-Bent/J. Langmore, A Crime against Humanity? Implications and Prospects of the Responsibility to Protect in the Wake of Cyclone Nargis, in: Global The Responsibility to Protect 3 (2011) pp. 37–60, at p. 41.

[32] A. Selth, Even Paranoids Have Enemies: Cyclone Nargis and Myanmar's Fears of Invasion, in: Contemporary Southeast Asia 30 (2008), pp. 379–403, at p. 385.

[33] International Crisis Group, Burma/Myanmar after Nargis: Time to Normalise Aid Relations, Asia Report N° 161, 20 October 2008, p. 8.

[34] A. McLachlan-Bent/J. Langmore, supra note 31, p. 38.

[35] UN Doc. A/61/224, para. 5.

International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR).[36] Moreover a number of human rights treaty norms apply to natural disaster situations, especially those protecting the right to life, the right to food, the right to health services and, more generally, the right to meet the victims' basic needs.

According to the UDHR everyone has the right to a standard of living adequate for the health and well-being of the person and the family. The ICESCR recognises the right of everyone to an adequate level of living, including food, clothing and housing and the continuous improvement of living conditions. The General Comment 12 of the Committee on Economic,

Social and Cultural Rights (CESCR) expressly stipulates that 'this obligation also applies for persons who are victims of natural or other disasters' (para. 15).

The States are, under article 2 ICESCR, obliged to take appropriate measures to ensure the realization of this right. Basically three different kinds of obligations concerning economic, social and cultural human rights can be identified: duties to avoid depriving, duties to protect from deprivation and duties to aid the deprived. The duty to respect requires States not to take measures that are incompatible with human rights. In contrast, the duty to protect requires positive measures by States to ensure that individuals or groups behave consistently with human rights. The duty to fulfil requires States to proactively engage in activities intended to strengthen compliance. This demands an active role of the State in the form of administrative, judicial, budgetary and other measures.[37] The implementation may be resource related, however the State has to utilise all appropriate means and is entitled to international cooperation on a voluntary basis: 'The right to humanitarian assistance depends entirely on the timely and careful identification and evaluation of actual needs. The assistance itself should be designed and monitored regularly, following a thorough assessment of needs, which should be comprehensive and multi-sectoral, and must be based on the participation of all involved parties as well as external experts recruited from the global research'.[38]

As of yet there is no general human rights instrument devoted specifically to the protection of victims of natural disasters. Article 11 of the *Convention on the Rights of Persons with Disabilities* of 30 March 2007 constitutes an exceptional universal provision, which stipulates that contracting States shall take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including the occurrence of natural disasters.[39] The regional *African Charter on the Rights and Welfare of the Child* of 11 July 1990[40] provides that contracting States shall take all appropriate measures to ensure that internally displaced children,

[36] 993 UNTS 3.

[37] E. Riedel, Economic, Social and Cultural Rights, in: C. Krause/M. Scheinin (eds.), International Protection of Human Rights: A Textbook, Abo 2009, p. 133.

[38] UN Doc. A/61/224, para. 6.

[39] Http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx.

[40] OAU Doc. CAB/LEG/24.9/49 (1990).

including in situations of natural disaster, shall receive appropriate protection and humanitarian assistance.

Without doubt, States are, in cases of disaster, under the obligation to take care of the victims. They have in particular a duty to take the necessary measures to prevent the misappropriation of humanitarian assistance and other abuses.[41] This raises the question of whether third States or organizations may provide assistance to prevent gross violations of human rights in cases in which the affected State is not going to protect victims of natural disasters. The 2001 R2P concept of the International Commission on Intervention and State Sovereignty offers a way out of this impasse. The concept applies also in a 'situation of overwhelming natural or environmental catastrophes, where the State concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened' (at para. 4.20). This is the only reference where R2P deals with natural disasters. However this reference is undoubtedly important, because the concept allows military intervention on the part of the international community to protect human beings, should the affected State be unwilling or unable to prevent and to protect its own people.

This produces quite a far-reaching consequence. Thus, many States were reluctant to accept the concept of R2P although it is referred to as an emerging guiding principle and not a legal norm.[42] China and Russia have always been afraid of giving too much power to the international community.[43] This became obvious in the 2005 World Summit Outcome Document. The R2P doctrine indeed appears, but only in relation to genocide, war crimes, ethnic cleansing and crimes against humanity. Natural disasters are left out. The Secretary-General gave the explanation that '[t]he responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity' since '[t]o try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility'.[44]

Nevertheless, some authors argue that R2P should apply to natural disasters, because its approach is in line with the ICJ judgment in the *Corfu Channel Case* of 1949. The Court identified a duty to warn of an impending disaster in order to mitigate its consequences.[45] Other authors consider that refusing to allow international humanitarian aid in cases of natural disasters, like the cyclone Nargis that resulted in the death of 140,000 people, is a crime against humanity and plead that

[41] Institute de Droit International, Resolution on Humanitarian Assistance, 2 September 2003, in: UN (ed.), Annuaire de la Commission du Droit International, Geneva 2004, p. 263.

[42] ICISS, fn. 18, p. 15.

[43] G. Evans, Responding to Atrocities: the New Geopolitics of Intervention, in: Stockholm International Peace Research Institute (ed.), SIPRI Yearbook 2012, Oxford 2012, p. 17.

[44] UN-Doc. A/63/677, para. 10.

[45] ICJ Reports 1949, The Hague 1949, p. 23.

the R2P principle is applicable. They understand the reluctance of the Myanmar Government's fear of foreign intervention, but do not accept it as an excuse for denying foreign presence: 'this should not be accepted as an excuse for denying lifesaving foreign aid in the critical days following the cyclone'.[46]

This argument constitutes little more than wishful thinking, since there is hope that R2P can be used to enforce humanitarian assistance. However, foreign humanitarian assistance cannot be executed within 'days' after a natural disaster that has brought absolute devastation to a State with an underdeveloped and destroyed infrastructure. The first aid has to be given by local actors and the international community has no other choice than to support them. The example proves that it is an unfair expectation to enforce humanitarian assistance by recourse to R2P. Thus, the reluctance of States to apply the R2P concept with respect to natural disasters is no surprise. The Hyogo Declaration 2005 of the World Conference on Disaster Reduction underlined that 'States have the primary responsibility to protect the people and property on their territory from hazards'. Thus they should conduct a national policy consistent with their capacities and the resources available to them. The issue of an intervention by other States on behalf of the international community in case of unwillingness or inability to ensure protection is not mentioned in this document. It seems the document does reflect the state of the art of the discussion on the right to humanitarian assistance.

5 ILC Draft Articles

Against the background of the experiences of the international community in cases like Myanmar or Haiti the ILC codification project inspired expectations. The title of the codification calls for a rights-based approach concerning the treatment to which the victim of a disaster is entitled: 'The rights based approach deals with situations not simply in terms of human needs, but in terms of society's obligation to respond to the inalienable rights of individuals, empowers them to demand justice as a right, not as a charity, and gives communities a moral basis from which to claim international assistance when needed'.[47] This point of origin enables 'victims' to become rights holders and respects the dignity of the individual, which is a customary law of international law.[48]

The ILC project was able to build on the activities of the International Federation of Red Cross and Red Crescent Societies (IFRC), which undertook an evaluation of the existing international and national norms relating to disaster relief by

[46] A. McLachlan-Bent/J. Langmore, supra note 31, p. 59.

[47] UN-Doc. A/CN.4/598, para. 12.

[48] D. S. Patnaik, Towards an International Legal Framework for the Protection of Individuals in the Event of Disasters: An Initial Inquiry, in: H.-J. Heintze/A. Zwitter (eds.), International Law and Humanitarian Assistance, Berlin 2011, pp. 129–141 (134).

implementing its International Disaster Response Laws (IDRL) project.[49] This project dealt with the legal basis of the laws, rules and principles applicable to the access, facilitation, coordination, quality and accountability of international disaster response activities in times of non-conflict related to disasters.

5.1 The R2P Issue

The preliminary report of 2008 dealt with the limitations of the scope of the project *ratione materiae* and the ILC agreed to exclude armed conflicts from the subject matter.[50] The idea was put forward to limit the topic to two phases: the disaster response and the post-disaster phase. The ILC also gave attention to the concept of R2P.[51] However, the relevance in the context of disasters remained unclear for some members. Therefore the Rapporteur decided, in the light of the approach of the UN Secretary-General, to omit this issue. In paragraphs 138 and 139 of the 2005 World Summit Outcome the report of Secretary-General explains that 'the responsibility to protect applies. . .only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility'.[52] Therefore, natural disasters were not included in the 2005 World Summit decision. However, if the treatment of the people in connection with natural disasters meets the criteria of a crime against humanity, as defined in the 1998 ICC statute, R2P again applies.[53] Against this background it is hard to understand the ILC decision to eliminate any discussion of the R2P.[54]

5.2 Definition

After reviewing several definitions of disasters, the Special Rapporteur came to the conclusion that the definition of the 1998 *Tampere Convention on the Provision of*

[49] International Federation of the Red Cross and Red Crescent Societies (ed.), Law and Legal Issues in International Disaster Response: a Desk Study, Geneva 2007.

[50] UN-Doc. A/CN.4/615, para. 6.

[51] I. Winkelmann, Responsibility to Protect, 2010, in: Max Planck Encyclopedia of Public International Law, at www.mpepil.com.

[52] UN-Doc. A/63/677, para. 10 (b).

[53] See R. Thakur/T. G. Weiss, R2P: From Idea to Norm – and Action?, in: Global responsibility to Protect 1 (2009) pp. 22–53 (48).

[54] R. Barber, The Responsibility to Protect the Survivors of Natural Disasters: Cyclone Nargis, a Case study, in: Journal of Conflict and Security Law 14 (1)(2009), p. 3.

Telecommunication Resources for Disaster Mitigation and Relief Operations[55] constitutes a good point of departure for a broader definition of a disaster. His draft definition in article 2 adopts a basic characterization and reads:

> "Disasters" means a serious disruption of the functioning of society, excluding armed conflict, causing significant, widespread human, material or environmental loss.[56]

The advantage of this definition is that it does not distinguish between natural and man-made events and does not demand that the event overwhelm a society's response capacity. Otherwise the definition would shift the attention away from the persons in need of protection. The definition applies in natural and man-made disasters because disasters often arise from complex sets of causes. They include natural and man-made elements. Therefore, it is very often impossible to identify a single cause. This broad definition was well received by States.[57]

5.3 Cooperation

The moral and legal fundament of international humanitarian assistance is the principle of cooperation. The UN Secretary-General has argued that 'the belief in the dignity and value of human beings as expressed in the preamble of the Charter of the United Nations is and must be the prime motive for the international community to give humanitarian assistance'.[58] Rudi Muhammad Rizki, the UN nominated independent expert on human rights and international solidarity held that 'international assistance and cooperation. . .must be oriented, as a matter of priority, toward the realization of all human rights, in particular economic, social and cultural rights, and. . .must respond swiftly and effectively to grave situations such as natural disasters'.[59]

The duty to cooperate is one of the basic principles of international law and can be found in the UN-Charter article 1(3). According to article 55 the UN shall promote 'solutions of international economic, social, health, and related problems; and international cultural and educational cooperation' with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations. Cooperation consecrates the solidarity among nations. Solidarity is a value driven principle and according to Macdonald it constitutes an international legal principle distinct from charity.[60] Solidarity has a

[55] Www.reliefweb.int/telecoms/tampere/index.html.

[56] UN-Doc. A/CN.4/615, para. 45.

[57] UN-Doc. A/CN.4/629, para. 10.

[58] UN-Doc. A/45/587, para. 5.

[59] UN-Doc. A/HRC/9/10, para. 7.

[60] R. St. Macdonald, Solidarity in the Practice and Discourse of Public International Law, in: C. Dominice/R. Patry/C. Reymond (eds.), Etudes de Droit International en l'honneur de Pierre Lalive, Paris 1993.

legal dimension 'because it is increasingly ensuring the cohesion and consistency of the legal order across various branches'.[61] Therefore it is gradually becoming a cornerstone of international law.[62] Against this background the ILC draft article 3 determines a 'duty' to cooperate:

> For the purposes of the present draft articles, States shall cooperate among themselves and, as appropriate, with:
>
> (a) competent international organizations, in particular the United Nations;
> (b) the International Federation of Red Cross and Red Crescent Societies; and
> (c) civil society.

The existence of such obligations means a restriction of the sovereignty of States. Thus, on the one hand the viewpoint of China that cooperation is 'a moral value only' does not surprise.[63] Poland on the other hand argued, that the duty to cooperate refers to a formal framework of protection of persons; solidarity refers to its substance.[64]

5.4 Principles of Protection

The principles that inspire the protection of persons in response to disasters must comply with the interests of the affected State and the assisting actors. The humanitarian principles of humanity, neutrality and impartiality meet these requirements. These principles are critical for ensuring the distinction of humanitarian action from other activities, 'thereby preserving the space and integrity needed to deliver humanitarian assistance effectively to all people in need'.[65] The principles were first codified in international humanitarian law and are now accepted in many international instruments on disasters.[66] The International Disaster Response Law Guidelines of the IFRC[67] refer to the principles and underline that aid priorities are only calculated on the basis of need alone. In *Nicaragua v. United States*,[68] the ICJ stated that the activities of the Red Cross based on the principles are only aimed at protecting life and health and at ensuring respect for the human being.

Neutrality is often described as non-engagement in hostilities or taking sides in the controversies of a political, religious or ideological nature. Valencia-Ospina

[61] K. Wellens, supra note 22, p. 36.

[62] UN-Doc. A/CN.4/629, para. 11.

[63] UN-Doc. A/C.6/64/SR.20, para. 24.

[64] UN-Doc. A/C.6/64/SR.21, para. 77.

[65] UN-Doc. A/64/84.

[66] A. Zwitter, United Nations' Legal Framework of Humanitarian Assistance, in: H.-J. Heintze/A. Zwitter (eds.), International Law and Humanitarian Assistance, supra note 48, pp. 51–70, at p. 60.

[67] S. Mehring, International Federation of Red Cross and Red Crescent Societies, 2010 in. Max Planck Encyclopedia of Public International Law, at www.mpepil.com, para. 3.

[68] ICJ Reports 1986, para. 243.

argues that such an approach applies not only in armed conflicts but also in other disasters in a modified manner. Humanitarian actors should abstain from any activity that might be considered as interference in the interests of the affected State.[69] It is an operational instrument to implement the idea of humanity. All in all it means that humanitarian assistance must not be guided by, or subject to, political considerations.[70]

Impartiality means that the humanitarian assistance is guided only by the needs of the victims. The rights of the affected persons are respected and priority is given to the most urgent cases of distress. Therefore the principle includes the observation of the norms of non-discrimination and proportionality.

Humanity means that human suffering must be addressed wherever it is found. Particular attention must be given to the vulnerable groups and the dignity and rights of all victims must be respected.

In the light of the forgoing draft article 6 reads:

> Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality.

It goes without saying that the principle of humanity is intimately linked to the human dignity. Therefore the ILC draft article 7 claims that the competent international organizations and other relevant actors shall respect and protect human dignity. For the first time, human dignity appears as an autonomous provision in the body of an ILC draft convention.

5.5 Responsibility of the Affected State

States are sovereign entities. Sovereignty covers the whole body of rights and attributes which a State possesses in its territory to the exclusion of all other States, and also in its relations with other States.[71] Disasters do not abolish the sovereignty, thus, other actors are not entitled to interfere into the domestic affairs of the affected State. The primary responsibility to organize humanitarian assistance in the event of a disaster is borne by the affected State. It is responsible for protecting disaster victims and has to facilitate, coordinate and oversee the relief operations in its territory. Any external assistance is therefore subject to the consent of the government of the affected State. Draft article 8 reads:

1. The affected State has the primary responsibility for the protection of persons and provision of humanitarian assistance on its territory. The State retains the right, under its national law, to direct, control, coordinate and supervise such assistance within its territory.
2. External assistance may be provided only with the consent of the affected State.

[69] UN-Doc. A/CN.4/629, para. 29.

[70] Regulation (EC) No. 1257/96.

[71] Corfu Channel Case, ICJ Reports 1949, p. 43.

Many States praised the ILC for striking the proper balance between the protection of victims of disasters and the respect of State sovereignty and non-interference. China underlined that the ILC activities should always be based on full respect for the sovereignty of the affected State and should not allow humanitarian assistance to be politicized or be used as an excuse for interfering in internal affairs.[72] However, Finland argues that the responsibility of the affected State should not remain exclusive.[73] Therefore additional consideration should be given to the affected State's duty towards the international community since inaction could have effects on the territories of its neighbours.

5.6 Duty to Seek Assistance

The affected State undoubtedly has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory. Nevertheless the question arises when the magnitude or duration of a disaster overwhelms its national response capacity. By way of example an analysis of human rights implicated in the context of a disaster is helpful. The human right to food which is codified in the International Covenant on Economic, Social and Cultural Rights (CESCR) of 1966 deserves interest in this connection.[74] The CESCR-Committee notes in General Comment No. 12 that if a State party maintains that resource constraints make it impossible to provide access to food to those in need:

> The State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. . . . A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.[75]

This comment of the CESCR-treaty body underlines that recourse to international help may be an element in the implementation of the obligations of a State party to persons under their jurisdiction where it considers that its own resources are inadequate to meet protection needs.[76]

The International Disaster Response Law Guidelines of the IFRC share that approach by stating: If an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons'.[77] The ILC Draft article 10 reads:

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[72] UN-Doc. A/CN.4/652, para. 13.

[73] UN-Doc. A/C.6/66/SR.21, para. 60.

[74] UNTS 993, No. 14531, p. 3.

[75] UN-Doc. E/C.12/1995/5, para. 17.

[76] UN-Doc. A/CN.4/643, para. 33.

[77] International Federation of Red Cross and Red Crescent Societies, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance 2007, guideline 3(2).

> The affected State has the duty to seek assistance, as appropriate, from among third States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations if the disaster exceeds its national response capacity.

5.7 External Assistance

There is, in general, in cases of disasters a willingness by the affected States to invite external assistance. They agree that international actors have access to the victims, particularly if the authorities are unable to cope with the disaster situation. Even if there are many such cases, one cannot conclude that this practice can be considered as a legal obligation to allow external assistance. Such cases cannot overrule the power of State sovereignty and therefore the consent of the affected State is still needed. According to the sovereignty principle the State is free to refuse the offer of humanitarian assistance.

However, sovereignty is not unlimited because it also includes obligations *vis-à-vis* the victim of such disasters. It has to be exercised in the way that best contributes to protection of persons under the jurisdiction of that State. In conclusion, the rule on consent to humanitarian assistance must be seen in line with human rights obligations of the affected State. Therefore humanitarian assistance should not be rejected arbitrarily. Article 11 reads:

> 1. Consent to external assistance shall not be withheld arbitrarily if the affected State is unable or unwilling to provide the assistance required.
> 2. When an offer of assistance is extended pursuant to draft article 12, paragraph 1, of the present draft articles, the affected State shall, without delay, notify all concerned of its decision regarding such an offer.

6 Conclusion

Literature and State practice offers evidence of the international community's great interest in the topic of humanitarian assistance in the event of disasters. Therefore one has to welcome the attempt by the ILC to codify legal principles applicable in natural and man-made disasters. The undertaking will help to improve the efficiency and quality of humanitarian assistance and mitigate the damages of the disasters. Many States praised the ILC draft for striking the proper balance between the protection of the victims and the respect of State sovereignty and non-interference. The importance of international solidarity was also emphasized by many States. Indeed, the draft convention does reflect the viewpoints of the States and does not meet all the demands of Non-State actors being involved in humanitarian assistance. However, the topic is now on the agenda and the draft articles are a starting point for further discussion and new interpretations of the obligations of affected States, the right to offer assistance and the duty of the affected State not to arbitrarily withhold its consent to external help.

Non-refoulement in International Refugee Law, Human Rights Law and Asylum Laws

Charlotte Lülf

1 Introduction

Recent armed conflicts in Syria, Libya, Sudan and Afghanistan, and similarly the increasing occurrence of natural disasters, such as the earthquake in Haiti, result in massive displacement of people within the affected country or across international borders. At the end of 2014 the United Nations High Commissioner for Refugees ('UNHCR') estimated the number of global refugees under its mandate to be 11.7 million, with a general displacement of 51.2 million individuals worldwide.[1] Refugee protection matters in their every manifestation lay at the centre of both fundamental but often opposing principles of international law, on one side the principles of State sovereignty and territorial supremacy and on the other side the humanitarian ideas of the international community framed in States' obligations under international treaties.[2] Additionally, the legal framework for the protection of refugees circles around the 1951 Convention on the Status of Refugees and its 1967 Protocol, in its broader application, however, refugee protection is composed of intersecting and mutually reinforcing rights and duties stemming from different fields of international law, to a great extent international human rights law, asylum laws and international humanitarian law. To clarify the various scopes and contents and identify beneficiaries of single provisions is essential to provide for a comprehensive protection of Convention and non-Convention refugees. This article will

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[1] UN High Commissioner for Refugees (UNHCR), Mid Year Trends 2014, p. 3.

[2] G. S. Goodwin-Gill/J. McAdam, The Refugee in International Law, Oxford 2007, p. 1.

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address the specifics of one of the major principles of refugee protection, the principle of non-refoulement.

Over the last years one has witnessed how different measures have been employed by States to restrict the number of migrants, in particular those reaching Europe. Even legal instruments, as the contested Treaty of Friendship, Partnership and Cooperation between Italy and Libya of 30 August 2008[3] have been concluded, whose provisions more than often facilitate breaches of the non-refoulement principle by the parties involved—without assessment of the individual entitlements of the potential refugees.[4] Refoulement measures vary from expulsion or deportation orders or intersections and push-offs at the high sea that lead to forcible return to the country of origin or any other unsafe third country. It does seem as if Byrne and Shacknove's statement of 1996 'Refugee law remains the unwanted child of States',[5] must still be considered valid.

Non-refoulement, as the term commonly used by scholars and practitioners, refers generally to a principle that is defined in a number of international and regional treaties of international law. It prohibits the return, expulsion or extradition of a person to a State's territory where the person's most fundamental human rights are at risk. As State practice has shown, a wide set of measures have been employed that have raised the question of whether they must be considered as refoulement or not. It has been heavily debated whether refoulement includes rejection at the frontier.[6] Most importantly, conduct of implicit refoulement, removing persons to State's from which they are highly likely to be refouled in a second step must be assessed, as it questions the effective application of the principle.[7]

'The' principle, however, differs depending on the various legal sources by which it is enshrined, and herewith differs also in its scope, its wider content, the group of beneficiaries and the addressees of its obligatory nature.[8] The traditional refugee law framework established by the 1951 Convention intrinsically links the principle of non-refoulement to the determination of refugee status and therefore to the core definition of a refugee. A protection gap for the wider group of fleeing

[3] See for discussions of the treaty N. Ronzitti, The Treaty on Friendship, Partnership and Cooperation between Italy and Libya, in: Bulletin of Italian Politics 1 (2009), pp. 125–133. Practice of other European States, M.-T. Gil Bazo, The Practice of Mediterranean States in the Context of European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited, in: International Journal of Refugee Law 18 (2006).

[4] F. Messineo, Non-Refoulement Obligations in Public International Law: Towards a New Protection Status?, in: S. S. Juss (ed.) Research Companion to Migration Theory and Policy, Farnham 2011, p. 3.

[5] R. Byrne/A. Shacknove, The Safe Country Nation in European Asylum Law, in: Harvard Human Rights Journal 187 (1996).

[6] G. S. Goodwin-Gill/J. McAdam, supra note 2, pp. 206–208; J. C. Hathaway, The Rights of Refugees under International Law, Cambridge 2005, pp. 315–317.

[7] K. Wouters, International Legal Standards for the Protection from Refoulement, Antwerp 2009, pp. 140–147.

[8] F. Messineo, supra note 4, p. 4.

people has historically existed and is currently, although slowly and often reluctantly, being tackled. The UNHCR continuously generates pressure to expand its mandate. In Africa and Latin America a wider definition of the term 'refugee' has been introduced into the regional refugee law frameworks and therewith a wider group of people benefits from refugee rights.[9] And within the European Union a common system of subsidiary protection has been constructed to integrate a wider group of non-Convention refugees.

In light of State practice and the severe consequences, and on the other hand the net of not-refoulement obligations in international law, it is essential to clarify the specific content and scope of the principle of non-refoulement and compare the different sources establishing it. Therefore this article will in a first step address and compare the existing obligations of non-refoulement under the 1951 Refugee Convention and Human Rights Law with a focus on their application in Europe in comparison. Apart from the treaty obligations, their status as custom or even *jus cogens* will furthermore be discussed. In a last step the common asylum system of subsidiary protection within the European Union will be in focus as it provides for a parallel but reliant additional framework.

2 One Principle in Its Divergent Designs: Non-refoulement Obligations in International Refugee Law and Human Rights Law

2.1 International Refugee Law: The 1951 Refugee Convention

Traditionally international refugee law most strongly reinforces rights of refugees and obligations of States for the protection of people being persecuted. Their legal protection is built around the 1951 Convention Relating to the Status of Refugees and its 1976 Protocol. The most prominent provision codifying the principle of non-refoulement at the universal level is incorporated in article 33 (1):

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Non-refoulement in article 33 does not carry the right of individuals to be granted asylum in Member States to the 1951 Convention. However the duty to ascertain that the people in need of international protection were granted a fair and

[9] See in comparison Article 2 (3) of the 1969 OAU Refugee Convention or the Cartagena Declaration.

efficient asylum procedure was emphasized by the UNHCR[10] and the Executive Committee[11] as fundamental requirement for the application of the Convention and its Protocol.

Due to its special importance for the legal protection of refugees, no reservations to this Article are permitted, as explicitly stated in article 42(1) of the Convention in conjunction with article 7 of the 1967 Protocol. Along with four other substantive exclusions concerning article 1 (Definition of the Term 'Refugee'), article 3 - (Non-Discrimination), article 4 (Religion), article 16 I (Access to Courts), the prohibition of non-refoulement creates an exception to the general permission of reservations contained in article 42.

The principle of non-refoulement as the cornerstone provision contained in the 1951 Refugee Convention, however, is intrinsically linked to the determination of refugee status, therefore also to the discussed definition of the term 'refugee'. In essence, this is a person crossing an international border due to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (article 1A(2)). Among legal scholars, the debate about the application *ratione personae* arose, discussing the wording of article 33 in comparison to Article 1A(2) of the Convention. Article 33 established protection for 'refugees', independent, as the UNHCR assessed, of the formal recognition of their refugee status.[12] Thus, determining refugee status is only of declaratory nature and the principle is binding prior to the formal recognition of their refugee status. This protection granted during pending procedures was explicitly acknowledged by the UNHCR Executive Committee in Conclusion No. 6 and the importance of that has subsequently been restated by the UNHCR.[13]

In comparison to the refugee definition established in article 1A(2), the US Supreme Court and one group of scholars argued for deviating thresholds. They considered article 1 being broader than article 33. The other line of argumentation favored a narrow interpretation of article 1, focusing on the criterion of individualized persecution and therewith also a narrow interpretation of article 33.[14] In the end, the prevailing opinion found among scholars and herewith following the line of argumentation one can find in the *travaux preparatoires*, the scope of article 33 should reflect that of article 1A(2), establishing a non-refoulement protection for those persons fulfilling the defining article. This interpretation has again in recent

[10] UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, paras. 4–5.

[11] Executive Committee, Conclusion No 81 (XLVIII) "General" (1997), para h; Conclusion No 99 (LV), "General Conclusion on International Protection" (2004), para. 1.

[12] Para C, UNHCR ExCom No 6 (1977).

[13] UNHCR, Note on the Principle of Non-Refoulement, November 1997, at http://www.refworld.org (accessed on 22 April 2014).

[14] E. Lauterpacht/D. Bethlehem, The Scope and Content of the Principle of Non-Refoulement, in: E. Feller/V. Türk/F. Nicholson (eds.), Refugee Protection in International Law, Cambridge 2003, pp. 124–126.

years been criticized as too narrow, for instance by Gallagher, stating 'these restrictive definitional efforts were motivated to keep the numbers down'.[15]

However, deviating from the terminology of the Refugee Definition of Article 1A(2), 'well-founded fear of persecution (...) in the country of his nationality', article 33 (1) expands the protection concerning refoulement to countries 'where his life or freedom would be threatened' and therewith includes, beside the refugee's country of origin, any country where he might fear persecution.[16]

The wording 'in any manner whatsoever' lies at the centre of debates on the protection standards *ratione materiae*. A restrictive and narrow interpretation of the terms has been brought forward, arguing that extradition or rejection at the frontier would not be included.[17] Not only the UNHCR Executive Committee but also the majority opinion of legal scholars, among others Lauterpacht and Bethelehem, stipulated the importance of including acts ranging from expulsion, deportation, extradition and rejection at the frontier, particularly by reference to the humanitarian object of the Convention. In Conclusion No. 6 the Executive Committee again stressed 'the fundamental importance of the observance of the principle of non-refoulement, both at the border and at the territory of a State'.[18]

The principle of non-refoulement as enshrined in article 33 has some legitimate exceptions that restrict its application. These mirror, in particular, national security concerns. Article 33 (2) of the 1951 Convention establishes that no entitlement can be claimed if 'there are reasonable grounds for regarding as a danger to the security of the country (or by someone) having been convicted by a final judgment of a particularly serious crime (that) constitutes a danger to the community of that country'.[19]

The first requirement to establish a legitimate exception, the national security concerns, is itself in need of clarification. The determination of such a security threat lies first and foremost in the hands of national authorities. However, already in 1977, the European Court of Justice interpreted in its *Regina vs. Bouchereau* Judgment that a genuine and sufficiently serious threat to the requirements of public policy must be established, more explicitly, one that was affecting one of the most fundamental interests of the society concerned. Taking into consideration State practice as well as the *travaux preparatoires* of the Refugee Convention, one can interpret that isolated threats to law and order would not amount to national security exceptions to non-refoulemnent.[20]

The conviction for a particularly serious crime exception to article 33 is and has to be interpreted in a very strict and narrow sense, as has been specifically stated in

[15] D. Gallagher, The Evolution of the International Refugee System, in: International Migration Review 23 (1989), p. 581.

[16] UNHCR, supra note 13.

[17] E. Lauterpacht/D. Bethlehem, supra note 14, p. 112.

[18] Conclusion No 6 XXVIII 1977, para c.

[19] Article 33 (2) 1951 Refugee Convention.

[20] European Court of Justice, Reg. vs Bouchereau, 27 October 1977, C-30/77, para. 35 ff.

the Executive Committee Conclusion No. 7. Even more and taking into account the serious potential consequences for the expelled, a proportionality test between on the one hand, the danger to security of the society or the gravity of the crime and on the other hand the danger or persecution feared after expulsion, has to be carried out. The UNHCR considers this exception as a last resort, declaring that article 33 (2) would only refer to such crimes where one or several convictions would be symptomatic of the basically criminal and incorrigible nature of the persons.[21] Additionally, preventing the danger to the community would not be effectively established by simply detaining or resettling the perpetrator.[22] This obligation is to be read in conjunction with the articles 31 and 32, establishing the State's duty to allow for a reasonable time period and facilities for the person to be granted admission to another country.

2.2 International Human Rights Law

International Human Right Law in various different legal instruments codifies the principle of non-refoulement and therewith supplements the protection granted by refugee law. The main contribution and difference is that it addresses persons irrespective of their status under refugee law. The 1984 UN Convention against Torture (CAT) prominently lays down in article 3 that State Parties shall not expel, return or extradite a person to another State, where there are substantial grounds for believing there would be a danger of being subjected to torture, as defined in article 1 CAT. In comparison to the prohibition of refoulement as established by refugee law, the Torture Convention establishes an absolute and non-derogable protection. Article 2 (2) CAT clarifies that:

> No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

However, this absolute prohibition is limited on two accounts: On the one hand it is by definition of article 1 strictly limited to prohibited conduct committed by State actors, '(. . .) when such pain is inflicted by or at the instigation of or with consent or acquiescence of a public official or other person acting in an official capacity'. One the other hand, and with regards to the specific conduct, solely torture, not encompassing inhuman or degrading treatment, is addressed. Eligibility under article 3 CAT is given in cases where asylum seekers are able to establish a prima facie case of 'forseeable, real and personal risk' of torture in the country of destination.[23] Based on its jurisdiction under article 22, the Committee against Torture, the CAT monitoring body, reviews complaints of rejected asylum seekers.

[21] J. C. Hathaway, supra note 6, p. 352.

[22] UNHCR, supra note 13.

[23] See CAT, EA v Switzerland, Comm No 28/1995, UN Doc. CAT/C/19/1995, para. 11.5.

Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearances entails another explicit prohibition of non-refoulement: '1. No State Party shall expel, return ('refouler'), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance', although limited to the conduct of enforced disappearance.

Two more important non-refoulement obligations have to be discussed, although they have not been explicitly established by the respective instrument but brought to the fore by broadly interpreting the respective provision.

The International Covenant on Civil and Political Rights ('ICCPR') prohibits non-refoulement in article 7. Reading article 7, however, one does not find any of the previously discussed phrasing: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'. But the Human Rights Committee as its monitoring and interpreting body, held in its General Comment on The Nature of the General Legal Obligation on State Parties to the Covenant in 2004:

> Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.

For Europe the most important human rights instrument is the European Convention of Human Rights and Fundamental Freedoms ('ECHR') that establishes a broad, although again implicit prohibition. There is no concrete wording on an obligation of non-refoulement, but, as it is commonly recognized by European and national courts, the removal of persons will constitute a breach of the European Convention's article 3: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

Article 3 prohibits the return of anyone to a place where they would face 'real and substantiated' risk of ill-treatment in breach of the prohibition of torture or inhuman or degrading treatment or punishment, therewith limiting the parties to the convention to expel aliens from their State's territory. Article 3 ECHR has been subject to a high number of judgments first and foremost by the European Court of Human Rights (ECtHR), addressing the scope and content of the prohibition. The *Soering* and *Cruz Varas v Schweden* Cases of 1989 and 1991 can be considered starting points.[24] The Court held in *Soering*[25] that extradition to a country where the

[24] For more details see N. Mole/C. Meredith, Asylum and the European Convention on Human Rights, Strasbourg 2010, pp. 19–80.

[25] "The decision by a Contracting State to extradite a fugitive may give rise to an issue under art. 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of

applicant would be executed for criminal offences would 'expose him to a real risk of treatment going beyond the threshold set by article 3'.[26] Much wider in scope than article 3 CAT, article 3 ECHR encompasses inhuman or degrading treatment without accepting limitations or establishing exceptions, as strongly reaffirmed by the court, for instance in *Saadi v Italy*: 'As the Court has repeatedly held, there can be no derogation from that rule'.[27]

There have furthermore been a number of judgments assessing the exact scope of the broad phrasing of article 3 in relation to socio-economic rights. The scope of ill-treatment in the country of destination was analyzed as to whether it would include lack of medical care. In *D v UK* concerning the return of a HIV patient in his last stages from the UK to St Kitts, the court held the threshold of ill-treatment under article 3 would be reached only in exceptional circumstances.[28] In its judgment the court considered this threshold met, in comparison to *N v UK*, where the bench ruled that the return of the applicant, because she was not in the last stages of illness and could find adequate care with her family, would not violate article 3 ECHR.[29]

Interestingly, and in analogy to the discussion surrounding article 7 ICCPR, it has been addressed by the Court itself whether to recognize other Convention Rights, articles 2, 5, 6, as implicitly establishing non-refoulement obligations. Violations of article 6 for instance, so the Court, would arise in exceptional cases, i.e., 'flagrant denial of justice' in cases of refoulement. This was established in *Othman v UK* with regard to evidence obtained by torture.[30] The Court denied a similar argumentation of interpreting specific non-refoulement obligations in the Articles 8 and 9 as they would naturally be included in any violation of article 3.

Assessing the nature of non-refoulement obligations contained in human rights treaties in comparison to the 1951 Refugee Convention one can consider them as expanding the protection granted. McAdams held 'the role of human rights law in broadening the categories of persons to whom international protection is owed beyond article 1 A (2) of the Refugee Convention'.[31] Apart from the personal scope of application their absolute and non-derogable character differs from that of article

being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. (. . ..) In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment", ECtHR, Soering v United Kingdom, 7 July 1989, Appl. No. 14038/88, para. 91.

[26] ECtHR, Soering v United Kingdom, supra note 25.

[27] ECtHR, Saadi v Italy (Merits) (GC), Appl. No. 37201/06, para. 138.

[28] ECtHR, D v United Kingdom, 2 May 1997, Appl. No. 30240/96, paras. 53 f.

[29] ECtHR, N v United Kingdom, 27 May 2008, Appl. No. 26565/05, paras. 42–51.

[30] Id., paras. 260 f.

[31] J. McAdam, Seeking Refuge in Human Rights? Qualifying for Subsidiary Protection in the European Union, Forced Migration Online, at http://www.forcedmigration.org/pdf/events/prague2004/mcadam-paper.pdf/view.
(accessed on 12 April 2014), p. 2.

33 Refugee Convention, which allows for certain restrictions and exceptions. Treaty law in general, however, is restricted by the principle of consensus and therewith also its territorial scope of application. Concerning refugee rights this aspect is of utmost importance keeping in mind the refugee escape routes, practices of push backs and rejection and their often deadly consequences for instance in the 'cemetery'[32] Mediterranean Sea.

2.3 *The Extraterritorial Application of Refugee and Human Rights Law Treaties*

The matter of potentially extraterritorial application of refugee law has become highly controversial within the last 20 years with a growing attempt by States to restrict access to their territory and access to asylum-procedures by 'sending their non-refoulement obligations offshore'.[33] Amnesty International estimated that around 130,000 migrants crossed the Mediterranean Sea in 2014,[34] with hundreds to thousand people dying. These incidents often occur as result of a legal grey area or overlapping responsibilities that are exploited by States in their quest to hinder access to the European Union Territory.[35] Rejection at frontier was a matter of discussion already at the Conference of Plenipotentiaries, where several delegations rejected the idea, stressing that any non-refoulement obligation would arise solely after crossing a State's border. This argumentation was based on the lack of a right of asylum contained in the Convention.[36] The application of treaties solely on the State's territory and therewith the argumentation, refugee and human rights treaties would not apply outside of their territory, has traditionally been the general assessment of treaty law application.

In 1927 the Permanent Court of Justice held: 'Now, the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it must not exercise its powers in any form in the territory of another State. In this sense jurisdiction is certainly territorial.

[32] Mediterranean 'a Cemetery' – Maltese PM Muscat, BBC News Europe, 12 October 2013, at http://www.bbc.com/news/world-europe-24502279 (accessed on 25 April 2014).

[33] Justice AM North, Extraterritorial Effect of Non-Refoulement, International Association of Refugee Law Judges World Conference, 7–9 September 2011, Bled, Slovenia, at p. 2.

[34] The Death Toll in the Mediterranean Rises While Europe Looks the Other Way, Amnesty International, at http://www.amnesty.org/en/news/death-toll-mediterranean-rises-while-europe-looks-other-way-2014-09-30 (accessed on 2 December 2014).

[35] Mediterranean the Deadliest Sea for Refugees and Migrants, Says UN Agency, UN News Center, 31 January 2012, at http://www.un.org/apps/news/story.asp?NewsID=41084&#.U2pVW1e7UmM (accessed on 25 April 2014).

[36] G. S. Goodwin-Gill/J. McAdam, supra note 2, pp. 206–208.

It cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention'.[37]

This traditional definition of jurisdiction, based on territoriality, has been upheld also in decisions of different bodies. Between 1981 and 1991 around 25,000, and following the downfall of President Aristide another 34,000, people fled and were intercepted by US border authorities in only 6 months. The Executive Order of President Bush, mandating the Coast Guard to intercept and return vessels to Haiti explicitly authorizes forced repatriation to be undertaken only beyond the territorial sea of the United States',[38] thus holding that article 33 (1) would not apply to persons outside the territory of the US. In reference to legal experts, inter alia Robinson and Goodwin-Gill, the Court at that time in its *Sale* Judgment affirmed: 'A treaty cannot impose uncontemplated exterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions towards aliens outside its own territory, it does not prohibit such actions'.[39] This assessment of article 33(1) was followed by subsequent judgments.[40] These judgments following the *Sale* argumentation were ever since highly criticized by scholars and practitioners, among others by Hathaway, Goodwin-Fill or McAdam.[41]

In 2007 the UNHCR, directly contradicting this argumentation, published its Advisory Opinion of the Extraterritorial Application of Non-Refoulement Obligations under the Convention. The High Commissioner, in a complete rejection of the *Sale* argument and subsequent jurisprudence, emphasized the cross-fertilization of human rights law and refugee law: 'The reasoning adopted by courts and human rights treaty bodies in their authoritative interpretation (. . .) is relevant also to the prohibition of non-refoulement under international refugee law, given the similar nature of the obligation and the object and purpose of the treaties which form their legal basis (. . .) The decisive criterion is not whether such persons are on the State's territory, but rather, whether they come within the effective control and authority if that State'.[42] The question was whether one could adapt the human rights treaty

[37] Permanent Court of International Justice, S. S. Lotus (France vs Turkey), 7 September 1927, at p. 19.

[38] Executive Order 12887 "Interdiction of Illegal Aliens", at http://www.uscg.mil/hq/cg5/cg531/amio/eo12807.pdf (accessed on 17 November 2014).

[39] United Nations Supreme Court, Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al v Haitian Center Council, Inc, et al, 509 US 155, 21 June 1993, p. 158.

[40] United Kingdom House of Lords (Judicial Committee), Regina v Immigration Officer at Praque Airport and Another, Ex parte European Roma Rights Centre and Others (2204), UKHL 55, 9 December 2004.

[41] J. C. Hathaway, supra note 6, pp. 336–339; G. S. Goodwin-Gill/J. McAdam, supra note 2, pp. 247–248.

[42] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, at http://www.refworld.org/pdfid/45f17a1a4.pdf (accessed on 2 April 2014).

interpretation to another field of international law. In support of this argumentation and the position of the UNHCR, the International Law Commission reported 'Article 33(3)(c) (of the Vienna Convention on the Laws of Treaties) also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty (. . .) or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation (. . .)'.[43]

As stated by the UNHCR in its Advisory Opinion, the reasoning behind the application of human rights treaties has changed over the last decades. The European Court of Human Rights denied any extraterritorial application of the European Convention of Human Rights in the renowned *Bankovic and Others v Belgium* case in 2001 by reference to the territorial notion of jurisdiction, which was highly contested. However, following that decision, a changing and expanding trend can be witnessed, one that is promoting a different interpretation, concerning human rights treaties and their special character, more precise their special object and purpose.

The International Court of Justice held in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Territories* that 'while the jurisdiction of States is primarily territorial, it may sometimes be exercise outside of the national territory. Considering the object and purpose of (the ICCPR), it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions (. . .)'.[44] Extraterritorial jurisdiction is here conceived as an expansion of the original territorial area of application to every conduct of a State, party to the respective human rights treaty, which could amount to a violation of its international obligation and was committed outside of its territory. This development was specified inter alia by the *Al-Saadoon and Mufdhi v the United Kingdom* case in 2009, where the court stated that prisoners of war held in Iraq by the British forces were actually under the British jurisdiction. The United Kingdom's exclusive *de facto* control would entail also its *de jure* jurisdiction.[45] This argumentation has been widely adopted by international, regional and national courts and therefore constitutes a solid basis for the extraterritorial application of human rights treaties and in analogy of the 1951 Refugee Convention. Non-refoulement, as contained in these treaties, is therefore applicable also outside the territories of State parties in cases where States have effective control and therewith *de facto* jurisdiction over people. Rejecting fleeing people or initiating pushbacks at high sea does not circumvent the States' obligation of non-refoulement.

[43] ILC, Report 58th session, 1 May – 9 June and 3 July – 11 August 2006, UN Doc. A/61/10, pp. 414–415.

[44] International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2003, p. 109.

[45] ECtHR, Al-Sadoon and Mufdhi v United Kingdom, 2 March 2010, Appl. No. 61498/08, p. 162.

2.4 The Customary Nature of Non-refoulement Obligations

Apart from the divergent treaty provisions establishing non-refoulement obligations for parties to the treaty, it must be questioned whether a principle of non-refoulement can also be found in customary international law, as a general practice accepted as law by the States.[46] Non-refoulement can here be considered under two pillars, as custom established under refugee law as well as a customary obligation stemming from human rights law.

The UNCHR and the Executive Committee Members argued for the customary character of the principle as enshrined in article 33 of the Refugee Convention. Nowadays the prevailing opinion of legal scholars tends towards affirming the crystallization of article 33 into a customary law norm. As Messineo argues with Kirgis, the acceptance of the customary status of non-refoulement 'is so overwhelming that one may even argue (...) that the requirement of State practice should consequently be sensibly reduced'.[47] Reference to this overwhelming evidence of *opinio juris* can be found in Declarations of States. The 2001 Declaration UN Doc HCR/MMSP/2001/09(2001), paragraph 4, '[a]cknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of non-refoulement, whose applicability is embedded in customary international law' was systematically reaffirmed by the Executive Committee and approved also by the General Assembly in its Resolutions A/Res/41/124 (1986), A/Res/42/109 (1987) and more recently A/Res/194 (2010) and A/RES/65/193 (2010).[48]

A major argument that is often used by legal scholars, based on the Courts argumentation in *Nicaragua v United States*, is that justifications or arguing for exception or non-application of norms by States, counts as argument for its binding character and not to the contrary.[49] Some scholars, very prominently Hathaway, argue against this reading and themselves call for evidence of more or less universal State practice in form of actual practical conduct of States.[50] The more generally excepted view on the requirement of State practice for the establishment of custom understands, by reference to article 38(b) ICJ Statute, practice as being general rather than truly universal. Even in light of violations of non-refoulement during

[46] International Court of Justice, North Sea Continental Shelf Case, 20 February 1969, ICJ Rep. 1969, paras. 70 ff.

[47] F. Messineo, supra note 4, p. 18.

[48] Executive Committee, Conclusion No 6 on Refoulement.

[49] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs United States of America) (merits), 27 June 1986, ICJ Rep. 1986, 14, para. 186, para 77. Nicaragua.

[50] J. C. Hathaway, Leveraging Asylum, in: Texas International Law Journal 45 (2010), pp. 515–527.

contemporary practice it must be considered as widespread and consistent[51] and therewith one can consider it a crystallization of article 33.

Apart from article 33 one has to similarly question the potential customary character of the principle of non-refoulement in human rights instruments as article 3 CAT or article 3 ECHR. One can argue again along the lines of traditional customary law nature based on *opinio juris* and State practice as has been done for article 33. *Opinio juris*, regarding the obligation of non-refoulement to countries where people will subsequently risk being tortured, can be found in numerous declarations and resolutions by the UN General Assembly, the UNHCR Executive Committee Conclusions or the Human Rights Committee.[52]

Another argumentation concerning the customary character of the principle is based on Lauterpacht and Bethlehem and the ECtHRs judgment on article 3 also supports this reading. Non-refoulement is considered an intrinsic part of the prohibition of torture and inhuman and degrading treatment and its customary nature follows from the customary nature of the primary obligation not to torture. The customary obligation under human rights law can therefore be considered a result of State practice and *opinio juris* concerning the prior recognized customary prohibition of torture and inhuman and degrading treatment.[53]

The majority opinion without doubt accepts non-refoulement as part of customary international law, thus binding States whether they are parties to the respective treaties or not.[54]

2.5 *The Potential* Jus Cogens *Character of Non-refoulement*

The potential *jus cogens* character of a non-refoulement obligation must be considered in a final step. Can non-refoulement be considered a peremptory norm, one from which no derogation is allowed? The normative value of a *jus cogens* and its relationship to other norms of international law is *inter alia* laid down in the articles 53–64 of the 1969 Vienna Convention on the Laws of Treaties, determining the difference of *jus dispositivum* and *jus cogens*.

The Articles on State Responsibility, in particular through special Rapporteur James Crawford, emphasized the meaning of jus cogens norms. The article 40 (Application of this Chapter), article 41 (Particular Consequences of a Serious Breach of an Obligation under this Chapter) and article 50 (Obligation not affected by Countermeasures) deal with international responsibility for breaches of an

[51] Ibid.

[52] See among others UNGA Resolution 37/95 of 18 December 1982, 48/116 of 21 December 1993.

[53] A. Duffy, Expulsion to Face Torture? Non-Refoulement in International Law, in: International Journal of Refugee Law 20 (2008), p. 388.

[54] G. S. Goodwin-Gill/J. McAdam, The Refugee in International Law, 2nd ed., Oxford 1996, pp. 166–167; J. Allain, The Jus Cogens Nature of Non-Refoulement, p. 538.

obligation arising under a peremptory norm. The main question regarding the general nature of *jus cogens* is, how to identify this highest normative character of a norm as such and as a second step determine whether non-refoulement can be considered so essential to the international system that every violation of that norm would threaten the very existence of the system itself.

A *jus cogens* norm requires the fulfillment of two cumulative criteria, its acceptance 'by the international community as a whole' and 'as norm from which no derogation is permitted'. The question is whether States refrain from refoulement because they consider being bound by *jus cogens*. In an early study of 1988 Lauri Hannkainen completely rejected the notion of an article 33 as *jus cogens* norm. This was done by reference to the exceptions contained in article 33 (2), as discussed under Sect. 2.1, inherently incorporating the possibility of a derogation.[55] Apart from the fact that the principle has afterwards been enshrined in other treaties without the exception made by the 1951 Convention, the subsequent assessment tends towards the contrary.

The Executive Committee in its conclusions assesses the character of non-refoulement on the international plane and so does the UNHCR.[56] In particular the conclusion of the Executive Committee can be considered as guiding opinion, as the committee consists of the Member States of the UNHCR and thus of the States affected and bound by the major refugee law instrument. For the first time in 1989 the Committee in its Conclusion No. 25 considered the normative character of the non-refoulement principle and already then held that the principle 'was progressively acquiring the character of a peremptory rule of international law'.[57] In 1996 they then explicitly stated that the 'principle of non-refoulement is not subject to derogation'.[58] Additional State practice explicitly declaring the *jus cogens* nature of the non-refoulement principle can be found in regional instruments as the Cartagena Declaration on Refugees, and with that also influences the practice of international bodies concerned as the Inter-American Commission on Human Rights or the OAS General Assembly.[59]

Contrary State practice and violations of the non-refoulement principle also here must be subjected to the land-mark argumentation of the International Court of Justice: 'The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule

[55] L. Hannkainen, Preemptory Norms (Jus Cogens) in International Law, Helsinki 1988, pp. 261–263.

[56] Executive Committee, Conclusion No. 25 para. b; UN Docs. A/AC.96/694 para. 21; A/AC.96/660 para. 17; A/AC.96/643 para. 15; A/AC.96/609/Rev.1 para. 5.

[57] Executive Committee, supra note 56.

[58] Executive Committee, Conclusion No 79 "General Conclusion on International Protection", 1996; Executive Committee, supra note 49, para. (c).

[59] J. Fitzpatrick, Temporary Protection of Refugees: Elements of a Formalized Regime, in: American Journal of International Law 284 (2000); H. Koh, The Haitian Center Council Case: Reflections on Refoulement and Haitian Center Council, in: Harvard International Law Journal 30 (1994).

(. . .) instances of State conduct inconsistent with a given rule should generally have been treated as a breach of that rule, not as indication of the recognition of a new rule',[60] and the bench went further, stating '[i]f a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule'.[61]

Messineo goes further in considering whether one cannot adopt the same argumentation for the nature of a non-refoulement principle towards torture as *jus cogens*.[62] This however must be understood as 'navigating through murky waters', as the States' reaction to this final step of argumentation is highly controversial.[63]

Given the oft debated character of non-refoulement, and in light of the various treaty instruments and customary character of non-refoulement, one has to question whether it is truly necessary to also attribute a *jus cogens* value to the principle. These considerations hold, as a general practice of the international community seems to publicly reject refoulement and justify possible breaches in single cases. The importance of assessing the exact nature of the principle, however, does become quite important in cases where the international community seems to lean towards a mild version of refoulement. This has been the case over the last few years whenever questions of migration flows as potential security issue for the countries of destination arise.

In 1991 the Security Council in its Resolution 688 regarding the situation of Iraqi Kurds fleeing to Turkey and Iran stipulated the 'massive flow of refugees towards and across international frontiers (. . .) threaten international peace and security in the region'.[64] The Resolution does not express any direct demand for refoulement. In the latter practice, however, it did enhance pressure on the Turkish government to provide assistance and care while at the same time reprimanding their closed border policy.[65] Indirectly and in consideration of the effects of the Security Council Resolution, it did foster refoulement. The Security Council Resolution, therewith, indirectly contributed to a potential violation of the principle of non-refoulement and was heavily criticized as ambiguous and controversial by scholars.[66]

Lauterpacht addressed this conflict: 'Now, it is not to be contemplated that the Security Council, would ever deliberately adopt a resolution clearly and deliberately flouting a rule of jus cogens (. . .) But the possibility that a Security Council

[60] International Court of Justice, supra note 49, para. 98.

[61] Ibid.

[62] F. Messineo, supra note 4, p. 22.

[63] Ibid.

[64] UN SC, Resolution 688 (1991) of April 1991.

[65] F. Teson, Collective Humanitarian Intervention, in: Michigan Journal of International Law 17 (1996), p. 344.

[66] G. S. Goodwin-Gill/J. McAdam, supra note 54, p. 289.

resolution might inadvertently or in an unforeseen manner lead to such a situation cannot be excluded'.[67] Binding Security Council measures under Chapter VII would demand States' follow their obligations arising under the Council's resolution, as article 103 holds that in cases of conflicts between the UN and a State's 'obligations under any other international agreement (...) Charter shall prevail'.'(T)he concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of a conflict between one of its decisions and an operative treaty obligation cannot – as a matter simply of hierarchy of norms – extend to a conflict between a Security Council Resolution and *jus cogens*. Indeed one only has to state the opposite thus – that a Security Council resolution may even require participation in a genocide – for its unacceptability to be apparent'.[68] This example clearly illustrates the importance of determining the nature of the non-refoulement principle.

The next question arising from consideration of the various sources and scope of the principle of non-refoulement, as discussed in the previous subchapters, is to determine the exact phrasing a *jus cogens* norm of non-refoulement would have. This question still remains unanswered and even though evidence points towards assessing non-refoulement as *jus cogens*, no clear and generally accepted majority opinion can be identified yet.[69]

3 Non-refoulement in European Asylum Law

3.1 Non-refoulement in Union Law

Since the establishment of the European Union the protection complementary to the Refugee Convention has differed widely between the European Union Member States. This, however, changed with the development of a Common European Asylum System (CEAS), established by the Tampere[70] and the Hague[71] Programs. The idea of designing one single space of protection for refugees and people in need of protection, one 'area of Freedom, Security and Justice' was drafted in a proposal to introduce an EC Directive on a harmonized asylum policy in September 2001. The 28 Member States of the European Union (EU) registered 398,200 asylum claims in 2013, a 32 % increase compared to 2012 (301,000). EU States together

[67] International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia), Order, 13 September 1993, Separate Opinion of Judge Lauterpacht, p. 286.

[68] Id., p. 440.

[69] J. Allain, supra note 54, pp. 540 ff.

[70] 1999–2004.

[71] 2005–2010.

accounted for 82 % of all new asylum claims submitted in Europe.[72] Current numbers for Germany indicate that of 61,826 first instance decisions on asylum status, only 18 % were granted refugee status and consequently primary protection under the Refugee Convention.[73]

Five legal instruments provide the main legal framework for the asylum framework and process in the EU, the Temporary Protection Directive 20/70/01, the Reception Condition Directive 27/01/03, the Dublin Regulation 10/02/03, the Qualification Directive 29/04/04 and the Asylum Procedure Directive 01/12/05. They are, in the case of Regulations, directly applicable in all Member states or the deadline for transposition has already expired and the respective national legislations have entered into force. The EU Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or stateless Persons as Refugees or as Persons Who Otherwise Need International Protection (hereafter Qualification Directive) for the first time established a secondary protection for people not eligible under the primary protection granted by the 1951 Refugee Convention. It is here considered in more detail as it contains the non-refoulement obligation of European member States toward non-Convention refugees.

As a supranational legislative act under the first European Union Pillar, the relevant Qualification Directive expanded a minimum standard EU-wide, replacing the net of deviating domestic legislation and the discretion of governments to react based on humanitarian considerations. It was designed to close the protection gap and 'clarify and codify existing international and Community obligations and practice'.[74]

'Member States shall grant subsidiary protection status to third country nationals or a stateless person eligible for subsidiary protection' states article 18 QD.

Article 2(2) Directive entails the relevant non-refoulement principle:

> [T]hird country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country (emphasize by author).

'Serious harm' is the keyword which needs clarification, which is given by article 15, identifying a) death penalty or execution, b) torture or inhuman or degrading treatment or punishment in the country of origin and c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in

[72] UNHCR, Asylum Trends, p. 2.

[73] Application and Granting of Protection Status at First and Second Instance 2012, Asylum Information Database, at www.asylumineurope.org (accessed on 29 April 2014).

[74] J. McAdam, The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime, in: International Refugee Journal 17 (2005), p. 466.

armed conflicts, as three bases for serious harms. However, due to discrepancies in the national transpositions and a lack of exact interpretation, the European Courts as well as national courts still carve out the exact scope of article 15 and therewith also 2.

The scope of the non-refoulement obligation in comparison to article 3 of the Refugee Convention differs. Article 3 ECHR established a broad and general protection, as discussed in the previous chapter, not granting any exceptions of national security or public order. It establishes a non-derogable right, as stressed also by the ECtHR, 'States face immense difficulties in protecting the communities (. . .) this must not must not call into question the absolute nature of article 3'.[75]

The principle of non-refoulement as laid down in the QD on the other hand includes an exception in article 2:

> 1. Member States shall respect the principle of non-refoulement in accordance with their international obligations. 2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoul a refugee, whether formally recognized or not, when (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

Therewith the QD contains a wider exception clause and has in consequence a more limited application than the protection contained in article 1 F 1951 Refugee Convention and even more the absolute article 3 ECHR.

3.2 Non-refoulement to Safe Third Countries

Considering the principle of non-refoulement in Europe and its actual consequences, one must additionally address the concept of safe third countries, which is applied in the region. In cases where asylum-seekers are returned to third countries, adherence to the principle of non-refoulement also in the third States must be considered by the returning State.

Cases of agreements regulating transfers of asylum seekers have been a known practice already in the 1990s when the US with Jamaica and the UK respectively arranged to process asylum seekers outside of the US. A similar practice was conducted by Australia around 2000 when a domestic law permitted authorities to transfer asylum seekers to Papua New Guinea and Nauru to process their application. In 2001 the ECtHR assessed the binding obligations stemming from the ECHR and its Common Asylum System and their interpretation with regards to the European Union's territory. The *Mss v Belgium and Greece* judgment held that the inadequacy of the Greek asylum procedures would induce refoulement to Afghanistan. The bench determined Belgium had breached its obligation under

[75] ECtHR, supra note 27, para 137.

article 3 ECHR (Prohibition of Torture and Inhumane or Degrading Treatment) and article 13 (Guarantee of effective remedy) by sending the applicant back to Greece, although in line with the Dublin Regulation.[76]

The Committee against Torture also considered a case concerning Safe Third Country Regulations, reflecting the danger and complexity of Safe Third Country Regulations. An Iraqi national was denied Asylum by the Swedish Immigration Board and Aliens Appeals Board based on the fact that his wife, a Jordanian, lived safely in Jordan, where he could be returned to safely. The claimant, however, being without residence permit in Jordan, feared refoulment from Jordan to Iraq. The Swedish government argued that even though Jordan was not party to the 1951 Refugee Convention, the State would adhere to its principles and furthermore had signed a Memorandum of Understanding (MoU) with UNHCR.[77] The UNHCR on the other hand declared Jordan did, on several occasions, refuse entry to Iraqi nationals and the MoU would explicitly contain a clause to not apply to third country deportees. The Committee against Torture assessed the risk of refoulement from Jordan to Iraq and decided in favour of the claimant to not be removed to either Iraq or Jordan.[78]

The Committee against Torture was additionally addressed to decide whether agreements between States would entail violations of the Convention against Torture. The Agiza case is one example where the committee held that diplomatic assurance made by a State would not grant a sufficient protection for individuals against violations of article 3. With its decisions the Committee as well as the ECtHR and other actors as the UNHCR established that any indirect refoulement through third States would be as unlawful as direct refoulement.[79]

4 Conclusion

The old contradiction between State sovereignty and international obligations becomes most apparent with regards to refugee protection and their entry as well as forcible removal from State territory. The principle of non-refoulement builds the cornerstone of protection for people fleeing from danger in countries of origin or other countries of destination. The imprints of this fundamental principle can be found in various sources of international law, in focus here refugee law, human rights law and European asylum law. Although at first instance only minor differences in its wording can be observed, taking a closer look shows differences in

[76] ECtHR, MSS v Belgium and Greece, Appl. No. 30696/09 (2011), 108 (21 January 2011) and Council of the European Union; Council Regulation (EC) No 343/2003 of 18 February 2003.

[77] A. Hurwitz, The Collective Responsibility of States to Protect Refugees, Oxford 2009, p. 202.

[78] CAT, Avedes Hamayak Korban v Sweden, Communication No 88/1997, UN Doc. CAT/C/21/D88/1997, 16 November 1998.

[79] A. Hurwitz, supra note 77, p. 203.

scope of protection that can have major consequences for its beneficiaries. One major difference that was discussed is the absolute and non-absolute characters of the principle. Additionally differences have been identified regarding the principles' scopes concerning their application *ratione personae* and *materiae* scope. Apart from the exact interpretation, the last years have been shaped by reports and statements on the deadly outcomes of flight across the Mediterranean Sea and resulted in questions on the extraterritorial application as well as customary or even *jus cogens* status of the principle.

The protection of refugees in the complex intersection of different fields of law with different beneficiaries and addresses of the respective obligations make a clear-cut and coherent assessment of 'the' principle of non-refoulement highly problematic. What has become obvious during the analysis, however, is that protection granted by only one single field of law or even one single provision offers the immense risk of restricting the principle in its scope and therefore limiting the protection granted to people in need. The parallel application of laws is therefore and in light of missing uniform interpretation and applications necessary. As Maduro stated, '[i]t is important in respect of each existing protection system, while maintaining its independence, to seek to understand how the other systems interpret and develop those same fundamental rights in order not only to minimize the risk of conflicts, but also to begin a process of informal construction of a European area of protection of fundamental rights'.[80]

[80] ECJ, C-465/07 Elgafaji v Staatssecretaris van Justitie, Opinion of AG Maduro, para. 22.

Gender in Armed Conflict: The Dimension of Sexual Violence

Wolfgang S. Heinz and Judith Kaiser

1 Introduction

Gender in armed conflict covers a wide spectrum of issues including, but not limited to, female and male roles in the military and in armed opposition groups, in peacekeeping operations, in peace negotiations as well as women and men as civilian victims of violations of human rights and international humanitarian law. Rather than attempting to cover all the topics mentioned above, which inevitably would allow for only a superficial treatment, the focus of this paper will be on the latter aspect.

This contribution starts with an overview on the efforts to reduce sexual violence in an armed conflict context at the international level, followed by the regional level. A short chapter is dedicated to armed opposition groups, which present a difficult issue because of the considerable research obstacles on how the topic of international law standards is addressed by these groups. In the concluding section some key insights and recommendations for further strengthening protection are presented.

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The dimension of sexual violence has been especially discussed since the 1990s mass rapes in Rwanda and in Ex-Yugoslavia with a strong and almost exclusive focus on sexual abuse, and in particular, on the rape of women. Despite difficulties in the collection of statistical data,[1] the following estimates illustrate the scope of violence targeted at women in recent conflicts.

According to the UN Outreach Programme on the Rwanda Genocide, citing estimates of UN agencies, more than 60,000 women were raped during the civil war in Sierra Leone (1991–2002), more than 40,000 in Liberia (1989–2003), up to 60,000 in the former Yugoslavia (1992–1995), and at least 200,000 in the Democratic Republic of the Congo since 1998. In Rwanda, between 100,000 and 250,000 women were raped during the three months of genocide in 1994.[2]

There are almost no estimates regarding sexual abuse against boys and men, as it is a less often reported and analysed phenomenon.[3] However, such sexual abuse still takes place to a considerable level. The 2007 Global Overview of the Geneva Centre for the Democratic Control of Armed Forces reported that in the last decade male-directed sexual violence, including rape, sexual torture, genital mutilation, sexual enslavement, forced incest and forced rape, had been reported in 25 armed conflicts worldwide and in 59 armed conflicts when the sexual exploitation of boys is included.[4] In the following section we examine the international instruments which define rape, with women and girls usually considered as the main group of victims.

2 International Legal Standards and Recommendations

International law now offers an array of tools to combat and prosecute perpetrators of sexual violence.

[1] T. Palermo/A. Peterman, Undercounting, Overcounting and the Longevity of Flawed Estimates: Statistics on Sexual Violence in Conflict, in: Bulletin of the World Health Organization 89 (2011), pp. 924–925.

[2] UN, Outreach Programme on the Rwanda Genocide and the United Nations, at http://www.un.org/en/preventgenocide/rwanda/about/about.shtml (all accessed on 1 December 2013).

[3] C. R. Carpenter, Recognizing Gender-Based Violence against Civilian Men and Boys in Conflict Situations, in: Security Dialogue 37 (2006), pp. 83–103 and S. Sivakumaran, Lost In Translation: UN Responses to Sexual Violence Against Men and Boys in Situations of Armed Conflict, in: International Review of the Red Cross 92 (2010), pp. 259–276.

[4] M. Bastick/K. Grimm/R. Kunz, Sexual Violence in Armed Conflict. Global Overview and Implications for the Security Sector, Geneva 2007; and many scholars refer to the Sarajevo Canton where "no less than 80 % of 5000 male detainees reportedly had been raped or had fallen victim to other forms of sexual violence." Z. Mudrovcic, Sexual and Gender-Based Violence in Post-Conflicts Regions: The Bosnia and Herzegovina Case, in: UNFPA (ed.), The Impact of Armed Conflict on Women and Girls: A Consultative Meeting on Mainstreaming Gender in Areas of Conflict and Reconstruction, Bratislava 2002, p. 64.

In a human rights context, the UN General Assembly Resolution 48/104 Declaration on the Elimination of Violence against Women (1993) defines the term "violence against women" as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".[5]

Humanitarian law seeks to regulate the conduct of armed hostilities. Fundamental principles include the principles of distinction, necessity and proportionality, humane treatment and of non-discrimination. In terms of the protection of women against rape and sexual violence in armed conflict situations, references to women in international humanitarian law conventions were first indirectly, and then later more directly, addressed. Examples include the 1907 Hague Convention (article 46, "Family honour and rights . . . must be respected"), Geneva Convention IV (article 27), and the First Additional Protocol (articles 76–77) and Second Additional Protocol (article 4, para 2 lit. e) thereto.

Rape is now considered a serious contravention of international humanitarian law and as a grave breach of such law.[6] According to the UN Security Council, a grave breach may be punished by any State on the basis of universal jurisdiction.[7]

It is a difficult question of what constitutes a grave breach of the Geneva Conventions. Although definitions in the Additional Protocol (AP) I do not include rape and sexual violence, it is possible to interpret the AP to include such acts.[8] However, proving rape as a grave breach is a complicated matter.

In the Convention on the Prevention and Punishment of the Crime of Genocide[9] rape and sexual violence has not been specifically enumerated as an act of genocide. But the International Criminal Tribunal for Rwanda (ICTR) in the case Akayesu,[10] has interpreted rape with regard to article 2(b) as causing serious bodily or mental harm to members of the group (case of genocidal rape). The specific intent in the crime of genocide lies in the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The ICTR stated in its verdict that there was no commonly accepted definition of rape in international law.[11]

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[5] For a detailed definition see article 2 of the UN Declaration on the Elimination of Violence against Women, UN Doc. A/RES/48/104, 20 December 1993.

[6] On the history of the place of rape in humanitarian law, see J. Gardam, Women, Human Rights and International Humanitarian Law, in: International Review of the Red Cross 324 (1998), pp. 421–432.

[7] UN Commission of Experts Established Pursuant to Security Council 780(1992), Final Document, S/1994/674, 27 May 1994, §§ 42 and 45.

[8] J. de Dieu Sikulibo, The Evolving Status of Conflict-Related Rape and Other Acts of Sexual Violence as Crimes under International Law, in: Humanitäres Völkerrecht – Informationsschriften 2 (2014) p. 85.

[9] Https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=1507EE9200C58C5EC12563F6005FB3E5&action=openDocument.

[10] ICTR, The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, 2 September 1998.

[11] Id., para. 596.

According to Kai Ambos, the Akayesu case shows "that 'intent to destroy' means a special or specific intent which, in essence, expresses the volitional element in its most intensive form and is purpose-based. This position is shared by other authorities. Thus the International Court of Justice (ICJ) also refers, citing the International Criminal Tribunal for the former Yugoslavia (ICTY), to a 'special or specific intent' as an 'extreme form of wilful and deliberate acts designed to destroy a group or part of a group'".[12]

The term "crimes against humanity" is used as a broad umbrella term for a number of human rights abuses. It conceives of humanity as a victim. Two prominent cases are the ICTR case Akayesu,[13] and ICTY case Furundzija.[14] Matteo Fiori summarizes the overwhelming importance of the latter case: "It was the first case at the ICTY in which the accused were convicted of rape not only as violation of the laws or customs of war according to Article 3 of the Statute of the Tribunal (the 'Statute'), but also as a crime against humanity under Article 5(g) of the Statute. Previous convictions at the ICTY had only ever been handed down for the crime of rape as a violation of the laws or customs of war. This judgment elevated the crime of rape to a crime against humanity whose gravity is second only to the crime of genocide. Furthermore, this case marked the first time that an international tribunal had convicted defendants exclusively for sexual violence or prosecuted sexual slavery at all".[15]

Neither the ICTR nor the ICTY have successfully prosecuted many cases on rape charges. In 37 cases the ICTY and the ICTR brought allegations of rape, of which 25 ("in which sexual violence was found to be part of a widespread and/or systematic attack directed against civilian population") were completed by 2010.[16]

The Rome Statute of the International Criminal Court includes rape in its definition of crimes against humanity (article 7(1)(g)). Rape is also codified as a war crime in article 8 (2)(b)(xxii). In the ICC case 'Prosecutor vs Jean Pierre Bemba Gombo'[17] the defendant was not accused of raping women himself. Instead the prosecutors argued that he was criminally responsible for rape, under command

[12] Cited in K. Ambos, What does 'Intent to Destroy' in Genocide Mean?, in: International Review of the Red Cross 91 (2009), p. 838.

[13] See discussion in K. Wachala, The Tools to Combat the War on Women's Bodies: Rape and Sexual Violence Against Women in Armed Conflict, in: The International Journal of Human Rights 16(3) (2012), pp. 533–553.

[14] ICTY, The Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, ICTY, Trial judgment of 10 December 1998.

[15] M. Fiori, The Foča "Rape Camps": A Dark Page Read through the ICTY's Jurisprudence, The Hague Justice Portal, 19 December 2007, at http://www.haguejusticeportal.net/index.php?id=8898.

[16] UN DPKO, Review of the Sexual Violence Elements of the Judgments of the International Criminal Court for the Former Yugoslavia, the International Criminal Court for Rwanda, and the Special Court for Sierra Leone in Light of Security Council Resolution 1820, New York 2010, pp. 31, 48.

[17] ICC-01/05 -01/08. The Prosecutor v. Jean-Pierre Bemba Gombo Trial.

responsibility, as a commander or superior, under article 28(a) of the Rome Statute, because he failed to punish or stop his soldiers from committing these crimes.

2.1 The New CEDAW Recommendation No. 30

The Convention on the Elimination of Discrimination Against Women (CEDAW) General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations from 2013 holds that the Convention also "requires States parties to regulate the activities of domestic Non-State actors, within their effective control, who operate extraterritorially".[18] According to General Recommendation No. 30, State parties' obligations to prevent, investigate and punish trafficking and sexual and gender-based violence are reinforced by international criminal law, which must be interpreted consistently with the Convention without adverse distinction as to gender.[19]

The Recommendation points out that, during and after a conflict, specific groups of women and girls are at particular risk of violence, especially sexual violence: internally displaced and refugee women, women's human rights defenders, women belonging to diverse caste, minorities or identities who are often attacked, widows, women with disabilities, female combatants and women in the military.[20]

According to Recommendation No. 30, State parties should *inter alia*

- Engage with Non-State actors to prevent human rights abuses;
- Use gender-sensitive practices in the investigation of violations during and after conflict;
- Guarantee conflict-affected women and girls equal rights to obtain documents necessary for the exercise of their legal rights and the right to have such documentation issued in their own names, and ensure the prompt issuance or replacement of documents;
- Establish early warning systems and adopt gender-specific security measures to prevent the escalation of gender-based violence and other violations of women's rights;
- Prohibit all forms of gender-based violence by State and Non-State actors including through legislation, policies and protocols;

[18] CEDAW, General recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, UN Doc. CEDAW/C/GC/30, 18 October 2013.

[19] Id., para. 23. The Recommendation refers to the "jurisprudence of the international and mixed criminal tribunals and the Rome Statute of the International Criminal Court, pursuant to which enslavement in the course of trafficking in women and girls, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity may constitute a war crime, a crime against humanity or an act of torture, or constitute an act of genocide."

[20] Id., para. 36.

– Prevent, prosecute and punish trafficking and related human rights violations that occur under their jurisdiction; and
– Adopt bilateral or regional agreements and other forms of cooperation.[21]

The Committee on the Elimination of Discrimination against Women also explicitly addresses Non-State actors. Under certain circumstances, Non-State actors are obliged to respect international human rights.[22] They should respect women's rights in conflict and post-conflict situations, in line with the Convention and commit themselves to abide by codes of conduct on human rights and the prohibition of all forms of gender-based violence.[23]

In conclusion, the impact of this broad spectrum of legally binding and non-binding norms and recommendations will depend on to what degree the international community has the political will to enforce the law. Some of these efforts will now be assessed.

3 International Level: United Nations and G8

Since 1999, the UN Security Council has passed around 20 resolutions on the protection of civilians in armed conflict. Seven address women in peace and conflict.[24]

The most important one, in terms of gender, is Security Council Resolution 1325 on Women and Peace in Conflict. The number of countries that have articulated their priorities on women and peace and security through national action plans (NAP) continues to grow. 42 UN member states have adopted NAPs as of October 2013.[25] Germany has one since December 2012.[26]

[21] Id., summarized from paras. 17, 29, 38, 41, 61.

[22] Id., para. 16.

[23] Id., para. 18.

[24] UN Security Council, Resolution 1325, UN Doc. S/RES/1325, 31 October 2000; Res. 1820, UN Doc. S/RES/1820, 19 June 2008; Res. 1888, UN Doc. S/RES/1888, 30 September 2009; Res. 1889, UN Doc. S/RES/1889, 05 October 2009; Res. 1960, UN Doc. S/RES/1960, 16 December 2010; Res. 2106, UN Doc. S/RES/2106, 24 June 2013, Resolution 2122, UN Doc. S/RES/2122, 18 October 2013.

[25] Report of the Secretary-General on Women and Peace, UN Doc. S/2013/525, 4 September 2013, para. 58.

[26] Auswärtiges Amt, Aktionsplan der Bundesregierung zur Umsetzung von Resolution 1325 des VN-Sicherheitsrats für den Zeitraum 2013–2016, Berlin 2012, BT-Drucksache 17/11943, at http://www.auswaertiges-amt.de/DE/Aussenpolitik/Menschenrechte/Aktuell/121219_Aktionsplan_Res1325.html; for an evaluation of the 10th anniversary of resolution 1325, see J. Arloth/F.L. Seidensticker, Frauen als Akteurinnen in Friedensprozessen. Begleitstudie zum Werkstattgespräch "Frauen und bewaffnete Konflikte" anlässlich des 10. Jahrestages der UN-Resolution 1325, Berlin 2011, at http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/studie_frauen_als_akteurinnen_in_friedensprozessen.pdf.

In 2012, Secretary General Ban Ki-Moon addressed progress on the theme in his report to the General Assembly on Women and Peace and included best practices, common goals and areas which require special attention.[27] Sexual violence is analysed as a strategy of war, referring to experiences from the Democratic Republic of Congo ('DRC'), Northern Mali and Libya. Examples mentioned as good practices were the work of a Women's Civilian Protection Unit as a community patrol mechanism in Mogadishu/Somalia, a centre for legal aid for women in the DRC and the preparatory training of soldiers and police in UN Peacekeeping missions. In Afghanistan, the DRC, Georgia, Kyrgyzstan and Somalia, legal clinics have reportedly improved women's access to free legal aid.[28]

The United Kingdom launched a Preventing Sexual Violence Initiative in 2012. It aimed at replacing the culture of impunity with one of deterrence. Objectives were to increase the number of perpetrators brought to justice both internationally and nationally, strengthening international efforts and co-ordination to prevent and respond to sexual violence and to support States in the building of national capacity. An increase of the funding of the UN Secretary-General's Special Representative on Sexual Violence in Conflict was announced.[29] The United Kingdom also took the lead in elaborating a new international protocol on the investigation and documentation of rape and sexual violence in conflict.[30] In June 2013, the Security Council passed Resolution 2106, which focuses on impunity.

3.1 UN Peacekeeping

In response to a considerable number of allegations of sexual exploitation and abuse by UN personnel in the 1990s, Conduct and Discipline Units (CDU) have been established in almost all peacekeeping missions. These teams provide training to raise awareness on the UN code of conduct, the zero tolerance policy on sexual exploitation and abuse, and on gender issues within the cultural context of the

[27] UN Security Council, Report of the Secretary-General on Women and Peace and Security, UN Doc. S/2012/732, 2 October 2012, paras. 4 ff.

[28] Id., para. 32.

[29] Foreign and Commonwealth Office, Ministry of Defence and Department for International Development, Preventing Conflict in Fragile States – Preventing Sexual Violence Initiative, 12 December 2012, at https://www.gov.uk/government/policies/preventing-conflict-in-fragile-states--2/supporting-pages/preventing-sexual-violence-initiative. See also: UK Government: Policy. Preventing Sexual Violence in Conflict, at https://www.gov.uk/government/policies/preventing-sexual-violence-in-conflict/activity.

[30] Foreign and Commonwealth Office, Foreign Secretary and UN Special Envoy Urge to Tackle Sexual Violence in Conflict, Speech of William Hague, 24 June 2013, at https://www.gov.uk/government/news/foreign-secretary-and-un-special-envoy-to-urge-un-to-tackle-sexual-violence-in-conflict.

country.[31] The lack of efficiency of the UN's zero tolerance policy has often been deplored. There is also the issue of immunity for UN personnel. However, more recently local women, in all cases assessed, reported that CDU teams represented a concrete benefit of the implementation of the Resolution 1325.[32]

The UN exercises jurisdiction over disciplinary breaches and can, as the most severe punishment, ask the sending State to repatriate the staff concerned. States do not want to agree to their peacekeepers being judged by any court or tribunal outside their jurisdiction. The accused peacekeepers are sent back home supposedly to face their own legal system. While statistical data is lacking, research clearly indicates that very few peacekeepers are actually prosecuted once returned home, as attested to by examples from both India and Morocco.[33]

In October 2012 the UN Secretary General stresses in his Annual report on Women, Peace and Security, among other points, that measures should focus on consistency in the implementation of international norms and standards on the human rights of women and girls in all efforts to prevent and resolve conflict and build peace. The question of women and girls should be systematically included in all country-specific and thematic decisions and in the establishment or renewal of mission mandates. They should be reviewed from the perspective of their impact on the empowerment and human rights of women and girls. Relevant instructions should be included in the mandates.

The Secretary General also called upon the international community, regional organisations and member states to consult with women's civil society organisations early in conflict resolution and peacebuilding endeavours. Special attention is required for the protection of female human rights defenders who are often particularly targeted in situations of conflict.

3.2 The G8 Group

The Declaration on preventing sexual violence in conflict adopted by the Foreign Ministers of the G8 in London 2013[34] called for urgent action to address impunity and hold perpetrators of sexual violence in armed conflict accountable.

[31] Http://cdu.unlb.org; on UN experience see W.S. Heinz/J. Ruszkowska, UN-Friedensoperationen und Menschenrechte, Berlin 2010, pp. 9 ff.

[32] UN, Ten-year impact study on implementation of UN Security Council Resolution 1325 (2000) on Women, Peace and Security in Peacekeeping, Final Report to the United Nations, Department of Peacekeeping Operations, Department of Field Support, New York 2010, p. 39.

[33] K. Schmalenbach, Der Schutz der Zivilbevölkerung durch UN-Friedensmissionen und die Rechtsfolgen bei Mandatsversagen, in: Archiv des Völkerrechts 51(2) (2013), pp. 170–200.

[34] Foreign and Commonwealth Office, G8 Declaration on preventing sexual violence in conflict, 11 April 2013, at https://www.gov.uk/government/publications/g8-declaration-on-preventing-sexual-violence-in-conflict.

With this initiative, the G8 sought to strengthen the fight against sexual violence around the world, supporting the victims of sexual violence in a context of armed conflict, to prevent those acts, and to implement accountability for the perpetrators. The declaration states that those crimes are a fundamental threat to peace and stability. They hurt not only the individual victim but entire communities, making the post-conflict reconciliation process even more difficult, and blocking all efforts in favor of a sustainable peace.[35]

In the declaration, the G8-Foreign Ministers recognized that rape and serious sexual violence in conflict were grave breaches of the Geneva Convention, as well as war crimes, insisting on the responsibility of all to prosecute the perpetrators. The G8 supported the work of the UN Special Representative on sexual violence in conflict and affirmed that perpetrators must be held accountable at international and national levels, including before the International Criminal Court. It also acknowledged the need for increased funding.[36]

4 Regional Level

In his 2012 Report on Women, Peace and Security, the UN Secretary General welcomed the development of a Pacific regional action plan, the development of a regional strategy on women and peace and security by the League of Arab States, as well as efforts to secure financing for the implementation of the Economic Community of West African States (ECOWAS) regional action plan for the implementation of Resolutions 1325 (2000) and 1820 (2008). The Economic and Social Commission for Western Asia, together with the Inter-Parliamentary Union and the Economic Commission for Africa planned to support legislators in the region to advance implementation of the resolutions.[37]

4.1 African Union

The promotion of gender equality was included in the African Union Constitutive Act (article 4).[38] The AU adopted the Protocol to the African Charter on Human and

[35] UN News Centre, New G8 initiative a beacon of hope for victims of sexual violence – UN envoy, 11 April 2013, at http://www.un.org/apps/news/story.asp?NewsID=44627#.VLFnWnuKLVI.

[36] Foreign and Commonwealth Office, supra note 34.

[37] UN Security Council, Report of the Secretary-General on Women and Peace and Security, supra note 27, para. 5.

[38] B. Diop, The African Union and implementation of UNSCR 1325, in: F. Olonisakin/K. Barnes/E. Ikpe (eds.), Women, Peace and Security: Translating Policy into Practice, New York 2011, p. 175.

Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), which entered into force in 2005. This Protocol contains provisions on women in armed conflict.[39]

In article 10 it refers to the right to participate in the promotion and maintenance of peace and in article 11 to the protection of civilians, including women, in armed conflicts, specifying that care should be taken in the application of humanitarian law. States Parties should undertake to protect asylum-seeking women, refugees, returnees and internally displaced persons against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.

Furthermore, the Economic Community of West African States (ECOWAS) has adopted a regional action plan for the implementation of Resolution 1325 and 1820.[40]

4.2 League of Arab States

In 2013 a conference in Cairo, organized by the League of Arab States and the UN, discussed a regional strategy for the protection of Arab women. The strategy relied on the prohibition of all forms of violence against women during and after armed conflict. Recommendations have been formulated on the elaboration of an Arab action plan about women, peace and security that should serve as a guideline for Arab countries to develop their national action plans.[41]

4.3 Council of Europe

On the European level, the Council of Europe adopted, in April 2011, a Convention on preventing and combating violence against women and domestic violence, including during armed conflict.[42]

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[39] Text of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), 11 July 2003, at http://www.achpr.org/instruments/women-protocol.

[40] Dakar Declaration and ECOWAS Plan of Action for the Implementation of UN SCRs 1325 and 1820 in West Africa, 17 September 2010, at http://www.peacewomen.org/assets/file/Resources/Academic/dakar_declaration.pdf.

[41] Menara, Conférence au Caire sur la stratégie régionale de protection de la femme arabe, 8 May 2013, at http://cinema.menara.ma/fr/2013/05/08/581795-conf%C3%A9rence-au-caire-sur-la-strat%C3%A9gie-r%C3%A9gionale-de-protection-de-la-femme-arabe.html.

[42] Http://www.conventions.coe.int/Treaty/EN/treaties/html/210.htm.

4.4 NATO

In 2011, the NATO Secretary General published the first annual report detailing the work of NATO to support the implementation of UN Security Council Resolution 1325. The second annual public report on women, peace and security, and related resolutions was published in January 2013.[43] It acknowledged the need to support the incorporation of gender perspectives in all aspects of planning, exercises and training.

NATO mentioned as priorities, the further strengthening of education and training as a strategic tool for ensuring implementation of the Resolutions on women, peace and security and to raise public awareness of NATO policies on gender mainstreaming in NATO structures, operations and programs.[44]

In Afghanistan, NATO holds that full participation of all Afghan women is supported by ISAF. It has helped to continuously raise gender awareness, and to provide gender-related training as well as to support the recruitment and retention of women in the Afghan security forces.

Moreover, the position of NATO Special Representative for women, peace and security was created, with Marriët Schuurman being the present office holder.

5 Armed Opposition Groups

While a large number of NGOs report on violations of human rights and humanitarian law by armed opposition groups, few have sought direct contact with such groups for the dissemination of information about standards and seek commitments to respect them. Many obstacles abound, among others is a lack of belief among governments that progress can be made in this area and the natural tendency of governments to criminalize such groups (as "criminals", "terrorists" etc.). In the wake of 9/11 some governments made it a criminal act for private groups/individuals to provide support to foreign armed opposition groups (clearly, support can be interpreted in different ways).[45]

The most well-known NGO working with armed groups is Geneva Call. For this NGO, while Non-State actors (NSAs) "play an increased role in contemporary warfare and are responsible for many abuses, the State-centric nature of inter-

[43] NATO, NATO Secretary General's Second Annual Public Report on Implementing United Nations Security Council Resolution 1325 on Women, Peace and Security, and Related Resolutions, January 2013, at http://www.nato.int/nato_static/assets/pdf/pdf_topics/20130115_130111-SG-1325-Public-Report2013.pdf.

[44] Ibid.

[45] For example in the U.S. legislation: § 2339A. Providing material support to terrorists, and § 2339B. Providing material support or resources to designated foreign terrorist organizations.

national law still poses challenges for addressing the behaviour of NSAs".[46] It started its work with anti-personnel mines but has now expanded its work with armed Non-State actors (ANSAs) to include the protection of women and children in situations of armed conflict.

In its Asia regional workshop in 2010, Geneva Call brought together armed Non-State actors to discuss their conception of the protection of women and girls in armed conflict. The goal was to explain to them the international humanitarian law standards they must respect, as part of the obligations of all parties to an armed conflict, and to help them in elaborating a code of conduct that takes into consideration the situation of women and girls in armed conflicts.[47]

According to the workshop report, ANSAs often considered themselves as being not related to the international human rights bodies of law as holders of obligations. A workshop participant commented that they did not have a code of conduct or rules and regulations on how to protect women and girls because they were more focused on political issues.[48] However, it was realized by the ANSAs at the Asia conference that gender issues are as important as political issues. Acts of sexual and gender-based violence that were perpetrated by government forces in the framework of their respective armed conflicts was often, in fact, a contributory factor in causing ANSA members to join the armed struggle against the State.[49]

In these discussions, measures that were highlighted to deter ANSA fighters from committing acts of gender-based violence include the systematic integration of international instruments into policies of the movement, the need to define expected standards of behaviour which could lead to codes of conduct as well as formal trials and sanctions within the movement against proven perpetrators of sexual and gender-based violence.

ANSAs perceived the fact that their internal policies and practices were based on cultural norms as a strength, which could be translated into key internal documents. This would, together with strong disciplinary measures, encourage the respect of internal policies. Church organizations and religious leaders were seen to play an important role in providing guidance on conduct and behaviour.

The internal policies and practices of the participating ANSAs' also evidenced weaknesses. Codes of conduct for example did not refer to gender-based violence as a prohibited act, ANSAs lacked the expertise to develop appropriate prevention and sanction measures and women did not participate in the development of law. Furthermore, adequate complaint mechanisms did not exist for the victims to safely

[46] Taken from http://www.genevacall.org/about/about.htm.

[47] Geneva Call, Improving the Protection of Women and Girls During Armed Conflict, Asia Regional Workshop Report, 6–9 December 2010, at http://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/11/20101209_protection_of_women_and_girls.pdf.

[48] Id., p. 9.

[49] Ibid.

and confidentially report their case. There was a general lack of awareness and education regarding gender-based violence.[50]

In 2012, Geneva Call published a deed of commitment for the prohibition of sexual violence in situations of armed conflict and towards the elimination of gender discrimination.[51]

Generally, research in this area has, for obvious reasons, been very limited (few researchers would be accepted in an armed opposition group during fighting and if accepted, they would obviously have to face many limitations in their research work). Processes of recruitment, training, organization and discipline in such groups, the inculcation of values and standards including respect for international humanitarian law standards and human rights standards are not well-known and remain an under-researched topic.[52]

There are different ways to try to influence armed opposition groups and their supporters at home and in the different diasporas. Collection of credible information on fighters conduct and formulation of recommendations by respected human rights bodies and other actors should help to convince the leadership of these groups to respond to such information, to correct mistakes and not the least, punish members of the group which were found guilty of violations. Clearly however, there is a long way to go until such responsibility is taken seriously in the internal political and military hierarchy of organizations, especially during an ongoing conflict.

6 Strategies Against Gender Violence. Recent Trends in Congo

Protection always takes place on the level of specific countries. One brief account must suffice here.

The catastrophic situation in the DRC Congo since the 1990s is well known. A publication by the UN Special Rapporteur on violence against women in 2008 and a major ten year study are the main resources on mass rape in armed conflict in the UN context, apart from countless media and NGO reports.[53]

[50] Id., p. 12.

[51] Http://www.genevacall.org/resources/deed-of-commitment/f-deed-of-commitment/GC2012_DoC_GENDER_SVD_ENG.pdf.

[52] C. Hoffmann/U. Schneckener, NGOs and Non-State Armed Actors. Improving Compliance with International Norms, in: United States Institute of Peace Special Report 284 (2011); U. Schneckener, Zwischen Vermittlung und Normdiffusion. Möglichkeiten und Grenzen internationaler NGOs im Umgang mit nicht-staatlichen Gewaltakteuren, in: Deutsche Stiftung Friedensforschung (ed.), Forschung DSF No. 35, 2013.

[53] Y. Ertürk, Mission to the Democratic Republic of the Congo. Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, UN Doc. A/HRC/7/6/Add.4,

Various initiatives have been undertaken by the Congolese government, among others, the adoption of a framework of an action plan for the implementation of the Resolution 1325,[54] steps to reform the military and the security sector, a new law on fighting violence against women and the creation of an agency for fighting violence against women.[55] Together with 11 countries a "Framework of Hope – The peace, security and cooperation Framework for the Democratic Republic of Congo and the Region" was agreed upon on 24 February 2013.[56]

In the face of continuing mass rapes and massive criticism of the lack of UN action, a number of new approaches were introduced.

MONUSCO deployed, starting in 2009, so-called Joint Protection Teams (JPT) which include UN military, police personnel, MONUSCO Civil Affairs, Human Rights and Child Protection staff.[57] 40 % of them have been women. Local populations, particularly women, report that JPTs have reduced the number of attacks on women, for example when they go to the fields, wells and markets. Experience with female police has been welcomed.[58]

Community Liaison Assistants (CLAs)[59] were recruited by the UN from the local population. They link up with UN troops and should act as "eyes and ears" of the mission.

Community Alert Networks (CANs) in isolated areas serve to improve emergency communications between the local population and the field camps of MONUSCO. The communities are being encouraged to share this information in case of an outbreak of violence.[60]

MONUSCO deployed its military in temporary operating bases, standing combat deployments (SCDs). Some 30–35 troops were temporarily deployed to

28 February 2008; OHCHR, DRC: Mapping human rights violations 1993–2003, at http://www.ohchr.org/en/countries/africaregion/Pages/rdcProjetmapping.aspx.

[54] Texte du Plan d'action du Gouvernement de la République démocratique du Congo pour l'application de la Résolution 1325 du Conseil de Sécurité des Nations Unies, Ministère du Genre, de la Famille et de l'Enfant, January 2010, at http://www.peacewomen.org/assets/file/drc_nap_2010.pdf.

[55] La Rdc résolument engagée dans la mise en application de la résolution 1325 du Conseil de Sécurité de l'ONU, Digitalcongo.net, 31 October 2012, at http://www.digitalcongo.net/article/87582.

[56] Office of the Special Envoy of the Secretary General for the Great Lakes Region of Africa, A Framework of Hope – The Peace, Security and Cooperation Framework for the Democratic Republic of Congo and the Region, 2013, at http://www.peacewomen.org/assets/file/SecurityCouncilMonitor/Debates/SexualViolence/sesg_great_lakes_-_framework_of_hope-1.pdf.

[57] E. Weir/C. Hunt, DR Congo: Support Community-Based Tools for MONUSCO, 5 February 2011, p. 2, at http://refugeesinternational.org/policy/field-report/drc-support-community-based-tools-monusco.

[58] UN, Ten-year impact study on implementation of UN Security Council Resolution 1325, supra note 32, pp. 31 f.

[59] E. Weir/C. Hunt, supra note 57.

[60] Ibid.

vulnerable towns in areas without MONUSCO bases in order to stabilize the situation, restore civilian confidence in the mission and rebuild a sense of security in the wake of the incidents of mass rape in Livungi.[61]

Last but not least, a Force Intervention Brigade with 3,000 soldiers from South Africa, Tanzania and Malawi was established—a major step forward, but which also led to an uneasy feeling by some States because of the risks involved.[62] After common effective military action by the government and MONUSCO, in October 2013 an accord was to be signed by the armed opposition group M23 and the government in the DR Congo, but this did not happen as the DRC government representatives at the final minute expressed their disagreement.[63] Afterwards an agreement was concluded in December 2013.

7 Monitoring

Progress has been made in time-bound and comprehensive monitoring of violations of international humanitarian law and human rights law, but public authoritative reporting on violations is still a difficult issue.

There are no monitoring bodies except the International Humanitarian Commission which is headquartered in Bern. To date it has not been invited by a conflict party to undertake an investigation.[64] The work of the International Committee of the Red Cross (ICRC), as is well known, takes place under the seal of confidentiality. There is very little information published about violations found during its work, but the ICRC is in constant confidential dialogue with States about its findings. These processes are not accessible by the public. In the area of human rights, respect for standards is conceived of as the responsibility of States, which ratify treaties and are monitored in their implementation, but not of armed opposition groups (a rare exception is the prohibition of recruitment of children into armed forces in the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000)).[65] However UN human rights expert bodies such as treaty bodies and special rapporteurs appointed by the UN Human Rights Council have taken into consideration Non-State actors on the issue of human rights, while addressing in their recommendations always governments. Several comprehensive studies and ongoing monitoring activities have taken place over the last 10 years, often with support from experts in humanitarian law—on Sudan, the Lebanon war, the Gaza war, the International Investigation

[61] Ibid.

[62] N. Kulish/S. Sengupta, New U.N. Brigade's Aggressive Stance in Africa Brings Success, and Risks, New York Times, 12 November 2013.

[63] DR Congo aborts peace deal with M23 rebels, Al-Jazeera, 12 November 2013.

[64] Http://www.ihffc.org/.

[65] Http://www.ohchr.org/Documents/ProfessionalInterest/crc-conflict.pdf.

Commissions on Libya and Syria—almost all initiatives were taken by the UN Human Rights Council. The Security Council, on the other side, has repeatedly addressed not only governments, but all conflict parties and even specific armed opposition groups by name.[66] Moreover, a special website of the UN Security Council provides information about the recruitment of children.[67] Finally, international and other human rights NGOs increasingly report on violations, including Amnesty International and Human Rights Watch.

8 Conclusions

Protection of civilian populations in general, and from sexual violence in particular, remains a considerable challenge for States, and regional and international organizations. While a significant body of legal standards and soft law has been developed since the 1990s, the avenues for the international community to intervene in such situations are limited and have not been fully exploited.

Among many possible proposals, there are four elements which are crucial for strengthening preventive protection of civilian populations against gender-oriented violence. First, there must be a time-bound comprehensive monitoring—in the fight against terrorism one talks about actionable intelligence—on what happens on the ground to be able to act swiftly, with sufficient resources and a clear focus. Clearly, a continuous effort is needed to identify leaders' perpetrators who are responsible and to make them accountable for their crimes. A third step must be to develop/implement more sustained approaches to sensitize and indeed influence conflict parties before and during conflict (knowledge about and obligations regarding international law—and the consequences of violating them). A fourth element—immediate and easy access to medical and psychosocial support after violations have occurred—is self-evident.

Regarding investigations and bringing perpetrators to justice, a number of international criminal law cases have been taken up by ICTY, ICTR and the ICC, as well as by hybrid or national courts. This has allowed for the first time for the prosecution and investigation of so far a small number of perpetrators.

The remaining big challenge is protection when conflict situations emerge and are in full swing. Conflict parties often do not pay sufficient attention to international humanitarian law and human rights law. Rather, they appear uninterested in or negligent about international standards. In various cases, a strategy of rape was even initiated to weaken the morale of the enemy, to engender forced migration and refugee movements away from the conflict area. The goal is to generally weaken the will to resist among members of the opposing party by instilling terror and a

[66] W. S. Heinz, Zum Umgang des UN-Sicherheitsrates mit Menschenrechtspflichten bewaffneter Oppositionsgruppen, in: Humanitäres Völkerrecht-Informationsschriften, 1 (2013), pp. 4–11.

[67] Http://childrenandarmedconflict.un.org.

sense of helplessness to protect their own population. In established military organizations there are also major problems (impunity). Military courts tend to react in a benign and less objective way towards allegations coming from "enemy" populations against their members, especially when there is intention, a strategy, to rape with impunity.

In a number of countries it appears to be particularly difficult to change policies and attitudes during conflict, let alone to bring perpetrators to justice. Highly partisan, ideological conflict actors, political leaders and/or institutions lacking the political will to establish the truth of allegations and other actors cannot or do not put sufficient pressure on them to change their policies (extreme cases are of course Ukraine, Nigeria, Sytia and Iraq).

Part VI
Practical Insights on Humanitarian Action and Challenges to the Humanitarian Principles

International Coordination of Humanitarian Assistance

Eltje Aderhold

1 Introduction

Over the last two decades, the world has witnessed a strong increase in the frequency and intensity of natural hazards in all parts of the world. The most devastating disasters coming to mind were the Tsunami in Asia in 2004, the earthquake in Haiti in 2010, the floods in the Philippines in 2013 and the drought and famine in the Horn of Africa in 2011.

At the same time violent conflicts and complex emergencies in Afghanistan, Syria, the Central African Republic and South Sudan have led to an increasing number of internally displaced people and refugees.

Humanitarian needs are unfortunately on the rise. At the same time the world is rapidly changing. Innovations in technology have led to a flood of information and opened opportunities to better connect affected populations with humanitarian actors. But available information has to be analysed, packaged and translated into a common and shared understanding of what the information actually means and which actions need to follow. New stakeholders have emerged on the 'humanitarian horizon', whether these are new donors, the private sector, military or non-governmental organizations. How can the humanitarian system engage with these new actors and agree on common humanitarian standards and renew consensus around the humanitarian principles?

It becomes obvious that coordination *was*, *is* and *will* remain key for international humanitarian assistance. As the world is changing, and with it the humanitarian landscape, so international humanitarian coordination has to constantly refine

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and reform itself. The article will offer a brief outline of the origin of international coordination of humanitarian assistance, will discuss recent reform processes and the challenges it will need to navigate through in the future.

Specifically, the first part will outline the origins of international humanitarian coordination. The second part will look at reform efforts of the international humanitarian system between the year's 2005–2011. The subsequent part will focus on achievements and current challenges for international humanitarian coordination. Finally, the article will look at Germany's strong commitment towards international humanitarian coordination and its own coordination within Germany.

2 The Origins of Humanitarian Coordination

Global coordination of humanitarian assistance is a relatively recent development. Before the Second World War, it was mainly the Red Cross Movement, which was dedicated to humanitarian assistance as a main actor. Coordination attempts however were short-lived and focused solely on Europe.[1] Change came at the end of the Second World War with the creation of the United Nations ('UN') in 1945. This institutional development was accompanied by a series of normative and major developments in the structure and mechanism of international assistance, notably the Universal Declaration of Human Rights, the establishment of the four additional Geneva Conventions expanding and strengthening existing International Humanitarian Law (1949), and the process of decolonization.[2] As a result, the post-war period saw an increasing number of humanitarian UN agencies emerging along with the creation of international humanitarian non-governmental organizations (NGOs). A large number of medium and small sized national humanitarian NGOs and initiatives emerged mainly in Western countries. The driving force behind the creation of these humanitarian NGOs was the idea that humanitarian assistance needs specialized agencies and NGOs in order to deliver humanitarian assistance and to translate global solidarity into effective and efficient humanitarian action on the ground.

Alongside the increasing numbers of globally reaching humanitarian actors evolved the idea and necessity of global coordination. In 1971, the General Assembly ('GA') of the UN created the UN Disaster Relief Organisation ('UNDRO') and endowed it with a mandate to coordinate humanitarian assistance. The organization however was insufficiently funded and staffed to be able to function effectively and fulfil its mandate.

[1] OCHA, Coordination to Save Lives: History and Emerging Challenges, Policy and Studies Series, 2012, p. 1.

[2] E. Davey, A History of the Humanitarian System: Western Origins and Foundations, London 2013, pp. 9–10.

A renewed opportunity within the UN for global humanitarian coordination emerged after the end of the cold war and during the Gulf War. At the time, the UN's humanitarian assistance to conflict-displaced people was uncoordinated and led to duplication efforts highlighting the need for an organization with the specific mandate to coordinate assistance to affected people in emergencies.[3] Against this context, the GA adopted the now famous resolution 46/182 entitled 'Strengthening of the coordination of humanitarian emergency assistance of the United Nations' on 19 December 1991. The resolution outlines a framework for humanitarian assistance and a set of guiding principles.

Foremost, the resolution established the position of the Emergency Relief Coordinator (ERC) at the Under-Secretary-General level in the UN-Secretariat and endowed the position with mainly five areas of responsibilities: coordinated humanitarian assistance, facilitating access to emergency areas, organizing needs-assessment missions, preparing joint appeals and mobilizing resources. In addition, GA resolution 46/182 established also the Inter-Agency Standing Committee (IASC), the Central Emergency Revolving Fund (which in 2005 became the Central Emergency Fund—'CERF') and the Consolidated Appeal Process ('CAP'). A department, entitled the Department of Humanitarian Affairs ('DHA') within the United Nations Secretariat was created in 1992 to support the new coordination arrangements and mechanisms. In 1997, the then UN-Secretary General (SG) Kofi Annan released his report 'Renewing the United Nations: A programme for reform' which recommended that DHA was transformed into the Office for the Coordination of Humanitarian Affairs ('OCHA') focusing less on operational issues, but rather strengthening its coordination role and mandate. OCHA was finally established in 1998.[4]

3 The International Coordination System Between 2005 and 2011: Strengthening and Reform

The need for effective and efficient coordination continued to be in demand and the established system kept reforming itself on a continuous basis. Under the leadership of the then Emergency Relief Coordinator Jan Egeland the reform process culminated in the so-called Humanitarian Reform 2005 after an intensive review process of humanitarian operations.

The Humanitarian Reform aimed at improving capacity, strengthening coordination, predictable leadership and partnership and accountability. The most visible aspect of the reform in 2005 was the creation of the so-called Cluster Approach. The Cluster Approach introduced a system of sectoral coordination (between UN and non-UN organizations working in the main sectors of humanitarian action) with

[3] OCHA, OCHA on Message, General Assembly Resolution 46/182, March 2012, p. 1.

[4] Ibid.

designated lead organizations.[5] Moreover, the 2005 Humanitarian Reform established a professional Humanitarian Coordinator system for emergency leadership from within and outside the UN, and developed mechanisms to ensure adequate, flexible and predictable humanitarian financing tools, mainly through the establishment of the Central Emergency Relief Fund (CERF). Finally, the Humanitarian Reform introduced the Global Humanitarian Platform, a forum where UN agencies and NGO's could collaborate and foster their partnerships and synergies.

The humanitarian coordination system, which emerged from the Humanitarian Reform process, was put immediately to the test in several large-scale disasters. It was applied during the worst-ever recorded Cyclone Nargis in Myanmar in 2008, the devastating earthquake in Haiti (2011) affecting over 3 million people, the floods in Pakistan in 2010, which flooded one fifth of the country and during the acute drought and famine in the Horn of Africa in 2011. The international humanitarian system responded to these crisis, while it was also engaged in operations in protracted settings such as in Afghanistan, the Democratic Republic of the Congo, Sudan and Cote d'Ivoire to name but a few.

Given the high number and magnitude of sudden-onset disasters and protracted crises, the humanitarian international system recognized the need for further strengthening its capacity in order to continue to provide a coordinated, effective, efficient and relevant response.

The need for a strengthened coordination system was in particular realized during the devastating earthquake in Haiti, which was later also termed within the humanitarian system as a 'mega-disaster'. The earthquake struck Haiti on 12 January 2010 with a magnitude of 7.0 on the Richter scale. It completely destroyed Haiti's capital Port-au-Prince and its surrounding areas and killed an estimated 230,000 people, leaving many injured and more than 2 million people displaced.[6] The Government in Porte au Prince and the United Nations were both victims of the earthquake with the latter loosing over 100 of its staff to the quake. Generosity and humanitarian response to the crisis was immense. Over 3000 NGOs registered in Haiti after the earthquake. Most of these actors however were not part of the IASC Cluster Approach/OCHA System, had little capacity and did not deliver aid according to the professional standards and norms of the international humanitarian systems. At the same time, the humanitarian actors experienced challenges in operating in a destroyed urban setting marked by huge amount of debris and in coordinating with the affected population in a situation where the host Government itself was severely affected by the earthquake (Ministries and the Presidential Palace were all destroyed).

[5] OCHA, Cluster Coordination, at http://www.unocha.org/what-we-do/coordination-tools/cluster-coordination (all accessed on 3 February 2014).

[6] F. Grünewald/A. Binder, Inter-Agency Real Time Evaluation in Haiti: Three Month after the Earthquake, 31 August 2010, at http://www.urd.org/IMG/pdf/Haiti-IASC_RTE_final_report_en.pdf.

The response in Haiti, but also in other mega-disasters renewed consensus that a strong humanitarian coordination and leadership is key to an effective and high-quality humanitarian response.

Against this context, the Inter-Agency Standing Committee evaluated in 2010 the Cluster Approach with the aim of assessing its operational effectiveness and outcomes. The findings of the IASC Cluster Approach evaluation showed that the cluster approach improved the coverage of the humanitarian response, identified and filled its gaps and thus reduced duplications. The Cluster Approach also increased partnerships between humanitarian actors and provided better humanitarian leadership. But there was room for improvement. The overall assessment of the evaluation, which was organized by OCHA and supported by the German Federal Foreign Office, was rather sobering when it stated that: the 'investments [in the Cluster Approach] are beginning to pay off as the benefits generated by the cluster approach to date already slightly outweigh its costs and shortcomings'.[7] Recommendations included, among others, to better link the Cluster Approach with national and local authorities and coordination mechanisms, to better manage clusters and to promote inter-cluster coordination. While the evaluation identified several challenges for the Cluster Approach it also highlighted its centrality and importance for the coordination of humanitarian response and advocated strongly for its further improvement and refinement.

In 2010 and 2011, the Inter-Agency Standing Committee, under the leadership of the new Emergency Relief Coordinator Valerie Amos recognized the operational shortcomings and stated that

> challenges still remain in deploying adequate leadership; putting in place appropriate coordination mechanisms at various levels and ensuring clear mutual accountabilities as evidenced by several major disasters over the past years. Furthermore, the application of the cluster approach has become overly process-driven and, in some situations, perceived to potentially undermine rather than enable delivery.[8]

In reaction to the challenges posed to the multilateral humanitarian response system, the IASC Principals agreed to review the leadership and coordination of its common operations and adopted in 2011 a set of actions entitled the 'Transformative Agenda' with the aim of further improving the humanitarian response system.

The Transformative Agenda focused on three key areas for improvement: (1) better and empowered leadership, (2) improved accountability to all stakeholders, particularly to local and national authorities, and (3) improved coordination within the cluster system by focusing more on results and less on process. The Transformative Agenda also started to define emergencies, which are exceptional in scale, complexity, urgency, capacity and reputational risk as so-called 'Level 3 Emergencies'. Level 3 Emergencies follow specific emergency protocols which request specific expert deployments to emergencies and provide timeframes for

[7] J. Steets et al., IASC Cluster Approach Evaluation 2 Synthesis Report, Berlin/Plaisians 2010.

[8] IASC, IASC Principles Transformative Agenda, at http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-template-default&bd=87.

specific tasks in sudden onset emergency, such as deployment of pre-identified emergency experts, common scenario understanding, initial rapid multi cluster needs assessment to name but a few.

The last decade has shown that international coordination of humanitarian assistance is a complex task, which needs on-going refinement and reform, in order to adequately respond to the humanitarian needs in sudden-onset and protracted crises. But we should be well aware that there is no alternative to UN-led humanitarian coordination, if the international community wants to provide efficient, effective and adequate response based on humanitarian standards and principles to people in need.

4 Humanitarian Coordination Today and Tomorrow: Achievements & Challenges Ahead

Apart from the successes of the reform processes above, one of the highlights of achievements in the international humanitarian coordination system in recent years is the effort among humanitarian stakeholders to carry out joint needs assessments. In July 2009, the IASC Working Group created the so-called IASC Needs Assessment Task Force (NATF) with the aim 'to develop a package of tools and products aimed at harmonizing and promoting cross-sector needs assessment initiatives [with the aim to] to ensure the collection of consistent, reliable and timely data on needs in humanitarian settings and strengthen informed decision-making to improve humanitarian response'.[9]

Until recently, each humanitarian organization had carried out their specific needs assessment and while there was a huge abundance of assessment information for a given crisis, there was a strong lack of capacity to 'validate and analyse the information necessary to determine priorities and guide planning of the humanitarian response'.[10] The IASC NATF consequently developed guidance, tools and procedures for coordinated and joint needs assessments in a crisis. These joint assessments are key to providing humanitarian operational actors, as well as donors with a shared vision of needs and priorities. Having an evidence-based agreed humanitarian picture of a given situation at hand is key to act swiftly and support humanitarian relief operations. From a donor perspective it helps tremendously to release funds in support of humanitarian operations, if there is a joint and coordinated needs assessment available. OCHA has now integrated joint needs assessments in its humanitarian programme cycle, which forms the basis for subsequent strategic response planning, resource mobilization and implementation.

[9] IASC, Operational Guidance for Coordinated Assessments in Humanitarian Crises, 2012, at http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-subsidi-common-default&sb=75.

[10] Ibid.

The world is rapidly changing and with it the humanitarian landscape. The importance and further refinement of coordination remains high on the humanitarian agenda. Trends and data predict that the world will see more complex emergencies, more natural disasters and an increased number of stakeholders in the humanitarian area.

Operational coordination, but also conceptual coordination in the way humanitarians approach the changing humanitarian landscape around them will be key to successfully alleviate human suffering and address humanitarian needs. In particular, humanitarian stakeholders will face the following six trends and challenges:

We will experience more natural disasters*:* Within the last 20 years, the number of natural disasters has nearly doubled from 200 to 400 per year. The increase in numbers of affected people and loss due to damages of natural disasters was even higher.

We will experience more complex emergencies: Conflicts and displacement are already generating increased humanitarian needs. According to OCHA, the number of people displaced in their own countries as a result of violence and armed conflict rose from 16.5 million in 1989 to an estimated 28.8 million at the end of 2012.[11]

More people will be affected: Until the mid-1980s, less than 100 million people were affected by emergencies in a given year. During the last 5 years, this number has actually risen to 300 million people.

Higher costs & do more with less: Humanitarian appeals by the UN are a good indicator for global humanitarian needs. Appeals have increased since 2006 from 4.4 billion USD to 8.79 billion USD in 2013. At the same time, the recent financial crisis has shown that international aid budgets are under increased pressure. Consequently, humanitarian organizations are asked to do more with less. It is obvious, that effective coordination will be key to create synergies and to reduce and avoid duplications, in order to do more with less.

More new actors will be involved in humanitarian affairs: The experience of the earthquake in Haiti, during which over 3000 NGOs registered in the country, has revealed a trend. The number of actors involved in humanitarian response is growing. As OCHA puts it in its recent Plan and Budget document:

'As more countries reach middle-income status, more Governments are becoming donors and sharing their experience and expertise. National disaster management authorities and regional organizations are playing more influential roles, and more NGOs and civil-society actors are becoming involved in response than ever before. The corporate sector is more and more engaged and seeks partnership with humanitarian stakeholders'.[12]

The key challenge for coordination will be how these various actors, which are often outside the IASC system can be included into a coordinated humanitarian response and work according to our humanitarian standards and principles.

[11] OCHA, OCHA in 2014 & 2015, Plan and Budget, at www.unocha.org/ocha2014-15, p. 4.
[12] Id., p. 5.

Risks that people are affected by disasters are growing, as populations remain vulnerable: Global challenges, such as 'climate change, population growth, food- and energy-price volatility, water scarcity and environmental degradation – are increasing risks for vulnerable people',[13] as these challenges erode people's ability to cope with shocks originating from natural hazards. Unfortunately, over 300 million extremely poor people are predicted to be in the countries most exposed to hazards by 2030.[14] In particular, 47 % of world population will be living in areas of high water stress by 2030,[15] meaning that there are increasingly more people at risk of flooding, tsunamis and storms.

These trends and predictions do not only pose a challenge for operational international humanitarian coordination, but are also calling for a coordinated conceptual approach among traditional and emerging humanitarian actors.

Taking the example of the increased risk and vulnerability of populations to exposure to natural disasters mentioned above. How will humanitarian actors react to this trend in a coordinated and efficient way? How will humanitarian stakeholders come up with a shared vision of responding to this challenge and ensure that their voices are heard among the development community, but also by civil society, the private sector and authorities? Given the trend of increased risk and vulnerability, one would assume that the international community is investing as much as possible in disaster preparedness and prevention. But in 2011, 'less than 5 per cent of all humanitarian aid was used for prevention and preparedness, and those activities comprised less than 0.5 per cent of the USD 3 trillion spent in international aid between 1991 and 2010'.[16] It is obvious that the humanitarian community needs a focused and coordinated approach to push for international development funding into risk preparedness, prevention and reduction, in order to avoid an ever-increasing humanitarian caseload. Up to date however, 'of the top 40 countries receiving humanitarian aid, only 19 are also among the top 40 recipients of development aid'.[17]

As the world is changing, the international humanitarian system needs continuously to adapt and reform itself, including its coordination approach. Given the changing humanitarian landscape and the global challenges mentioned above, the UN Secretary-General is convening a World Humanitarian Summit ('WHS') in Istanbul in 2016 and has tasked OCHA with its organization. The WHS will be an opportunity for the international humanitarian community to explore how it can sustain and further develop a more effective and inclusive humanitarian system in relation to the outlined challenges. The Summit will consist of 4 themes, which will

[13] OCHA, Saving Lives Today and Tomorrow, Managing the Risk of Humanitarian Crisis, Policy and Studies Series, March 2014, p. 4.

[14] A. Shepherd et al., The Geography of Poverty, Disasters and Climate Extremes in 2030, October 2013.

[15] OCHA, supra note 13.

[16] Ibid.

[17] J. Kellet/D. Sparks, Disaster Risk Reduction, Spending Where It Should Count, March 2012.

be discussed, in 8 regional inclusive consultations aimed at setting the agenda for the actual Summit in 2016. The Summit is neither an inter-governmental, nor an inter-agency process, but aims to be truly inclusive and invites affected populations, affected Governments, donors, humanitarian NGOs and UN Member States to discuss the themes of the summit which are: (1) Humanitarian effectiveness, (2) Reducing vulnerability and managing risk, (3) Transformation through innovation, and (4) Serving the needs of people in conflict.[18] The Summit will be a huge opportunity to understand current challenges in more depth, gather best practices from around the world and agree on a way forward of how to best react to these challenges. It is an opportunity to agree on a shared and coordinated vision of humanitarian assistance beyond 2016.

5 Germany's International Commitment to Humanitarian Coordination

Germany is an active supporter for principled international coordination of humanitarian assistance and is strongly committed to humanitarian assistance.

The Strategy of the Federal Foreign Office for Humanitarian Assistance Abroad, drafted in 2012, prominently mentions its 'support [to] international coordination [by] reinforcing the UN-led international humanitarian assistance system constantly and sustainably'.[19] Given the challenges the humanitarian world is facing, it is of utmost importance for Germany to support a humanitarian coordination body, which provides professionalism, leadership, is able to adapt to a changing landscape, is analysing humanitarian trends and has a sense for innovation. Germany has shown commitment to UN-led coordination, in particular through a stable and growing funding support to OCHA over the last years.

But our commitment to UN-led humanitarian coordination does not rest solely on financial contributions. We are also engaged in shaping policy discussions aimed at further developing the humanitarian system. To mention just one example: the most prominent policy initiative Germany has undertaken within coordination bodies during the last years was the co-called 'preparedness-initiative'.

Given the global humanitarian challenges characterized by an increasing number of natural disasters and humanitarian need, Germany advocated for international humanitarian assistance to undergo a paradigm shift: Beyond the reaction to sudden disasters and crises, humanitarian assistance increasingly needs to be forward-looking, as the traditional reactive instruments will only to a limited extent be able to counter these challenges. The overall aim of the initiative was to advance the

[18] A full description about the Summit, its process and the expected outcome as well as a possibility to participate in the consultation itself can be found at www.worldhumanitariansummit.org.

[19] Auswärtiges Amt, Strategy of the Federal Foreign Office for Humanitarian Assistance Abroad, Berlin 2012.

understanding of preparedness, risk reduction, resilience and early and effective response.

In light of these challenges and the intensifying discussions about preparedness on the international level Germany made preparedness a priority when it was chairing the OCHA Donor Support Group ('ODSG') and co-chaired the Good Humanitarian Donorship Group ('GHD'). Within these fora, Germany elaborated in close collaboration with its partners a set of principles on preparedness based on best practices. We also gathered consensus around these principles, which culminated in a High Level Meeting in 2013 in Berlin, in which representatives of disaster-prone and donor countries, as well as international and non-governmental organizations adopted the Berlin Principles and Recommendations on Preparedness.

At present, we are strongly supporting the World Humanitarian Summit ('WHS') initiative. The summit will be an excellent opportunity to address global challenges in a coordinated way and to renew global commitment to principled and professional humanitarian assistance among the increasing number of stakeholders. We support financially and with personnel the WHS, advocate for its themes and process through diplomatic channels and support conceptually the themes of humanitarian effectiveness and reducing vulnerability and managing risk. The latter provides again an excellent opportunity to integrate and promote our 'preparedness' work and to ensure that the Berlin principles and recommendations on preparedness find their way into this thematic workstream. Most importantly however, Germany will host a preparatory thematic task team meeting in Berlin in 2015 and will invite the thematic experts of all four WHS themes to distil lessons and best practices from the preceding eight regional consultations.

Germany benefits as well from international professional humanitarian joint coordination. Our humanitarian assistance is granted on the basis of joint UN-led coordinated needs assessments. We appreciate humanitarian situation overviews which provide a common picture between UN and non-UN partners on a given humanitarian crisis and we fund coordinated and common appeals which share a common vision and provide a common strategy to alleviate human suffering. Our resource allocations and funding decisions rest on these evidence-based humanitarian needs assessments and appeals.

6 Humanitarian Coordination in Germany

While Germany is strongly engaged in promoting humanitarian coordination at the international level, we are also coordinating at home. In the Humanitarian Assistance Coordinating Committee, the Federal Foreign Office conducts a regular dialogue with the Association of German Development NGOs ('VENRO') and the Committee members on the priorities of humanitarian assistance. The Coordinating Committee strengthens the coherence of German humanitarian assistance and has proven its worth as an information and coordination body in acute

emergencies. It provides space in which the German humanitarian community can also engage in a coordinated approach conceptually vis-à-vis international processes like the World Humanitarian Summit for instance and it is thus a very valuable coordination tool.

7 Conclusion

International humanitarian coordination is a key tool for assisting populations in need and alleviating human suffering. It is a pre-condition for implementing and operationalizing large scale humanitarian assistance.

Coordination does not come for free. It is time-intensive and it has financial costs. We should not forget however, that international coordination and division of labour create synergies, reduce duplications and thus costs in the long term. Coordination at the policy and conceptual level allows the humanitarian community to exchange information, discuss positions, and enhance and refine further their tools. It also provides the opportunity to engage with new actors and partners with a coherent international humanitarian voice.

Given the predictions and trends of the future, characterized by an increase of humanitarian needs through an higher number of natural disasters and complex emergencies, coordination will remain key.

We will continue to witness efforts to reform and refine the system. Coordination is a process. It should never be a fixed and rigid system, but allow for improvement, innovation and refinement. As the world is constantly changing and with it the humanitarian landscape, the international humanitarian community needs to follow this pace of change and ideally be a step ahead of it.

The themes for discussion at the World Humanitarian Summit are a good indication that the humanitarian community is ready to approach and discuss the most pressing issues. What will be important is to come up with actionable and smart recommendations for further improvement of the international humanitarian coordination system.

Germany remains a strong advocate for humanitarian coordination and will continue to support partners and stakeholders engaged in it.

Humanitarian Action and Western Military Intervention: A View from Médecins Sans Frontières Germany

Ulrike von Pilar, Corinna Ditscheid, and Alfhild Böhringer

1 Setting the Scene: What's Wrong with "Humanitarian Interventions"?

Since the end of the cold war and the collapse of the Soviet Union, international armed forces and humanitarian organisations have increasingly found themselves working alongside each other in the context of armed conflicts: North-Iraq in the early 1990s, Somalia, Bosnia, Kosovo and Afghanistan are cases in point, to name just a few. Many of these military interventions (so-called 'humanitarian

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interventions'[1]) have been justified, at least partly, by governments as having 'humanitarian goals': supporting the affected populations or protecting the work of humanitarian organisations in the conflict areas. After 9/11, this process took a new turn, as governments started using humanitarian aid as one of several tools to counter terrorism and/or stabilise fragile contexts, through a comprehensive approach that ties security to aid and development in international crisis management.

Using humanitarian aid as a tool for political and military ends is not a new phenomenon; aid has always been subject to potential exploitation and misuse. The extent to which aid has become an integrated component of western countries' foreign and security policy, however, has increased so much over the past two decades that "humanitarianism has become part of global governance, if not of government".[2] From the point of view of Médecins Sans Frontières (MSF), this represents a critical breach of humanitarian principles—one that endangers the very ability of humanitarian actors to provide help to vulnerable populations. For one, when aid workers are perceived not as independent providers of aid, but as extensions of western countries' political and military interests, they risk becoming targets in situations of armed conflict. Further, when the warring parties do not trust aid actors to be independent, they lose their ability to negotiate access to civilians who, in turn, have to suffer the consequences—whether in Afghanistan, Syria, South Sudan, the Central African Republic or the Democratic Republic of Congo. As a result, millions of people are left without timely and adequate life-saving support. For MSF, as for many other humanitarian organisations, this is simply unacceptable.

This article begins by introducing key humanitarian principles and some of the important codes and regulations in which these are outlined. It moves on to trace the historical development which led to the increased politicisation of aid since the end of the Cold War, and then analyses the tensions which have emerged between this politicisation of aid and humanitarian principles. The consequences of these tensions on aid actors and the populations they serve will then be shown in a second step. With its long history of documenting the serious risks posed to humanitarian actors and the populations they serve when military interventions use aid as a foreign policy and/or security tool, MSF continues to advocate against this process. To illustrate this, the article will offer a brief discussion of the recent western military intervention in Mali, with particular focus on the German government's rhetoric and the MSF response.[3] The article then concludes by arguing that despite various politicians' claims to the contrary, "we [do not] all want the same", before offering field-tested strategies in the campaign towards a more independent space for humanitarian action in today's complex armed conflicts.

[1] In this article the term 'humanitarian intervention' is not applied as defined by International Humanitarian Law, but in the way it is used in political public discourse.

[2] A. Donini (ed.), The Golden Fleece, Sterling 2013, p. 3.

[3] Médecins Sans Frontières/Ärzte ohne Grenzen e.V., 20 Jahre deutsche Außenpolitik aus humanitärer Sicht: Eine Konferenz von Ärzte ohne Grenzen, 25 April 2013, Berlin, at www.aerzte-ohne-grenzen.de/sites/germany/files/konferenzbroschuere_web.pdf (all accessed on 14 October 2014).

While this article explicitly deals with the process and impact of an increased instrumentalization of aid by western states, it is not the intention of the authors to represent this as the only challenge for today's humanitarians. Indeed, other factors also contribute towards the increasingly reduced access to populations in need during volatile crisis situations, at least in some contexts.

The matter is far more complex than what can be illustrated in a single article—most of today's armed conflicts involve a range of State actors and Non-State actors, all of whom use and misuse aid and thus restrict our access to populations in need. It is also worth highlighting that MSF works in a wide range of conflict situations in which western states are barely, if at all, present (Chad and Pakistan—to name just two). A lack of respect for international humanitarian law and humanitarian principles, attacks on aid workers and medical facilities also occur in these contexts and contribute to the decreased ability of humanitarian actors to provide aid to the most vulnerable populations. The fact remains that over the past two decades, western states have, more than ever, used humanitarian aid as a tool for their own political and military ends—a trend that was prompted in part by changes in the nature of armed conflict, and that, in turn, has fuelled some of these changes in conflict dynamics.

The following analysis will focus primarily on the case of German foreign policy. Despite the historically-founded scepticism towards military intervention that has come to shape Germany's (self-) image and political culture, the country has in fact, over the past two decades, been actively involved in a range of United Nations (UN), European Union (EU) and North Atlantic Treaty Organization (NATO) military interventions including, among others, in Somalia, Bosnia, Kosovo, Afghanistan and, more recently, in Mali, South Sudan and the Central African Republic. While the German government, especially the Ministry of Foreign Affairs, claims to adhere to humanitarian principles, it has also, at times, in fact actively contributed to blurring the boundaries between political and military interventions and humanitarian aid. Indeed, Germany's (self-)image as a country historically averse to military intervention has encouraged the tendency by successive German governments to legitimize foreign action on humanitarian grounds. In any case, questions arising out of the complex relationship between political and military aims, on the one hand, and humanitarian aid on the other have repeatedly featured in political and media debates over the past two decades, offering a rich basis upon which to build this article's analysis. More recently these debates have resurfaced, after several prominent German political leaders called for Germany to take on a more active role and shoulder more responsibility in international armed conflicts.[4] These recent developments make the continued

[4] F. Steinmeier, Regierungserklärung von Außenminister Steinmeier zur Außen-, Europa-, und Menschenrechtpolitik vor dem Deutschen Bundestag, Auswärtiges Amt, 29 January 2014, at www.auswaertiges-amt.de/DE/Infoservice/Presse/Reden/2014/140129-BM_BT-aussenpol.html; U. von der Leyen, Rede von Verteidigungsministerin Ursula von der Leyen vor der Münchner Sicherheitskonferenz, 31 January 2014, at www.nato.diplo.de/contentblob/4123416/Daten/3885836/redevdleyensiko2014.pdf.

critical reflection on the relationship between western military engagement and humanitarian action particularly timely.[5]

2 Principles, Codes and Regulations

While 'humanitarian aid' as a term has not been defined in a legally binding international instrument, four 'principles' are commonly understood to form the essential framework for humanitarian action: humanity, impartiality, independence and neutrality.[6] These principles are based on the Geneva Conventions and the Code of Conduct of the Red Cross and Red Crescent Movement.[7]

The principle of *humanity* aims "to ensure that individuals are treated humanely in all circumstances", with respect for their human dignity.[8] In that sense, humanity forms the core and basis of humanitarian aid; it justifies its use and importance because every person, being human, is entitled to life-saving assistance.[9]

Impartiality establishes that aid must be given solely on the basis of need, and as such, should not allow for any adverse discrimination based on nationality, ethnicity, gender, sexual orientation, religion or affiliation to any particular political group. Impartiality also means that to the extent possible, the most vulnerable must be prioritised. Aid that does not aim at being impartial cannot be considered humanitarian.

[5] The arguments in the present article are not intended to take a stance towards military intervention per se, pacifist or otherwise. There have been cases when MSF has been openly very critical of western states' lack of response to conflict and human suffering. Here, the point is that armed conflicts need political solutions, and these are the responsibility of political actors. Humanitarian aid has other goals – to save lives and alleviate suffering – and must be clearly distinguished from other forms of intervention or political crisis management.

[6] F. Bouchet-Saulnier, The Practical Guide to Humanitarian Law, Oxford 2007, p. 160.

[7] The Geneva Conventions and the additional protocols define the rights and responsibilities for parties to a conflict and can be seen as a guiding frame for the conditions under which humanitarian aid is delivered. Signatories to the Conventions are states, hence their regulations do not guide directly the actions of humanitarian agencies, but "confer rights or impose obligations upon humanitarian agencies". K. Mackintosh, HPG Report: The Principles of Humanitarian Action in International Humanitarian Law, HPG Report 5, London 2000, p. 4; the Code of Conduct for The International Red Cross and Red Crescent Movement and NGOs in Disaster Relief was developed by eight of the world's largest disaster response agencies in 1994 and signed to date by 536 organisations. ICRC, The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief, 1994, at www.ifrc.org/Global/Publications/disasters/code-of-conduct/code-english.pdf.

[8] F. Bouchet-Saulnier, supra note 6, p. 160.

[9] Strictly speaking, humanity is a value, the central defining value of humanitarian action, rather than a principle.

Independence means that aid should not be constrained or influenced by military, political, ideological or economic interests; this principle is vital for any humanitarian organisation striving to implement impartial aid programmes.

And finally, *neutrality* means that humanitarian organisations should not take sides in situations of conflict and that aid should never be used to favour one side or support political or economic goals.[10]

With the increasing presence of Western political and military powers in conflict zones after the end of the Cold War, the need to clarify the roles of humanitarian and political actors has grown significantly. As a result, a number of rules and regulations have been introduced since the 1990s. These include, for example, *Good Humanitarian Donorship* (2003), the *European Consensus on Humanitarian Aid* (2007) and the *Oslo Guidelines* (2007).[11]

These documents reiterate that humanitarian aid aims to preserve human life and alleviate suffering in situations of crisis. They also stipulate that aid must be needs-based and should not be used as an instrument for political or military ends. The *European Consensus on Humanitarian Aid* adopted by the EU and its member states, for instance, affirms that humanitarian aid aims "to provide a needs-based emergency response aimed at preserving life, preventing and alleviating human suffering and maintaining human dignity wherever the need arises if governments and local actors are overwhelmed, unable or unwilling to act".[12] It distinguishes between civil and military action and states that humanitarian aid should be autonomous, and not used as a tool to further political aims. The European Consensus explicitly states that:

> Respect for independence means the autonomy of humanitarian objectives from political, economic, military or other objectives, and serves to ensure that the sole purpose of humanitarian aid remains to relieve and prevent the suffering of victims of humanitarian crises.[13]

This demonstrates the European Consensus seeks to uphold humanitarian principles as well as International Humanitarian Law, including Human Rights Law and Refugee Law. While it is not a legally binding document, it is an important political tool to strengthen respect for humanitarian principles and ensure that aid is delivered on the basis of need rather than political interest.

However, as Katherine Derderian *et al*. have pointed out, the European Consensus also highlights the tensions between the efforts of EU states to adhere to humanitarian principles and their search for a more comprehensive approach to

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[10] For a critical look at our humanitarianism's holy principles, please compare: I. Smillie, The Emperor's Old Clothes, in: A. Donini, supra note 2.

[11] Good Humanitarian Donorship Agreement, 2003; European Commission, The European Consensus, 2007, at www.ec.europa.eu/echo/files/media/publications/consensus_en.pdf; OCHA, Oslo Guidelines, 2007, at http://vosocc.unocha.org/Documents/29786_OSLO%20Guidelines%20Rev%201.pdf.

[12] European Commission, The European Consensus, supra note 11, C25/2, para. 8.

[13] Ibid.

international crises and armed conflicts.[14] Thus, it refers to "*transitional contexts and situations of fragility*" where "*humanitarian aid and development cooperation, as well as the various instruments available to implement stability measures, will be used in a coherent and complementary fashion [. . .] in order to use the full potential of short and long-term aid and cooperation*".[15]

In a similar way, the 2009 Lisbon Treaty reflects the tensions between maintaining a commitment to humanitarian principles and pursuing comprehensive approaches to foreign policy and action.[16] On the one hand, the Treaty invokes international law and humanitarian principles of impartiality and neutrality, and locates humanitarian aid within an independent agency, the European Commission's Humanitarian Aid and Civil Protection department (ECHO). On the other hand, however, it establishes the European External Action Service (EEAS or EAS), the joint foreign ministry and diplomatic corps for the EU, and states that "the Union's operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the Union."[17] This effectively institutionalizes the Union's comprehensive approach to international crisis management. It is significant that the principle of independence of humanitarian aid is explicitly avoided in the Treaty. The treaty's disregard for humanitarian principles has been criticized by many humanitarian agencies. They argue it can act to reinforce the politicisation of aid, a trend which has steadily increased since the 1990s.[18]

3 The Position of the German Federal Government on Humanitarian Principles

Germany, like the majority of western states, officially has accepted the vast majority of the treaties and guidelines discussed above. In addition, several German governments have further codified humanitarian principles in various ministerial guidelines and doctrines. The German Foreign Office, which finances most of Germany's humanitarian aid, has committed itself to the humanitarian principles because Germany is a signatory State to the Geneva Conventions and to various Human Rights and Refugee Law treaties. Furthermore, in the early 1990s, the

[14] K. Derderian/A. Ponthieu/A. Pontiroli, Losing Principles in the Search for Coherence? A Field-Based Viewpoint on the EU and Humanitarian Aid, in: The Journal of Humanitarian Assistance (2013), at http://sites.tufts.edu/jha/archives/2010.

[15] European Commission, The European Consensus, supra note 11, C25/4, para. 30.

[16] The European Union, The Lisbon Treaty, 2007/C307/01, 2007, at www.eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:C:2007:306:TOC.

[17] Id., chapter 3, article 188 J, para. 1.

[18] Caritas Europa/A. Featherstone, Den Widerspruch zwischen Politik und Praxis überwinden, Brussels 2011, p. 31.

Federal Ministries German Humanitarian Aid Coordination Committee, comprised from several German relief agencies, developed the "Twelve Basic Rules of Humanitarian Aid Abroad".[19] The Federal Government has repeatedly underlined its intention to align its humanitarian aid with these rules.

Germany was additionally involved in initiating both the European Consensus and ECHO during its EU Presidency in 2007; the Consensus forms a conceptual foundation for German humanitarian assistance.[20] Germany has also committed itself to the Principles of Good Humanitarian Donorship since their formulation in 2003.[21] In 2012, the Foreign Office further published a strategy on humanitarian aid abroad,[22] which explicitly states that "*the German Government is committed to the humanitarian principles of humanity, neutrality, impartiality and independence*", and that "*unconditional adherence to these principles is essential if humanitarian players on the ground – who often face a difficult political environment and a poor security situation – are to operate*".[23]

Finally, the 2013 coalition agreement between the CDU, the CSU and the SPD dedicated a whole chapter to humanitarian aid—a first in German politics.[24] This further affirms the government's new intention to strengthen humanitarian principles and advocate for the independence of humanitarian aid actors. However, it is also important to recognise that the section dedicated to development stipulates that such efforts will be linked to German foreign interests and values.[25]

These commitments from the coalition treaty, which may be or appear abstract at times, were operationalised in 2013 by a working group made up of the German Military, Ministry of Foreign Affairs, Ministry of International Development, and a coalition of NGOs delivering humanitarian aid in conflict zones. Their final agreement states explicitly that "*in all military communications, NGOs should not be referred to as 'partners', 'force multipliers' or any other equivalent*", and that "*despite the military delivering aid in emergency situations, it should not refer to itself as a humanitarian actor*".[26]

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[19] German Foreign Office, Twelve Basic Rules of Humanitarian Aid Abroad, at www.auswaertiges-amt.de/DE/Aussenpolitik/HumanitaereHilfe/Grundregeln_node.html.

[20] German Foreign Office, EU's Humanitarian Aid, at www.auswaertiges-amt.de/EN/Europa/Aussenpolitik/HumanitaereHilfe_node.html.

[21] Good Humanitarian Donorship, supra note 11.

[22] German Foreign Office, Strategy of the Federal Foreign Office for Humanitarian Assistance Abroad, 2012, at www.auswaertiges-amt.de/cae/servlet/contentblob/634144/publicationFile/177860/121115_AA-Strategie_humanitaere_hilfe.pdf.

[23] Id., p. 8.

[24] CDU/CSU/SPD, Coalition Agreement: "Deutschlands Zukunft gestalten", 2013, p. 125, at www.bundesregierung.de/Content/DE/_Anlagen/2013/2013-12-17-koalitionsvertrag.pdf;jsessionid=EBE89540ADBAD2591ADFA4B38E6B0C86.s1t1?__blob=publicationFile&v=2.

[25] Id., p. 126.

[26] VENRO, Handreichung: Empfehlung zur Interaktion zwischen VENRO-Mitgliedsorganisationen und der Bundeswehr, Bonn/Berlin 2013.

While these commitments demonstrate an awareness of the importance of humanitarian principles and the need to distinguish between humanitarian and other objectives in *theory*, Germany's practice is often less principled than its official discourse. In fact, as stated above, it has actively contributed to the increased politicisation of aid since the end of the Cold War, as will be shown in the next section.

4 The Increased Instrumentalisation of Aid

4.1 The Post-Cold War Period

Until 1989, humanitarian aid and humanitarian organisations played mainly a marginal role in international political relations. With the end of the Cold War and the collapse of the Soviet Union this changed radically.[27] Since the exodus of the Kurds in 1991 into Turkey as a result of the first Iraq war and the failed intervention in Somalia 1992–1993, western states have been increasingly present in conflict situations. They also started using humanitarian aid as a valuable form of intervention for their own ends, namely as a tool to win popular support, or to mask political inaction in the face of heavy conflicts in which humanitarian aid was 'easier' (and cheaper) to provide than politically effective interventions. This development was partly due to moral pressure at home; it was facilitated by the fact that aid is visible, seen as positive and largely accepted (if not expected) in western home societies.

Thus, following UN resolution 688, Operation "Provide Comfort" in Iraq was the first intervention to be labelled "humanitarian" at the beginning of the 1990s: western states claimed they were assisting the fleeing Kurdish population, even though the intervention clearly had military aims.[28] The intervention in Somalia, launched in 1992 under the name "Restore Hope", was also called "humanitarian". Other similar interventions followed in Liberia, Bosnia and East Timor, made possible in part because the impasse within the UN Security Council, that had prevailed during the Cold War, had come to an end. Western governments did not intervene militarily to stop the genocide in Rwanda in 1994, nor did they disarm those responsible for the genocide in the refugee camps in former Zaire. They did, however, provide humanitarian aid in the camps.[29] In fact, after an outbreak of

[27] For an interesting view on this period from MSF, see F. Weissman, Silence Heals … from the Cold War to the War on Terror, MSF Speaks Out: a Brief History, in: C. Magone/M. Neuman/F. Weissmann (eds.), Humanitarian Negotiations Revealed: The MSF Experience, London 2011, at www.msf-crash.org/livres/en/humanitarian-negotiations-revealed.

[28] United Nations Security Council, S/RES/0688 (1991), 5. April 1991.

[29] F. Terry, Condemned to Repeat?: The paradox of humanitarian action, New York 2002, pp. 155–216.

cholera in the camps, "everyone was there, everyone wanted to help".[30] As Rony Brauman put it, "the spectacle of aid" had come to "replace politics".[31] MSF knew even then that humanitarians do not have a monopoly on the term "humanitarian". However, western states, including Germany, were increasingly using aid as a tool to disguise their inability to devise effective *political* solutions to crises and conflicts.[32]

In 1999, the Kosovo war was legitimised by several western leaders on humanitarian grounds. British Prime Minister Tony Blair went as far as calling it a "humanitarian war",[33] while German Chancellor Gerhard Schröder, in the context of controversial public debates surrounding increased German military involvement in the Balkans, claimed the intervention was intended to "avert a humanitarian disaster".[34] The German military, although party to the conflict, also provided what they called 'humanitarian' aid in the refugee camps—building shelter, providing food and water as well as medical services. This was, in part, to "embellish" the harshness of war with the philanthropy of aid, both vis-à-vis the German electorate—what has been referred to as "winning hearts and minds at the home front"—and the local population.[35] After the end of the war, the State Secretary in the German Foreign Office at the time, Wolfgang Ischinger, joined a regular session of the German Coordinating Committee for Humanitarian Aid and requested that member organisations set up their aid programmes in the areas of occupied Kosovo in which the German military was stationed. Here, too, the intended aim was for aid to 'soften' the German military presence—again, both vis-à-vis Kosovars and the public at home.[36]

Humanitarian aid has always been subject to manipulation and misuse. Indeed, aid has always been used by the military as a means of winning the hearts and minds of populations. Whether this form of aid administered by states is emergency relief, for reconstruction or development is irrelevant: what states and the military want to

[30] U. von Pilar, I close my eyes and treat people, in: J. Calließ (ed.), Zehn Jahre danach: Völkermord in Ruanda, 2005, at www.aerzte-ohne-grenzen.de/sites/germany/files/attachments/msf-wenn-humanitaere-hilfe-mehr-schadet-2005.pdf; F. Terry, supra note 29.

[31] R. Brauman, Hilfe als Spektakel: Das Beispiel Ruanda, Berlin 2002; F. Terry, supra note 29.

[32] U. von Pilar, Feigenblatt einer gescheiterten Außenpolitik, Die Zeit, 14 July 1995, at www.zeit.de/1995/29/Feigenblatt_einer_gescheiterten_Aussenpolitik.

[33] T. Blair, Statement to the House of Commons, 23 March 1999, at www.theguardian.com/world/1999/mar/23/balkans.tonyblair; D. McNamara, Discussion: Looking Back – Moving Forward? A Humanitarian Perspective, 5 December 2011, video at www.frontlineclub.com/third_party_event_looking_back_-_moving_forward_a_humanitarian_perspective.

[34] German Federal Government, Press Release Nr. 111/99, German Chancellor Gerhard Schröder on the Situation in Kosovo, 24 March 1999.

[35] U. von Pilar, Die Instrumentalisierung der Humanitären Hilfe, in: W. Eberwein/P. Runge (eds.), Humanitäre Hilfe statt Politik? Neue Herausforderungen für ein altes Politikfeld, Münster 2002, pp. 181–184.

[36] U. von Pilar/P. Prangenberg, Humanitarian Aid under Siege, Conference Report "Europe and Humanitarian Aid – What Future?", Bad Neuenahr, 22–23 April 1999, at www.aerzte-ohne-grenzen.de/sites/germany/files/attachments/msf-humanitarian-space-under-siege-1998.pdf.

convey is a message that the military is helping and has a role beyond its primary combat function. It is essential to recognise, however, that this form of aid represents a breach of humanitarian principles as it is not impartial: it is no longer administered purely on the basis of need, focusing on the most vulnerable wherever possible, but on the basis of western states' own political interests at home and abroad. This misuse of aid damages the core of humanitarianism, as laid out in the Geneva Conventions. Thus, during the 1990s aid was increasingly instrumentalised in western politics. By the end of the decade, humanitarian action had effectively been established as a useful foreign policy tool.

4.2 Towards Comprehensive Approaches to Security

The year 2000 saw the publication of the Brahimi Report on behalf of the UN Secretary General Kofi Annan. This introduced, amongst others, the concept of "integrated missions" as a model for UN intervention in response to questions surrounding the need for a more effective and coherent UN policy for crises and conflicts: the idea—which is politically plausible—was to integrate all components of a UN mission into a coherent political approach, including peace building, democratisation, protection of human rights, development, and humanitarian aid.[37]

This illustrates, in part, how the UN itself is part of the contradictory set up of the humanitarian system, being in charge of coordinating (supposedly independent) humanitarian assistance on the one hand, whilst also being a political organisation of member states on the other. In conflict situations this is especially problematic, as the UN plays both a humanitarian and a highly political role. In 1998 Sergio Vieira de Mello, former head of the UN Office for the Coordination of Humanitarian Affairs (OCHA), had already noted this dual role and its potentially problematic consequences: "Humanitarian agencies have [. . .] become an important instrument at the disposal of the international community to undertake what is as much a political as a humanitarian task: the containment of crises".[38]

Other institutions and states have since developed their own coherence concepts: NATO promoted the "comprehensive approach", the UK that of the "whole of government", and Germany introduced its concept of "Vernetzte Sicherheit" (*networked/integrated security*). Common to all these is the idea that "security and development are inseparable and that different branches in crisis management should integrate their thinking and action".[39] The shift towards such comprehensive approaches does not, however, account for the fact that it must still be possible to

[37] United Nations Security Council, Brahimi Report, A/55/305, S/2000/809. 2001, at www.un.org/ga/search/view_doc.asp?symbol=A/55/305.

[38] S. Vieira de Mello, Politics and Humanitarian Action, Final Report of the Seminar on Humanitarian Action, Perception and Security, Lisbon, 27–28 March 1998, pp. 46–51.

[39] K. Derderian/A. Ponthieu/A. Pontiroli, supra note 14.

provide humanitarian aid independent of a coherence agenda.[40] As a result, this conceptual shift paved the way for the further erosion of humanitarian principles: this is what Derderian *et al*. have called "losing principles for coherence".[41] This took shape and intensified in the context of the "war on terror".

4.3 After 9/11: Counter-Insurgency-Concepts, Western Security Policy and Humanitarianism

The German Federal government's official discourse and practice surrounding the intervention in Afghanistan after 9/11 followed many of the same patterns, discussed above, as the western military interventions of the previous decade. Thus, the German Defence Minister at the time, Peter Struck, in part used humanitarian arguments to justify the military intervention at home, thereby blurring the boundaries between political/military ends and humanitarian goals. He claimed that soldiers were needed to protect humanitarian aid workers in the country—despite the fact that most humanitarian organisations would not accept armed protection from states. The German Ministry for Economic Development and Cooperation also prioritised aid financing in Afghanistan for agencies running programmes in areas where the German military was active: again, this was in part to "soften" the perception of the military and win the support of both the local population and the German public at home.[42] A statement made by Dirk Niebel, former German Secretary for International Development, illustrates the extent to which aid and the military became connected in people's minds in the context of Afghanistan: "Development policy, when it is well done, is the best weapon against extremism we have".[43]

The intervention in Afghanistan also saw the introduction of civil-military reconstruction teams, so-called Provincial Reconstruction Teams (PRTs), in the Afghan provinces. These hybrid-function troops served to cushion NATO's combat mission, as the soldiers were deployed not only to fight but also to build bridges, schools and hospitals with the aim of winning the trust of the local population and

[40] V. Metcalfe/A. Giffen/S. Elhawarym, UN Integration and Humanitarian Space: An Independent Study Commissioned by the UN Integration Steering Group, December 2011, at www.odi.org/publications/6205-un-integration-humanitarian-space.

[41] Ibid.

[42] Caritas Europa/A. Featherstone, supra note 18; L. Weingärtner et al., Die deutsche Humanitäre Hilfe im Ausland: Kurzfassung der Evaluierung, Bonn/Berlin 2011.

[43] D. Niebel, Official Opening of "Heidelberger Dialog", Press Release, 19 October 2012, at www.bmz.de/de/presse/aktuelleMeldungen/archiv/2012/oktober/20121019_pm_253_heidelberger_dialog/index.html.

their support for the military operation.[44] Contradictorily, NATO, during its 13 year involvement in military battles in Afghanistan, caused a large number of civilian deaths in the country despite aiming to contribute to reconstruction and development.

Overall, during the "war on terror", humanitarian aid became increasingly integrated into western security policy, especially into so-called Counter-Insurgency-Concepts (COIN). Some speak of a veritable militarisation of aid in this period.[45] Indeed, former US Secretary of State, Colin Powell, described NGOs as "our force multipliers" in the "war on terror", and NATO Secretary General, Anders Fogh Rasmussen, said in 2010 that the military no longer provided "the complete answer" for complex conflicts such as Afghanistan.[46] Instead, it needed the support of international development organisations and NGOs to provide the "soft power" necessary to prevail in such crises.

Marc Duffield and Nicholas Waddell have summarised the shift in this decade as follows:

> At the close of the 1990s, human security encapsulated a vision of integrating existing aid networks into a coordinated, global system of international intervention able to complement the efforts of ineffective States in securing their citizens. Compared to this more universalistic and Southern oriented notion of human security, which had a place for independent aid agencies, the war on terrorism is refocusing developmental resources on those subpopulations, regions and issues regarded as important for homeland security.[47]

5 What Does It All Mean on the Ground? The Impact on Independent Humanitarian Aid

As we have seen, aid increasingly became subsumed under overall strategies to fight the "war on terror". As such, it came to be used as a reward for political good behaviour, or, in turn, to deprive those groups of aid who are politically unwelcome and/or considered as terrorists, for example, Security Council Resolution 1373.[48] Thus, a number of resolutions and laws (e.g. UNSCR 1373 and UNSCR 1390) were

[44] M. Hofmann/S. Delaunay, Afghanistan: A return to Humanitarian Action, December 2012, pp. 2–3, at www.doctorswithoutborders.org/news-stories/special-report/afghanistan-return-humanitarian-action.

[45] P. Krähenbühl, The Militarization of Aid and its Perils, 22 February 2011, at www.icrc.org/eng/resources/documents/article/editorial/humanitarians-danger-article-2011-02-01.htm.

[46] A. Fogh Rasmussen, Speech at the Strategic Concept Seminar in Helsinki, 04 March 2010, at www.nato.int/cps/en/natolive/opinions_61891.htm.

[47] M. Duffield/N. Waddell, Securing Humans in a Dangerous World, in: International Politics 43 (2006), pp. 1–23.

[48] UN Security Council, Resolution 1373 (2001), at http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20%282001%29.pdf.

passed that criminalised any transfer of resources, including humanitarian aid, when the aid was intended for any terrorist-labelled groups or individuals.[49] These laws have been adopted at UN and EU level and become national law in some member states. They make it a criminal offence for aid organisations to negotiate with groups that are considered as terrorist or offer support to the populations living under the control of such groups.

As Sara Pantuliano *et al*. have shown, these developments undermine humanitarian principles and consequently have an impact upon aid:

> Humanitarian funding from donor governments is increasingly being made conditional on assurances that it is not benefiting listed individuals or organisations, and that greater security checks are being placed on local partners and implementing actors. The co-option of humanitarian actors into counter-terrorism efforts directed against one party to a conflict can undermine the principles of impartiality and neutrality.[50]

In other words, the integration of aid by western states into comprehensive approaches on the "war on terror" have seriously undermined the perception of aid as independent, impartial and neutral. This makes not only governments but also, by implication, the UN and the whole system of international aid seem untrustworthy to local political actors and affected populations. Today, all NGOs are faced with growing mistrust in conflict and crisis areas—even including the International Committee of the Red Cross (ICRC) and MSF, two organisations that are known for their strict adherence to humanitarian principles.[51]

The very real consequence of this growing mistrust is that local authorities or communities in conflict areas may prevent humanitarian access to populations in need.[52] MSF's Jason Cone and Francoise Duroch have illustrated this using the example of Pakistan, where humanitarian actors struggle to gain access and acceptance: "Armed groups — State and Non-State — have used any shift in the motives of aid organisations as a reason to deny access to locals.[53] In 2011, the US government is said to have employed a fake vaccination program in the search of Osama bin Laden. The damage was almost immediate and will be long- lasting".[54]

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[49] K. Mackintosh/P. Duplat, Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action, July 2013, pp. 18 ff.; S. Pantuliano/V. Metcalfe, Neutrality Undermined: The Impact of Counter-Terrorism Legislation on Humanitarian Action in Somalia, in: Humanitarian Exchange Magazine 53 (2012), at www.odihpn.org/humanitarian-exchange-magazine/issue-53/neutrality-undermined-the-impact-of-counter-terrorism-legislation-on-humanitarian-action-in-somalia.

[50] S. Patuliano et al., Counter-terrorism and Humanitarian Action, at www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7347.pdf.

[51] S. Pantuliano/V. Metcalfe, supra note 49.

[52] L. Hammond/H. Vaughan-Lee, Humanitarian Space in Somalia: a Scarce Commodity, HPG Working Paper, April 2012, at www.odi.org/publications/6430-humanitarian-space-somalia-aid-workers-principles.

[53] J. Cone/F. Duroch, Don't Shoot the Ambulance: Medicine in the Crossfire, World Policy, Fall 2013, at http://www.worldpolicy.org/journal/fall2013/Medicine-in-Crossfire.

[54] Ibid.

Persons in need may also avoid seeking assistance when they fear retribution by parties to a conflict, which can further limit the access of humanitarian workers. Again, Cone and Duroch illustrate this, using an example from MSF's field experience in the conflict-torn province of North-Kivu in the DRC: "In October 2009, hundreds of women and children who had gathered for a vaccination campaign [. . .] came under fire in seven separate villages during attacks by the Congolese Army against the Forces Démocratiques de Libération du Rwanda (FDLR). These attacks occurred just after the medical teams had received security guarantees from all parties involved in the conflict to carry out the campaign in these areas, which were otherwise inaccessible to the national ministry of health. This use of medical aid as bait for military purposes shattered the trust of patients in health services, causing only more suffering for people already confronted with violence and displacement."[55]

Increased insecurity for humanitarian workers is another direct consequence of lack of trust. When assistance is seen as part of a political or military agenda, aid workers may be endangered and be at risk of becoming a target themselves. While there is no formal evidence to tie the integration of humanitarian aid into western security policy to the increased violence faced by aid workers, most experts nevertheless agree that the rise in safety risks for humanitarian staff is a consequence of the policies described above.[56] Certainly Afghanistan proved to be a very dangerous situation for relief agencies to operate in, because the integrated approach made it extremely hard—for the local population and the parties to the conflict alike—to differentiate between independent aid workers and members of the PRTs.[57] Both the ICRC and MSF were forced to stop activities in Afghanistan for a period of time following abductions and killings of their staff—with severe consequences for the local civilian populations, who, in some areas, were left without any form of assistance.

Until today, Afghanistan remains quantitatively the most dangerous place in the world for relief work: in 2013, the number of aid workers killed in the country more than tripled.[58] This is in part due to military involvement in activities traditionally

[55] Ibid.

[56] Egeland, Jan, Adele Harmer and Abby Stoddard, To Stay and Deliver. Good practice for humanitarians in complex security environments, Office for the Coordination of Humanitarian Affairs (OCHA), Policy Development and Studies Branch, February 2011, at http://reliefweb.int/report/world/stay-and-deliver-good-practice-humanitarians-complex-security-environments-enar.

[57] It must be said that some aid agencies were also complicit in this confusion, as many of them accepted funding from western states that were party to the conflict or sought military protection for their staff, which is incompatible with humanitarian principles, particularly that of independence. Recent studies have also shown that the underlying approach to staff security is not effective. See P. Fishstein/A. Wilder, Winning Hearts and Minds? Examining the Relationship between Aid and Security in Afghanistan, Medford 2012, at www.fic.tufts.edu/assets/WinningHearts-Final.pdf.

[58] Humanitarian Outcomes, Aid Worker Security Report 2013 – The New Normal: Coping with the kidnapping threat, 2013, at www.aidworkersecurity.org/sites/default/files/AidWorkerSecurityReport_2013_web.pdf.

implemented by aid agencies and the resulting blurred boundaries between both groups. The consequences for the perception of the neutrality and independence of aid in the country have been dramatic, as MSF has repeatedly shown, including in the 2014 report *Between Rhetoric and Reality: The Struggle to Access Healthcare in Afghanistan*.[59]

6 Advocating Against Abuse: The Case of Mali

The recent international military intervention in Mali in 2013 illustrates that the confusion between political/military aims and humanitarian goals still pervades Germany's official discourse and practice. This case also illustrates MSF's advocacy against the use of aid as a foreign policy instrument.

The Mali intervention clearly reveals the tensions between the "coherence approach" of political/military actors and the ability to provide independent humanitarian assistance. As Derderian *et al*. have pointed out, the UN's approach to this complex political context (that involved Malian State and Non-State actors, the UN, the EU, France, the African Union (AU) and the Economic Community of West African States (ECOWAS)) included both explicitly acknowledging that "impartial, neutral, full and unimpeded access for humanitarian aid" was needed in Mali, while also aiming to develop an "integrated strategy for the Sahel region encompassing security, governance, development, human rights and humanitarian issues".[60]

Public rhetoric of the EU and its member states has tended to brush over these tensions by labelling the overall intervention as "humanitarian" or aligning humanitarian and political/military aims. The official discourse in Germany provides a case in point: in November 2012, as militant Islamic groups took over the North of Mali and African states were considering a military intervention with potential support from the EU, the German Foreign Minister at the time, Guido Westerwelle, visited the country and publicly stated that "the stability of Mali is also of great importance for the security of Europe".[61] He then announced that the Federal Government would increase humanitarian aid for Mali, thereby effectively blurring the lines between humanitarian aid on the hand and strategic and political goals on the other.[62]

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[59] MSF, Between Rhetoric and Reality: The Struggle to Access Healthcare in Afghanistan, February 2014, at www.msf.org/sites/msf.org/files/msf_afghanistan_report_final.pdf.

[60] K. Derderian/A. Ponthieu/A. Pontiroli, supra note 14.

[61] German Foreign Ministry, Westerwelle and Fabius: EU must take action in Mali, 10 November 2012, at www.auswaertiges-amt.de/EN/Infoservice/Presse/Interview/2012/121110-BM-Fabius-RHP.html.

[62] Kampf gegen Islamisten: Westerwelle stockt Hilfe für Mali auf, Spiegel Online, 1 November 2012, at www.spiegel.de/politik/ausland/westerwelle-sagt-mali-bei-besuch-in-bamako-hilfe-gegen-islamisten-zu-a-864760.html.

Then in January 2013, shortly before the Bundestag voted to provide air transportation to the allied forces in Mali, Westerwelle said that the German government would support the intervention not by sending troops, but by "logistical, medical and humanitarian" means.[63] His statements suggested that humanitarian aid in Mali was part of political/military efforts to stabilise the conflict and region. Likewise, the German Federal government argued in its motion to the Bundestag, asking to send German troops to support the African-led International Support Mission to Mali (AFISMA), that German support was part of a "broader effort to support the political process" including "through humanitarian aid".[64] Furthermore, Philipp Missfelder, foreign affairs spokesman for the German conservative party (CDU), declared in a public statement on 21 January 2014, that German military support for the Mali intervention was a way for Germany to "take on political, humanitarian and material responsibility".[65]

MSF publically criticised Westerwelle's statement in a press release on 16 January 2013, stating that it blurred the lines between political/military aims and humanitarian ones by implying that aid in Mali was aimed at supporting the military intervention—a misrepresentation which could in turn reduce humanitarian access to the affected population and place humanitarian aid workers at risk.[66] Two weeks later, MSF sent a joint open letter with Médecins du Monde Germany to Foreign Minister Westerwelle, criticising his abuse of the positive perception of humanitarian aid in order to promote public support for the intervention in Mali, and stating again that his public discourse was undermining humanitarian principles and putting aid workers and the people they serve at risk. Even though there was no official response, MSF's statement and letter received significant attention within the Bundestag and the Foreign Office, foremost the department for humanitarian aid. Nonetheless, only one year later, the German and French governments reaffirmed their "common political, military, civilian and humanitarian efforts for the stabilisation of Mali" in a public statement.[67] On 14 May 2014, in a motion before the Bundestag, the government requested renewal of military support for the integrated UN mission in Mali (MINUSMA) by claiming, amongst other reasons,

[63] German Foreign Ministry, Press Release: Foreign Secretary Guido Westerwelle in telephone call with French Foreign Secretary Fabius about the Situation in Mali, 14 January 2013.

[64] German Bundestag, Motion 17/12367, 19 February 2013, at http://dip21.bundestag.de/dip21/btd/17/123/1712367.pdf.

[65] CDU/CSU, Deutschland übernimmt politische, humanitäre und materielle Verantwortung in Mali, Press Release, 21 February 2013, at www.cducsu.de/presse/pressemitteilungen/deutschland-uebernimmt-politische-humanitaere-und-materielle-verantwortung.

[66] MSF Germany, Press Release, Mali: Medizinische Hilfsorganisationen werfen Außenminister Westerwelle Missbrauch humanitärer Hilfe vor, 30 January 2013, at www.aerzte-ohne-grenzen.de/presse/mali-medizinische-hilfsorganisationen-werfen-aussenminister-westerwelle-missbrauch.

[67] German Foreign Office, Press Release, Erklärung des Rates des Deutsch-französischen Verteidigungs- und Sicherheitsrats (DFVSR), 19 February 2014, at http://www.auswaertiges-amt.de/DE/Infoservice/Presse/Meldungen/2014/140219_DFVSR_Erklaerung.html.

that "access to humanitarian aid" in the country was dependent on a stabilised security situation in the country.[68]

7 Conclusions

MSF does not as a priority pursue security and stability in armed conflicts, nor does it aim to promote peace, democracy, and human rights. While these goals may be desirable and praiseworthy, they are not the responsibility of humanitarian aid organisations. Their role is not to support any particular ideology or world view; it is merely to save lives and alleviate suffering. For MSF, it is important to insist on this distinction. In this sense one would need to say we do not all want the same.

Of course, humanitarian action does not happen in a vacuum. Aid workers operate in a political context, often standing knee-deep in local and international political debates. There can, in fact, never be a truly neutral position to any conflict—particularly from the perspective of local populations or involved armed groups. Humanitarian aid also always has a function and a motivation. Even though MSF strives to remain as neutral as possible, sometimes, in exceptional circumstances, we raise our voice and take a political stance. Staying neutral, impartial and independent in today's complex armed conflicts is often a difficult balancing act. It is not our intention, in these arguments, to place humanitarianism above politics or deny that MSF itself sometimes has to make difficult compromises to try and help those people who suffer the most in today's world.[69] But recognising the complexities and challenges of humanitarianism in action does not however legitimise the increased misuse of humanitarian aid evident in western politics since the beginning of the 1990s. Rather, for MSF, it means we must think ever more critically about the respective roles of political/military and humanitarian actors, encourage rigorous public debate, promote the independence of humanitarian aid and insist on its autonomy as much as possible.

The stakes are high: today, there are millions of people affected by armed conflicts and crises that aid workers cannot reach. While there is more humanitarian aid today than ever before and the sector has been immensely professionalised, aid is still unevenly distributed, and, all too often, not based on needs.[70] This is in large

[68] German Bundestag, Motion 18/1416, 14 May 2014, at http://dip21.bundestag.de/dip21/btd/18/014/1801416.pdf.

[69] In the book Humanitarian Negotiations Revealed, MSF openly explores such compromises the organisation has had to make, their limits, and the challenges to neutrality. See: C. Magone/M. Neuman/F. Weissman (eds.), Humanitarian Negotiations Revealed – The MSF Experience, London 2011.

[70] S. Healy/S. Tiller, Where is everyone? A review of the humanitarian aid system's response to displacement emergencies in conflict contexts in South Sudan, eastern Democratic Republic of Congo and Jordan, 2012–2013, July 2014.

part a result of the instrumentalisation, criminalisation and abuse of aid by the politics discussed above.

MSF has decades of experience working in extremely volatile conflict situations. As stated above, MSF has long witnessed and documented the negative impact on aid programmes and, ultimately, populations in need, whenever aid has become aligned with or subsumed by foreign policy and security objectives in these conflicts.[71] In the following, we outline the operational and advocacy responses identified by MSF as best practice in the context of what former MSF president Dr. Christophe Fournier called the "reality of our coexistence [with political and military actors] in the tight and tense corridors of war".[72]

Humanitarian Principles as Guiding Framework:

The humanitarian principles remain the key framework for defining aid. Some claim these principles have lost relevance, or that they never had much meaning on the ground. But despite the challenges involved and the compromises that have at times been made, for MSF, as well as for many other humanitarians, and concerned politicians, they remain a valuable tool for defining and delineating what humanitarian aid should do and how this should be done, particularly as states are unlikely to change their practices of implementing integrated and coherent approaches to security. We must continue to provide needs-based non-discriminatory aid, to save lives and alleviate suffering, and assist the most vulnerable populations first, wherever possible.

Promotion of Humanitarian Principles:

More knowledge of, and respect for these principles is needed. MSF's experience clearly shows a lack of understanding of humanitarian principles and humanitarian action among key politicians and policy makers. All too often, humanitarian action is mistaken for human rights work or a means to stabilise fragile states. The rules and regulations for humanitarian action mentioned above clearly state that humanitarian aid has no other goals than to save lives and alleviate suffering—but even many donors have little knowledge of these rules.

Ensuring Trust:

Accepted credible programmes are our best safeguard against mistrust. We aim to provide the best possible medical humanitarian relief we can. Helping local communities to the best of our abilities is usually the safest way to ensure these communities trust us and our claim that we have no other aim but to help them.

Reliance on Private Funds:

MSF relies mostly on private funds and in contexts of armed conflict does not accept money from states involved in that conflict. In certain prominent contexts of

[71] K. Derderian/A. Ponthieu/A. Pontiroli, supra note 14.

[72] C. Fournier, Our purpose is to limit the devastations of war, Speech at NATO Gathering in Germany, 8 December 2009, at www.doctorswithoutborders.org/news-stories/speechopen-letter/our-purpose-limit-devastations-war. Said at a NATO conference set to examine best working practices on the integration of civilian and military efforts. Fournier went on to say: "While we will never have a common understanding, we need to improve our mutual understanding in order to be clear about our different motivations, responsibilities, strategies, and purposes."

armed conflict, like Syria, Afghanistan or northern Mali, we do not accept funds from any government. Altogether, MSF's work is 90 % privately funded.

Preparedness to Talk with Every Party:

We talk with everyone (who talks with us). Providing health care to communities in volatile conflict areas requires MSF to demonstrate its independence and impartiality every day, in painstaking daily effort, to communicate with all the actors involved in a conflict. This work can be easily undone when states blur the boundaries between political and humanitarian goals. As this article has shown, when aid workers lose access to populations in need as a result of the politicisation of aid, the cost is high.

Monitoring Perceptions of MSF:

We monitor the perception of us; or at least, we try. How a humanitarian organisation is perceived locally influences its capacity to work as well as the safety of its staff. How a humanitarian organisation is perceived internationally impacts on its capacity to wield humanitarian influence on political actors. This is a complex affair—many internal and external factors, often hardly understood, contribute to our counterpart's perception of our work. Often enough we are also confronted with surprising misinterpretations of our appearance or our work (our logo being understood as a man with a spear, for instance).[73]

Distance from Politics:

We keep a distance from all political actors, especially the military. We almost never accept armed protection and we do not comment on political or military strategies in armed conflict. This also means we have no (official) position on the "Responsibility to Protect" doctrine. As a humanitarian organization, we always strive to remain neutral in conflict areas, as we may otherwise endanger the populations we serve.

Non-involvement in UN:

We are not official member of any UN coordination body or cluster. The UN is the political organisation of its member states, apart from being in charge of coordinating humanitarian assistance. As we have shown, this can become very problematic in conflict areas, when the UN plays both a humanitarian and a highly political role. For this reason, while we often act as observers and share information, we remain officially outside any UN coordination bodies. "We coordinate with everybody, but we do not like to be coordinated": because our field experience shows that being autonomous is an important prerequisite to successfully assisting patients in conflict situations.

Resist Governments' Abuse of Humanitarian Rhetoric:

We fight against the government abuse of humanitarian rhetoric. As in the case of MSF's press statement on Mali and the open letter to Foreign Minister Westerwelle cited above, we continue to monitor public discourse and speak out when states label political or military interventions as "humanitarian", because, as

[73] C. Abu-Sada (ed.), In the Eyes of Others: How People in Crises Perceive Humanitarian Aid, New York 2012, p. 25, at www.msf.org/sites/msf.org/files/msf-in-the-eyes-of-others.pdf.

we have seen, this undermines humanitarian principles and effectively puts our patients and staff at severe risk.

MSF will continue to call on governments to respect the independence and autonomy of humanitarian aid actors. European states, including Germany, must ensure an independent space for humanitarian aid, and that it can be clearly distinguished from other crisis management tools. In particular, states should stop labelling their political/military interventions as "humanitarian", or describing humanitarian aid as a part of a wider political and security strategy. The European Consensus remains a useful framework for the provision of humanitarian aid in armed conflicts; as such, governments should ensure it continues to inform their policy and practice.

In conclusion, we must reiterate: the instrumentalisation of aid by western states is by far not the only challenge for today's humanitarians, and western states are by far not the only actors who instrumentalise aid. As Antonio Donini has argued, "instrumentalisation is in the DNA of humanitarian action", because "in one way or another, humanitarian action is always subject to instrumentalisation".[74] It was also not the aim of this article to claim that humanitarians are in some way above politics—aid organisations too have to negotiate the complex realities of today's armed conflicts and, as we have stated above, this often entails difficult compromises. However, recognising that all actors are implicated in the power relations that affect the ability of humanitarian actors to access populations in need does not mean we cannot point to the mistakes made by western states in recent decades. On the contrary: we need candid debates that openly address the various obstacles we face in providing independent aid.

As Krähenbühl has argued:

> Given the stakes, I believe it is essential that political and military decision makers seriously confront the far reaching consequences of making humanitarian aid an integral part of counter-insurgency operations. Humanitarian organizations for their part must debate the consequences of their choices in a more self-critical and honest fashion and genuinely decide how they wish to operate. Failure to do so will continue to weaken the security of humanitarian workers, and more significantly, further isolate and endanger the victims of armed conflict.[75]

It is most crucial to keep this in mind on the way forward.

[74] The Global Observatory, Interview with Antonio Donini on manipulation and independence in humanitarian action, 26 February 2013, at http://theglobalobservatory.org/2013/02/interview-with-antonio-donini-editor-of-the-golden-fleece-manipulation-and-independence-in-humanitarian-action.

[75] P. Krähenbühl, supra note 45.

The Role of the German Red Cross as Auxiliary to the Public Authorities in the Humanitarian Field

Sascha Rolf Lüder

1 Introduction

The German Red Cross participates in the State order in different ways. As the national aid society and as a central non-statutory welfare organization it is engaged in the social and healthcare sector as well as in the field of danger prevention.

The participation is based on the principle of subsidiarity through which it perceives objects of public interests. In Germany these tasks are performed not only in the social and healthcare sector by non-statutory welfare organizations but have also been proven to be successful by aid organizations in the field of danger prevention. The participation is built on ideal principles as well as on the engagement linked between full-time and voluntary work.

As part of its participation in the State order, the German Red Cross coordinates civil protection and emergency services—which are a part of civil law in Germany—in cooperation with public authorities. The German Red Cross is also responsible for the sectional task of supplying the entire population of the Federal Republic of Germany with blood.

Emergency services and the blood transfusion service are objects of public interests in the form of resilient healthcare systems. This means that an important role in the performance of these tasks besides the economic efficiency is the security of supply. Emergency services and the blood transfusion service have to be provided comprehensively and around the clock—at inconvenient times and under difficult circumstances. In order to operate further under these circumstances

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the establishments of emergency services and of the blood transfusion service have to prepared and equipped accordingly.

The Federal Republic of Germany has entered a partnership with the German Red Cross in the humanitarian field. In the following, the task performance of the German Red Cross in the blood transfusion service and emergency services shall provide an example to outline this partnership.

2 The Specific Legal Status of the German Red Cross Concerning the Blood Transfusion Service and Emergency Services

The obligation of the German Red Cross, with its tasks covering the blood transfusion service and emergency services described above, faces the obligation of the State to prevent measures that may hinder the German Red Cross in the fulfillment its coordination and supply contract.

The legal status of the German Red Cross, as the National Red Cross Society and as a voluntary aid society auxiliary to the German authorities in the humanitarian field, is set out in section 1 DRKG (Act on the German Red Cross and Other Voluntary Aid Societies as Defined in the Geneva Conventions). The tasks that arise from international humanitarian law according to section 2 DRKG and the coordination and supply contract derived within also support this conclusion.

The subject matter of section 1 DRKG is the legal status of the German Red Cross as 'the National Red Cross Society on the territory of the Federal Republic of Germany and Voluntary Society, auxiliary to the German authorities in the humanitarian field'. This provision reflects the fact that a Red Cross Society requires a dual recognition before being a National Red Cross Society: firstly by the government of its own State and furthermore by the International Committee of the Red Cross (ICRC).

The recognition by the ICRC is thereby an act of the international law of the Red Cross and Red Crescent Movement. The privileges above all which only refer to Red Cross Societies, and which go beyond the framework laid down for voluntary aid societies in the context of Geneva Convention I and the attributed rights specifically listed, have as a specific prerequisite that the ICRC recognizes the Societies.

The recognition of the State represents, in contrast, a public sovereign of the own State—here the Federal Republic of Germany—and causing the Red Cross Society to be constituted as National Society so that specific tasks are entrusted to it, these being particularly the obligations deriving from international humanitarian law but also those a National Red Cross Society has to fulfill in its own State derived by virtue of the resolutions of the International Conferences of the International Red Cross and Red Crescent Movement.

The recognition of the State was awarded to the German Red Cross by the Federal Government, initially by a decision of the Federal Government of

26 February 1951, confirmed by the statement of the Federal Chancellor in 1956 and acknowledged most recently after the unification by the statement of the Federal Chancellor on 6 March 1991. The recognition was then validated as law in form of the DRKG of 5 December 2008.

The act of State therefore sets out the recognition for the German Red Cross to fulfill the tasks that have been given to it as a National Society of the Red Cross in accordance with the Geneva Conventions and the Additional Protocols as well as the framework given in the resolutions of the International Conferences of the International Red Cross and Red Crescent Movement. The German Red Cross is awarded a privileged legal position through this recognition. The privileged legal position is expressed not only in the structure of the non-statutory welfare organizations and aid organizations. The main difference between the German Red Cross and all other organizations is the recognition. The German Red Cross is therefore neither marked as a non-governmental organization nor a private aid organization but is rather auxiliary to the State.

The legislator has reflected this finding by confirming the legal status of the German Red Cross explicitly in section 1 DRKG; the DRK being 'voluntary aid society, auxiliary to the German authorities in the humanitarian field'. In the explanatory memorandum to the DRKG it is stated:

> With regard to is specific role of the German Red Cross as voluntary aid society, auxiliary to the public authorities in the humanitarian field, a statutory requirement is advisable.

Even more significant is the reference to section 1 DRKG:

> The bill reflects this recognition by way of acknowledging the characteristic of the German Red Cross as National Society in legislation.
> (...)
> Art. 4 para. 3 of the Statutes of the International Red Cross and Red Crescent Movement has the wording 'voluntary aid society, auxiliary to the German authorities in the humanitarian field' which complies with the precondition of recognition. Due to the fact that it covers all tasks in the humanitarian field the term 'aid society' used here is wider than the term in Art. 26 para. 1 of the First Geneva Convention.

This clearly demonstrates that the legislator has deliberately chosen the wider term 'voluntary aid society, auxiliary to the German authorities in the humanitarian field' in section 1 DRKG to contrast the narrow concept the term 'voluntary aid societies as defined in Art. 26 of the First Geneva Convention' used in section 4 DRKG. As the wording with reference to the legal status makes clear the recognition by the State also comprises the tasks that the German Red Cross has to fulfill by virtue of the international law of the Red Cross or through conveyance by operation of law. In this respect the explanatory memorandum emphasizes explicitly in the text that the German Red Cross as National Red Cross Society is subject to the regime of international law of the Red Cross as set out in the Statutes of the ICRC, the Statutes of the International Red Cross and Red Crescent Movement as well as in the implementing regulations and resolutions of the International Conferences of the International Red Cross and Red Crescent Movement.

The recognition of the German Red Cross as a National Red Cross Society is not limited to cases of armed conflict and preparations for these cases in times of peace but rather comprises precisely the statutory duties in times of peace.

Through the recognition as 'voluntary aid society, auxiliary to the German authorities in the humanitarian field' the State can ensure a supply to the population also in times of peace to such an extent as this obligation is included in the articles of the German Red Cross and the articles of its subdivisions and establishments.

The recognition as National Society of the Red Cross expresses further that the State can in turn expect the proper fulfillment of a statutory task by the German Red Cross. It is this recognition of the German Red Cross as the National Red Cross Society that provides assurance to the Federal Republic of Germany—in comparison to all other actors—in guaranteeing to take on this statutory task and to be organized accordingly thereby ensuring the fulfillment of this task independent of other actors.

It therefore results out of the context of the norm and the recognition of the German Red Cross as the National Red Cross Society through the act of State, that only the German Red Cross acts as aid society, auxiliary to the German authorities and having been individualized by way of recognition through the act of State.

At the same time the Federal Republic of Germany has—with the recognition of the German Red Cross as National Red Cross Society—also taken up the commitment to allow the German Red Cross to fulfill the statutory tasks.

It would be in bad faith if the Federal Republic of Germany and its organs were to recognize the German Red Cross as National Red Cross Society, to institute the recognition of the German Red Cross by the ICRC only to not create the preconditions with which the German Red Cross can fulfill its obligations according to the Statutes of the International Red Cross and Red Crescent Movement. With the recognition of the German Red Cross by the State, the Federal Republic of Germany has taken up a guarantee obligation with regard to the German Red Cross to protect it against measures of a third party, which could endanger the fulfillment of the statutory tasks.

The individual right to fulfill this obligation results from section 1 DRKG and the systematic connection with the specific, individualized legal status of the German Red Cross as 'voluntary aid society, auxiliary to the German authorities in the humanitarian field' transferred through the act of State.

3 The Specific Supply Contract of the German Red Cross in the Blood Transfusion Service

With regard to the blood transfusion service, the provisions given in section 2 DRKG lead to the same result. The German Red Cross assumes according to section 2(1) DRKG:

(...) as voluntary aid society the tasks that arise from the Geneva Conventions of 1949 and their Additional protocols, in particular

1. Rendering assistance to the regular Medical Service of the Bundeswehr as defined in Article 26 of the First Geneva Convention including the utilization of hospital ships pursuant to Article 24 of the Second Geneva Convention (...).

The explanatory memorandum explains in general:

The German Red Cross is involved specifically in the fulfillment of the obligations of the Federal Republic of Germany derived from international humanitarian law. The tasks of the German Red Cross arise directly from the Geneva Conventions of 1949, its Additional Protocols of 1977 and 2005 and the Resolutions of the International Conferences of the International Red Cross and Red Crescent Movement, which are formed from the State parties to the Geneva Conventions of 1949 and the three components of the International Red Cross and Red Crescent Movement: the International Committee of the Red Cross (ICRC), the National Societies of the Red Cross and Red Crescent Movement and the International Federation of Red Cross and Red Crescent Societies.

The legislator explains the following specifically to section 2 DRKG:

The German Red Cross derives its tasks in the humanitarian field directly from the Geneva Conventions, its Additional Protocols as well as from the resolutions of the International Conferences of the International Red Cross and Red Crescent Movement. The resolutions of the International Conferences of the Red Cross and Red Crescent Movement range below the Geneva Conventions and the Additional Protocols. In § 1 paras. 1 to 4 the main tasks of the German Red Cross are listed. The wording 'in particular' in para. 1 clearly expresses that the task catalogue is not exhaustive. Further tasks may result specifically from the Geneva Conventions, its Additional Protocols and the resolutions of the International Conferences of the Red Cross and Red Crescent Movement as well as from its articles, through which the German Red Cross is a recognized central non-statutory welfare organization (§ 1 para. 3 Articles of the German Red Cross in the version of 12 November 1993). The responsibility of other organizations apart from the National Red Cross Society remains unaffected.

It thereby results that the task assignment in section 2 DRKG is declarative as the listed statutory tasks of the German Red Cross derive directly from the aforementioned treaties.

At the same time the privileged legal position of the German Red Cross and its specific obligation toward the German State is expressed in section 2 DRKG. For section 2 DRKG in fact determines explicitly with regard to the German Red Cross the tasks it performs in the humanitarian field on a domestic level and thus includes the blood transfusion service. The other voluntary aid societies in the sense of article 26 Geneva Convention I are in contrast only mentioned as such in section 4 DRKG and are authorized to render assistance to the regular Medical Services of the *Bundeswehr* or the tasks assigned to them by law. The legislator takes account of the privileged legal position of the German Red Cross with this differencing regulation, which results from the recognition as National Society of the Red Cross in the Federal Republic of Germany and from the aforementioned legal position given in section 1 DRKG.

This is explicitly confirmed in the explanatory memorandum cited above where it cites the German Red Cross:

> (. . .) is involved, in the fulfillment of the obligations towards the Federal Republic of Germany arising from international law, in a particular way.

Hereby it is expressed unequivocally, that due to its privileged legal status the German Red Cross has been assigned in a particular way while equally having to insure a 'basic service' with view to armed conflicts under international law. This also covers the supply of blood. The privileged legal status does not only include the obligations of the German Red Cross in cases of armed conflicts. The aid can however only be insured in such cases if it has been prepared in times of peace.

This truism applies namely to the supply of blood products, which is one of the most essential forms of aid in the case of an armed conflict. In this case blood and blood components do not only have to be donated but blood products have to be stored in times of peace, so that in case of an emergency these can be accessed at any time. The donor file must also be established and maintained already in times of peace. And last but not least the establishment and maintenance of a functional and efficient organization for the blood transfusion service in times of peace is a necessary precondition for operational and functional capability in cases of armed conflict.

Regardless of the provisions given in section 3(1) TFG, whereby *the donation establishments (. . .) have the tasks to collect blood and blood components in order to supply the population with blood products*, the German Red Cross blood transfusion services have to insure the cross-sectional task of supplying the entire German population with blood in the sense of a 'basic service'.

The operational outflow of this specific mandatory position of the German Red Cross blood transfusion service is the agreement between the *Bundeswehr* and the German Red Cross of 13 June 2002 on the supply of the armed forces and the civil population with blood products by the German Red Cross blood transfusion services.

This agreement governed by public law obliges the German Red Cross blood transfusion services to assist the security of supply with blood products in times of increased demand in case of an armed conflict. The German Red Cross blood transfusion services have entered into agreements with the *Bundeswehr* on this basis to consistently provide blood products. Today this includes the supply of the establishments of the armed forces domestically and the provision of blood products for the foreign deployment of the *Bundeswehr* on the grounds of article 26 Geneva Convention I. Further agreements have been entered into with the visiting forces of the Federal Republic of Germany.

Due to the fact that the whole organization of the blood transfusion services has to be held as a provision for possible cases of armed conflict anyway these are involved on the basis of section 2 DRKG as well as the relevant domestic law as part of civil defense and civil protection in the Federal Republic of Germany.

The German Red Cross blood transfusion services therefore do not only provide for situations of armed conflict within their statutory role but also for natural disasters and other emergencies in which blood products are needed. It follows from the nature of things that blood is needed in any kind of emergency.

In addition, the blood transfusion services maintain as part of their cross-sectional tasks the continuous provision of healthcare of the population.

As a result a clear delineation of the task areas of the blood transfusion service—that is between healthcare and danger prevention—is insofar not possible and would not be appropriate. The German Red Cross blood transfusion services provide salvage in a broad sense—that is for all emergencies—including those which arise out of situations of armed conflict in which blood products are needed to save human lives.

As far as the task of the blood transfusion services in times of peace at first glance appear to be the current supply of medical practices and hospitals, it has to be noted that at the same time preparations for armed conflicts as well as natural disasters and other emergencies are being carried out. In this context the *Bundessozialgericht* held in its decisions:

> The stockpiling is (...) not only a theoretical willingness to supply blood but is an actual reserve for disasters. At least it would not be economically sensible to preserve the blood products having limited shelf-life and to dispose of them after the expiry date. That is why the products are continually being replaced by new ones while the stock is passed on to medical practices and hospitals against payment however – as the Landessozialgericht has observed – only at a price covering the costs at hand. The economic activity of the blood transfusion service therefore serves ultimately to finance the far-reaching willingness to assist in emergencies. The distinctive blood supply to medical practices and hospitals in times when emergencies are not apparent and therefore the practical activity of the blood transfusion service in the general healthcare service sector has so far reached an extent – as the Landessozialgericht has observed – in that the function of the blood transfusion service as a disaster relief organization would be questionable; the willingness of the blood transfusion service to provide blood supplies in cases of accidents, emergencies and disasters is still the main aim for its activity which is only facilitated by the sale of blood to medical practices and hospitals and in parts making it thereby possible in the first place.

This shows that the task of the German Red Cross blood transfusion services in principle has to be seen as a whole and by its very nature as a preparation for armed conflicts and in this sense the resulting specific supply contract in section 2 DRKG. This also demonstrates the current development of the civil-military cooperation between the *Bundeswehr* and the German Red Cross to supply the civilian population and the armed forces with blood products in working towards a strategic partnership.

Against the background of the reorganization of the armed forces the General Surgeon of the Medical Service of the *Bundeswehr* has decided:

- not to carry out the task of gaining and producing blood and blood components with its own personnel and keeping only one medical collection team;
- concerning this task and concerning the supply with blood products to be supported by the German Red Cross blood transfusion services; and
- to maintain the operation of a central blood bank as well as the distribution for foreign deployment of the *Bundeswehr*.

The aforementioned measures are to be put into practice by 2016. Apart from the economic reasons the decision of the General Surgeon of the Medical Service of the

Bundeswehr was based on the security requirements as well as the resulting necessary military capabilities to the blood transfusion service.

Against the background that:

- the constant capability to supply blood products in sufficient amounts is relevant to (military) operations;
- the total supply of the armed forces with blood products has to be absolutely ensured;
- peak demand is covered;
- contingents for rare blood groups are held; and
- in cases of emergencies prioritized delivery has to be ensured,

the Command Staff of the Medical Service of the *Bundeswehr* contacted the German Red Cross for the sake of a demand-supply of blood products. On the basis of the specific given standard of international humanitarian law and law of the Red Cross for the blood transfusion services the German Red Cross guaranteed a supply with blood products everywhere and at any time to the Medical Service of the *Bundeswehr* and also for foreign deployment of the armed forces.

The General Surgeon of the Medical Service of the *Bundeswehr* has now established that the German Red Cross is able to take on the supply contract of the armed forces with its regional German Red Cross blood transfusion services in the aforementioned way. Insofar, the practical blood donation practiced as such belongs to the preparatory tasks that characterize the specific supply contract of the German Red Cross.

The omnipresent preparation for cases of disaster means furthermore that the German Red Cross is regularly active also in times of peace in the Federal Republic of Germany when and wherever other aid organizations, medical practices or hospitals are not at hand or the reserves of blood are not sufficient.

In summary it can be stated that the blood transfusion service has a complex task with view to the donation establishments whose perception is essential for a sufficient medical supply of the population if required. With respect to the consideration of transfusion medicine, as well as economic aspects and aspects of public procurement this supply cannot be limited to the process of the donation of blood and blood components and the production of and supply with blood products.

The blood transfusion service is rather constantly shifting in a cross-section between healthcare service and danger prevention. As far as the German Red Cross blood transfusion services are subject of a specific supply agreement described above resulting from section 2 DRKG for the entire population this supply contract can in all be compared with the guarantee of a ‘basic service’ in the sense of a universal service.

4 The Specific Task of the German Red Cross to Coordinate Emergency Services

The same applies in effect to the coordination of civil protection and (civil) emergency services by the German Red Cross in cooperation with public authorities.

The continuous development of the adjudication of the European Court of Justice and the *Bundesgerichtshof* has led, with regard to an obligation of public procurement concerning public contracts of emergency services in *Kreisen* and *kreisfreien Städten* as the authorities responsible for emergency services as well as with view to the aid organizations participating in emergency services, to fundamental difficulties in the last years.

The reason being that the formal European procurement procedure bears the real risk that the aid organizations participating in emergency services are not awarded a contract although they fulfill vital functions for civil defense, civil protection and emergency services for the authorities responsible for emergency services as authority for civil protection. The role of the aid organizations in emergency services is forced back to their functional deployment in the sector of civil defense and civil protection is limited.

In the context of the reenactment of the European public procurement procedure the European Commission proposed on 20 December 2011, as revision of the existing directives, for a proposal for a Directive on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sector, and the proposal for a Directive on Public Procurement as well as the proposal for a Directive on the Award of Concession Contracts.

The European directive proposals have led to two divergent tendencies in competitive law and public procurement. On the one hand the tendency to label public tasks as services and to assign these to public procurement with exceptions in the social and healthcare sector as well as specific exceptions in the sector covering defense and safety as laid out in the proposals for the directives of the European Commission with regard to the regulations on public procurement. On the other hand the tendency to develop structures and resources beyond public procurement in order to strengthen the interests of a European civil protection as expressed, for example, in the Report of the European Commission to the European Parliament and the Council of Ministers 'Towards a Stronger European Disaster Response: the Role of Civil Protection and Humanitarian Assistance' of 26 October 2010.

The proposals for the directives of the European Commission on the regulations of public procurement and consequently the strong emphasis on the idea of service were not sufficiently responded to regarding the requirements of civil defence and civil protection. For the German Red Cross as National Red Cross Society recognized by the Federal Republic of Germany and voluntary aid organization, auxiliary to the German authorities in the humanitarian field specific problems arose from the proposed allocation.

On the basis of section 2 DRKG, described an the outset, as well as the corresponding domestic law applicable to civil defence and civil protection in the Federal Republic of Germany, the German Red Cross plays the part as the largest actor concerning the tasks in disaster medicine as well as in medical and care services. In this context the German Red Cross provides resources to deal with situations below the threshold of disaster and participates in emergency services. The application of the European proposals for the directives would in conclusion have lead to a weakening of the overall system of danger prevention.

The allocated support of the Medical Service of the *Bundeswehr* to the task of the German Red Cross set out in article 26 Geneva Convention I would have been undermined by the strengthening of the idea of service in the context of danger prevention. The final consequence of an application of the proposals for directives would have been that a comprehensive provision for emergencies at all times no longer exists.

In order to maintain the efficiency of the German Red Cross in danger prevention, as well as in the sense of the Geneva Conventions as part of the security provision of the State, it was necessary to exclude the resources relied on daily from the proposals for directives of the European Commission as far as these are retained for civil defence and civil protection and needed to support the Medical Service of the *Bundeswehr*, as for example the resources of emergency services and patient transport ambulance services.

In the course of the legislative process concerning the amendment of the European procurement procedure this development could have been mitigated by creating an exception in the directives in the joint interest of the organizations responsible for emergency services and the aid organizations involved.

The wording used to amend the European public procurement procedure as an outcome of the trilogues of the European Parliament, the European Commission and the Council of Ministers clearly show that emergency services are a component of civil defence and civil protection as well as danger prevention and these are therefore to be exempted from a European public procurement procedure *(Bereichsausnahme)*.

Precondition for this exception is that emergency services are provided by nonprofit organizations or associations. *Kreise* and *kreisfreie Städte*, as the authorities responsible for emergency services, can award the provision to the participating aid organization without having to invite tenders from the whole of the European Union.

In the trilogue the European Commission was particularly keen to find ‘common terms for public procurement’. These were used by the European Commission in order to avoid an exemption clause that was too wide. The exemption clause withholds the terms with regard to emergency services whereby here it specifically distinguishes between the terms ‘ambulance services’ and ‘patient transport ambulance services’, whereby ‘patient transport ambulance services’ are not included. The patient transport ambulance services are to be subject to a simple procurement process integrated in the social and healthcare sector.

What exactly is to be subsumed under the term ‘patient transport ambulance services’ is not specified. In general on the European basis, emergency services

cover all sudden and unexpected emergencies coming in over '112' regardless of whether life is in danger or not. These have to be separated from patient transports scheduled and prescribed by a doctor (transportation between hospitals, accompanied transports of dialysis patients by medical personnel to hospitals or clinics for treatment).

With regard to an organizational unity between emergency services and patient transport ambulance services the specific regulations for emergency services as well as the regulations concerning mixed contracts (those giving reference to emergency services as well as patient transport ambulance services) can be referred to. In principle it is distinguished between whether or not the individual obligation is objectively separable. If both obligations are not separable in a particular case then the provision is applicable which is of greater value; here meaning the financial value. There is also room for specific configuration in the transposition to domestic law.

The legal idea of the European exception from public procurement for emergency services can now be adopted into the legislation on emergency services of the Federal Republic of Germany directly by the *Länder*. The exception from public procurement as such is to be transposed into the federal regulations covering competition and public procurement.

The exception could therefore be taken into account in appropriate form regarding the reenactment of the law regulating emergency services in North Rhine-Westphalia directly after its enforcement on 17 April 2014.

The clarification of the term 'patient transport ambulance services' in its application in North Rhine-Westphalia is to be seen in the light of the envisaged scope of application of the draft bill of the *Landesregierung* on emergency services.

In accordance the scope of application is to cover both emergency and patient transport ambulance services as a unit and services of emergencies as a whole (including the provisions of mass casualty incidents); not least for the purpose of insuring the complete preclinical healthcare as part of public provision for elementary requirements.

The envisaged regulation in the draft bill of the *Landesregierung* can further be helpful for the necessary outline of the term 'patient transport ambulance services' described above and its differentiation in conformity with European regulations under domestic law.

On the grounds of the privileged legal status of the German Red Cross there is the possibility to combine the participation of the German Red Cross in emergency services including the provisions for mass casualty incidents with its participation in civil defence. Such a combination takes into consideration the character of the recognition of the German Red Cross according to section 1 DRKG as 'voluntary aid society auxiliary to the German authorities in the humanitarian field'.

In conclusion it can be stated whoever usually perceives objects of public interests, which are relevant also in cases of disasters must be able—as intended by the legislator—to fulfill these in standard cases as well as in cases of disaster.

The legislator has the responsibility to guarantee that the supplier of the necessary obligations in cases of disasters is able to train—also in times outside

deployment—to the required extent and under realistic conditions. This is specifically valid to the German Red Cross as 'voluntary aid society, auxiliary to the German authorities in the humanitarian field', which is comparable to the guarantee of a 'basic service' in the sense of a universal service.

A legal subsidiary nature of civil defence, as opposed to a fulfillment of tasks in standard cases, must not lead to the fact that the supplier in civil defense lacks the capability to provide for cases of disasters in general or in parts due to this subsidiary nature.

In other words: the subjective right to fulfill tasks of objects of public interest is derived from section 1 DRKG and the systematic connection with the—by act of State—individually assigned legal status as 'voluntary aid society auxiliary to the German authorities in the humanitarian field', which refers to the blood transfusion service and emergency services alike.

5 Concluding Remarks

The exemplary annotation of the partnership of the German Red Cross with the State concerning the blood transfusion service and emergency services may not in result be regarded as a limitation of State task. This partnership is on the contrary a logical outcome of a historically grown thought of plurality concerning the perception of objects of public interests in the Federal Republic of Germany.

The Red Cross has been performing these tasks now for 150 years. The operation of the Red Cross thereby starts—up to today—where volunteers get together in the humanitarian spirit of Solferino. In order for this spirit and the neutral and non-discriminatory assistance of the Red Cross to last, its responsibilities are in need of a solid legal framework.

The solid legal framework in Germany is given by the DRKG. It does not allocate new tasks to the German Red Cross, however, it emphasizes its specific humanitarian duty and some of the existing obligations. The German Red Cross is in this sense—irrespective if working on its own or in cooperation with State or Non-State actors—always National Red Cross Society with all the resulting mutual rights and duties.

Only then can the cooperation of the German State with the German Red Cross as its National Red Cross Society be a '(. . .) specific and distinctive partnership' as was emphasized in the 30th International Conference of the Red Cross and Red Crescent Movement in 2007.

This result is to be observed by the German Red Cross—as well as by the State as its partner—in the daily work everywhere—and it has to be recalled consistently. This applies specifically for emergency services and the blood transfusion service in their capacity as resilient medical healthcare systems. If the observance of this result was not given then the work of the German Red Cross would decay and would no longer be the manifestation of the International Red Cross and Red Crescent Movement and therefore the German Red Cross also not part of the Red Cross.

Siding with Rebels: Recognition of Opposition Groups and the Provision of Military Assistance in Libya and Syria (2011–2014)

Christian Schaller

1 Introduction

As the civil war in Syria moves into its fourth year without any signs of a peaceful resolution, the Obama administration is reviewing old and new options to bolster opposition forces in their fight against the government of Bashar al-Assad.[1] The New York Times and the Wall Street Journal reported in February 2014 that these options include providing moderate vetted rebels with more advanced weapons and training under the protection of a limited no-fly zone.[2] Four months later, National Security Advisor Susan Rice confirmed that the United States has ramped up its support for these groups by providing lethal and nonlethal assistance.[3] So far, President Barack Obama has been very cautious to not get dragged too deep into the conflict. The deadlock of peace talks in Geneva, however, seems to have prompted the administration to push for a stronger military resolve against the regime in Damascus. At the same time, the administration is concerned about the sharp increase in radical Islamist fighters entering Syria and destabilizing the

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[1] As of 13 June 2014.

[2] M. R. Gordon/D. E. Sanger/E. Schmitt, U.S. Scolds Russia as It Weighs Options on Syrian War, The New York Times, 17 February 2014, at http://www.nytimes.com/2014/02/18/world/middleeast/russia-is-scolded-as-us-weighs-syria-options.html?hp (all accessed on 13 June 2014); A. Entous/J. E. Barnes, U.S. Revisits Options on Syria as Talks Stall, The Wall Street Journal, 18 February 2014, at http://www.wsj.com/articles/SB10001424052702304675504579389872740714470.

[3] J. Acosta/K. Liptak, Rice: United States is leading with 'lethal and non-lethal' aid to Syria, CNN Politics, 6 June 2014, at http://politicalticker.blogs.cnn.com/2014/06/06/rice-united-states-is-leading-with-lethal-and-non-lethal-aid-to-syria.

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region. According to American and European officials, the aim would be to enable moderate rebel factions to hold territory against Assad's troops while also containing the spread of terrorist elements within the opposition.[4]

It is well known that international law does not provide many justifications for States to interfere in a civil war.[5] In 1986 the International Court of Justice (ICJ) reasoned that "it is difficult to see what would remain of the principle of non-intervention in international law if intervention. . .were also to be allowed at the request of the opposition".[6] This passage in the *Nicaragua* judgment is reflective of the traditional understanding that States are generally prohibited from assisting rebels in their armed struggle against an acting government. The 2011 armed intervention in Libya provoked a renewed debate about the legality of taking sides in a civil war. While most commentators focused on the controversial interpretation of UN Security Council resolution 1973 (which authorized States to take all necessary measures to protect civilians and civilian populated areas), another feature of the case has remained largely untouched: early recognition of the revolutionary National Transitional Council (NTC), which was a key component of the international effort to effect a quick political change in Libya.[7] Consequently, the NTC was recognized by many States as the new governing authority at a time when the Qaddafi regime was still in place. Section 2 of this article focuses on how the opposition in Libya benefitted from international support during the civil war in 2011 (recognition of the NTC and military support for the opposition). Section 3 deals with the international efforts to bolster Syrian rebels in their fight against the Assad regime between 2012 and June 2014 (recognition of the Syrian Opposition Coalition and arming and training of opposition forces).

[4] A. Entous/J. E. Barnes, supra note 2.

[5] A government facing internal unrest may seek support from other States or international organizations to maintain public order and security. The provision of direct military assistance in such situations is a particular sensitive issue. It has to be based on a specific and valid request and must not lead to a breach of fundamental principles of international law such as the prohibition on intervention, the peoples' right to self-determination and generally accepted human rights standards. When the situation has turned into a non-international armed conflict, the admissibility of sending armed forces upon request is less obvious. See G. Nolte, Intervention by Invitation, in: R. Wolfrum (ed.), Max Planck Encyclopedia of Public International Law Online, 2010, paras. 1, 18, at http://opil.ouplaw.com/home/EPIL. The most reliable legal basis for a military intervention in a civil war is a concrete mandate by the Security Council. Article 2 (7) of the UN Charter straightens out that the principle of non-intervention does not prejudice the application of enforcement measures under Chapter VII.

[6] International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, ICJ Reports 1986, p. 126.

[7] See, e.g. S. Talmon, Recognition of Opposition Groups as the Legitimate Representative of a People, in: Chinese Journal of International Law 12 (2013), pp. 219–253; P. Thielbörger, Die Anerkennung oppositioneller Gruppen in den Fällen Libyen (2011) und Syrien (2012), in: Journal of International Law of Peace and Armed Conflict 26 (2013), pp. 34–42.

2 Libya

Despite the explicit humanitarian focus of Security Council resolution 1973 of 17 March 2011, it was foreseeable that a robust implementation of the mandate would contribute to a radical transformation of the political realities in the country. Part of this effort was a broad campaign to upgrade the political status of the NTC vis-à-vis the acting regime. One commentator noted that during the Libyan Civil war governments have "rediscovered 'recognition' as a tool for conveying messages of varying degrees of political support".[8]

2.1 Recognition of the National Transitional Council

France was the first country to acknowledge the NTC as "the legitimate representative of the Libyan people".[9] This statement was made in March 2011, immediately after the outbreak of the hostilities and even before military operations by the international coalition began. A few weeks later, Italy went one step further and recognized the NTC as "the only political, legitimate interlocutor to represent Libya".[10] During the following months, more and more governments began establishing official relations with the rebels. In June 2011, French Foreign Minister Alain Juppé again took the lead by declaring the NTC to be "the sole repository of governmental authority, in France's relations with the Libyan State and the entities under it".[11] At a mid-July meeting of the Libya Contact Group in Istanbul, representatives from 32 countries and seven international organizations, including the United Nations, the European Union, NATO and the League of Arab States, reaffirmed that the Qaddafi regime no longer had any legitimate authority in Libya and that Qaddafi and certain members of his family had to go. Moreover, participants agreed to deal with the NTC as "the legitimate governing authority in Libya" until an interim authority would be in place.[12] This declaration motivated many governments to officially recognize the NTC. The United Kingdom, for example, announced that it will deal with the NTC as "the sole governmental authority in Libya"[13]—a remarkable move considering that it is a well-established

[8] S. Talmon, supra note 7, p. 226.

[9] Ministry of Foreign and European Spokesperson, Daily Press Briefing Archives, 10 March 2011, at www.franceintheus.org/IMG/html/briefing/2011/us110310.htm.

[10] S. Meichtry, Italy Recognizes Libyan Rebels, The Wall Street Journal, 4 April 2011, at http://online.wsj.com/article/SB10001424052748703806304576242722139488218.html.

[11] Statement by Alain Juppé, 7 June 2011, at www.ambafrance-us.org/spip.php?article2390.

[12] Fourth Meeting of the Libya Contact Group, Istanbul, 15 July 2011, para. 4, at www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair_s-statement_-15-july-2011_-istanbul.en.mfa.

[13] UK Foreign and Commonwealth Office, Libyan Charge d'Affaires to be expelled from UK, 27 July 2011, at www.gov.uk/government/news/libyan-charge-d-affaires-to-be-expelled-from-uk.

British policy not to recognize foreign governments.[14] At the end of August 2011, members of the Contact Group declared the NTC to be "the sole representative of the State and people of Libya". While expressing satisfaction for the ever-widening international recognition of this body, they also underlined the "need to empower the NTC with the legal, political and financial means necessary to form an interim government of Libya".[15] On 16 September 2011, the UN General Assembly finally accepted the NTC as the new representative of Libya in the United Nations.[16]

By acknowledging that a political leadership in another State meets certain conditions for government status, a State declares that it will treat this entity as being fully entitled to represent its State.[17] Effective territorial control is traditionally viewed as the primary criterion for being considered as a government under international law. The fact that a new leadership is accepted or tolerated by large parts of the population is an important indication of its effectiveness. In a situation in which an established government is challenged by an armed opposition, continuity of government status is usually presumed until the opposition has gained effective control over a substantial part of the territory. Nevertheless, there have also been instances in which States deviated from the effective control criterion and instead invoked standards of legitimacy in order to restore an ousted democratic government into power following a violent coup d'état.[18]

By recognizing the NTC in Libya as "the sole repository of governmental authority", as "the legitimate governing authority", or as "the sole representative of the State and people of Libya", States implicitly declared that they considered the Qaddafi regime as having lost its authority to act on behalf of the Libyan State.[19] In this case it was the particularly oppressive nature of the regime that motivated States to isolate Colonel el-Qaddafi and his cabinet. From the perspective of international law, however, even a government that has evidently forfeited its legitimacy is not automatically considered as being stripped of its legal status. Recognition of the political elite of an insurrectional movement as the new government is premature and constitutes an unlawful intervention in the internal affairs of the State as long as the parties are still fighting for supremacy and as long as the old regime has not definitely lost its power. Jochen A. Frowein has emphasized that a

[14] See C. Warbrick, British Policy and the National Transitional Council of Libya, in: International & Comparative Law Quarterly 61 (2012), pp. 247–264.

[15] Libya Contact Group Meeting, Istanbul, 25 August 2011, para. 5, at www.mfa.gov.tr/conclusions-of-the-libya-contact-group-meeting_-istanbul_-25-august-2011.en.mfa.

[16] UN General Assembly Resolution A/RES/66/1, 16 September 2011; UN Doc. A/66/PV.2, 16 September 2011.

[17] J. A. Frowein, Recognition, in: R. Wolfrum, supra note 5, paras. 1, 18, at http://opil.ouplaw.com/home/EPIL.

[18] G. H. Fox, Regime Change, in: R. Wolfrum, supra note 5, paras. 23–31.

[19] The U.S. and UK explicitly declared that they no longer recognized the Qaddafi regime as having any legitimate governing authority, U.S. Department of State, Background Briefing on Libya Contact Group Meeting, 15 July 2011, at www.state.gov/r/pa/prs/ps/2011/07/168662.htm; UK Foreign and Commonwealth Office, supra note 13.

revolutionary leadership must have established its authority to such extent "that the outcome of the conflict is clear and the former government's authority is reduced to a negligible area".[20] This requires that the revolutionary leadership has gained access to an infrastructure which enables it to assume the core functions of a government. The question is when did the NTC in Libya actually fulfil this requirement?

In mid-October 2011, the last strongholds of remaining Qaddafi forces, Sirte and Bani Walid, were captured by rebel forces; and on 23 October, the NTC officially declared the liberation of Libya. The most decisive turn in the civil war, however, was the capture of the capital Tripoli by the armed forces of the NTC two months earlier. On 26 August 2011, the NTC announced that its leadership had been transferred from Benghazi to Tripoli. Simultaneously, the last pockets of pro-Qaddafi resistance were overrun in the capital; by that time, the headquarters of the Libyan intelligence services had fallen under the control of the NTC. At this moment it was clear that the rebels, backed by the NATO-led coalition, would actually prevail in the armed conflict. It is therefore plausible to argue that the NTC with the takeover of power in Tripoli met the condition of effective and stable territorial control as required for governmental status. Earlier declarations of recognition, including during the mid-July 2011 meeting of the Libya Contact Group, were premature and amounted to an unlawful intervention in the internal affairs of the Libyan State.[21]

There was a vigorous debate on the issue of recognition among U.S. administration lawyers prior to the announcement of Secretary of State Hillary Clinton at the mid-July meeting in Istanbul. Some advisers were concerned that the NTC did not yet control sufficiently large swaths of Libya's territory in order to be recognized as the country's new governing authority.[22] In the official statement, however, the State Department merely alluded to the fact that the NTC had made a number of assurances and that the U.S. government wanted to send a clear signal to Qaddafi. Moreover, it was pointed out that recognition allowed the United States to help the NTC access additional funds, which were urgently needed.[23] A similar explanation was given by British Foreign Secretary William Hague who referred to the NTC's commitment to a more open and democratic Libya and who stressed the United Kingdom's readiness to unfreeze Libyan assets for the benefit of the

[20] J. A. Frowein, supra note 17, para. 15.

[21] P. Thielbörger, supra note 7, p. 39. For a different appraisal see C. Tomuschat, The Arabellion – Legal Features, in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 72 (2012), pp. 447–467 (463). Tomuschat argues that the recognition of the NTC in July 2011 was justified because the Qaddafi government had already been "downgraded" by the Security Council. Moreover, according to Tomuschat, the lack of factual power of the NTC had been compensated by its legitimacy as voice of the Libyan people.

[22] J. Greene, Legal Experts Debate Whether Libyan Rebel Group Constitutes a Government, LAW.COM, 7 June 2011.

[23] U.S. Department of State, supra note 19; see also J. Warrick/M. B. Sheridan, US Grapples with Legal Obstacles to Unfreezing Money for Libyans, The Washington Post, 24 July 2011, p. A 15.

Libyan people.[24] These statements corroborate the assumption that the early wave of recognition in mid-July 2011 was driven by practical necessities rather than by a stringent legal interpretation of the facts on the ground. As one commentator noted, "[s]upport was given to the NTC to secure its effective control in Libya, not because of it".[25]

2.2 Military Support for the Opposition in Libya

During the Libyan civil war, the rebel forces received massive military support through arms shipments and a major NATO-led air campaign. The intervention was based on UN Security Council resolution 1973, which contained an authorization to take all necessary measures for the protection of civilians and civilian populated areas. Russia, China and some non-permanent Security Council members warned that overthrowing Qaddafi would not be in conformance with the authorization.[26] The Chinese government particularly insisted that the international community in its dedication to protect civilians must not take sides in a civil war and must not engage in activities directed towards a regime change.[27]

Whether the Security Council has the power to authorize States to support an opposition in its armed struggle against an oppressive regime is a highly delicate and controversial issue.[28] Christian Tomuschat observed that the potential of the Council "is enormous, almost frightening in that it may decide on the existence or non-existence of governments of UN member states".[29] It is indeed not plausible why the Security Council should be prevented to take such a decision if it determines that the respective regime because of its "intrinsic wickedness"[30] and its consistent behaviour constitutes a threat to the peace. Practically, however, it is difficult to imagine a case in which the veto powers Russia and China—two of the most dedicated advocates of sovereignty and non-intervention—would tolerate an outright authorization of a regime change. If at all, it is conceivable that the Security Council would adopt a deliberately vague resolution which leaves enough space for each of the five permanent members to read their own interpretation into the text.

Resolution 1973 on Libya contained an authorization to take all necessary measures to protect civilians and civilian populated areas under threat of attack in

[24] UK Foreign and Commonwealth Office, supra note 13.

[25] C. Warbrick, supra note 14, p. 250.

[26] See UN Doc. S/PV.6528, 4 May 2011; S/PV.6531, 10 May 2011; S/PV.6566, 27 June 2011; S/PV.6595, 28 July 2011; S/PV.6620, 16 September 2011.

[27] UN Doc. S/PV.6531, supra note 26, para. 20.

[28] See W. M. Reisman, Why Regime Change is (Almost Always) a Bad Idea, in: American Journal of International Law 98 (2004), pp. 516–525.

[29] C. Tomuschat, supra note 21, p. 466.

[30] Ibid., referring to the NS regime in Germany.

the Libyan Arab Jamahiriya, including Benghazi.[31] This formula raised two questions in particular: Who qualifies as a "civilian" during a civil war and what measures were "necessary" to fulfil the protection mandate? Since these issues have already been comprehensively addressed by other authors,[32] there is no need to go into detail here. As far as international humanitarian law is used as a reference for the interpretation of such a mandate, persons who are members of the militant wing of an opposition group would fall outside the scope of protection. In situations of civil war, however, it is particularly difficult for armed forces to differentiate between fighters and uninvolved civilians. Opposition groups fighting against government forces are highly dependent on support by the civilian population. The Libyan conflict demonstrated how fast local demonstrations and spontaneous acts of revolt may transform into a nation-wide armed rebellion and how fast ordinary demonstrators become frontline fighters. Since the authorization in resolution 1973 expressly mentioned the rebel stronghold Benghazi as a civilian populated area under protection, it was clear that the rebels would definitely benefit from NATO operations. One commentator conceded that when a rebel army is the only force standing between a violent regime and the civilian population, "then defensive military support of the rebels is unquestionably necessary, irrespective of whether this will have consequences for regime change".[33] Even the most restrained military intervention to protect civilians against State actors will have a substantial impact on the incumbent government and increase the likelihood of a regime change.

Nevertheless, in the view of China, Russia and several other States, the international coalition in Libya clearly overstepped the boundaries of the mandate by helping the rebels to defeat the Qaddafi forces. Accordingly, many sceptics and opponents of the concept of an international responsibility to protect (R2P) are now referring to this case to show how the humanitarian imperative could be invoked as a pretext for intervening in the internal affairs of a sovereign State. Brazil rightly observed that the growing perception that R2P might be misused for purposes other than protecting civilians, in particular for regime change, makes it more difficult to

[31] Para. 4 of the resolution.

[32] See, e.g., O. Corten/V. Koutroulis, The Illegality of Military Support to Rebels in the Libyan War: Aspects of *jus contra bellum* and *jus in bello*, in: Journal of Conflict & Security Law 18 (2013), pp. 59–93; J. M. Lehmann, All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship Between the *Jus in Bello* and the *Jus ad Bellum*, in: Journal of Conflict & Security Law 17 (2012), pp. 117–146; M. Payandeh, The United Nations, Military Intervention, and Regime Change in Libya, in: Virginia Journal of International Law 52 (2012), pp. 355–403; P. D. Williams/A.J. Bellamy, Principles, Politics, and Prudence: Libya, the Responsibility to Protect, and the Use of Military Force, in: Global Governance 18 (2012), pp. 273–297.

[33] H. Breakey, The responsibility to protect: Game Change and Regime Change, in: A. Francis/V. Popovski/C. Sampford (eds.), Norms of Protection – Responsibility to Protect, Protection of Civilians and Their Interaction, Tokyo 2012, pp. 11–39 (31).

mobilize the political will and resources needed for concerted action in future situations of mass atrocities.[34]

3 Syria

The discord over the legality of the action in Libya made it impossible for the UN Security Council to agree on a forceful response to the escalation of violence in Syria. In the absence of any formal Security Council backing, some States decided to support the rebels on a unilateral basis.

3.1 Recognition of the Syrian Opposition Coalition

In the case of Syria, States were much more hesitant to upgrade the political status of the opposition vis-à-vis the acting government. In the early stages of the Syrian civil war, the National Coalition of Syrian Revolutionary and Opposition Forces, an umbrella organization of various anti-Assad groups formed in 2012, was widely acknowledged as the legitimate representative of the Syrian people. Unlike the NTC in Libya, however, it has not received recognition as a governing authority or as the representative of the State.

Soon after its formation, the Syrian Opposition Coalition was recognized by the six member States of the Gulf Cooperation Council as "the legitimate representative of the brotherly Syrian people".[35] France was the first Western country to acknowledge the Coalition as "the sole legitimate representative of the Syrian people and as the future government of a democratic Syria, allowing it to bring an end to Bashar al-Assad's regime".[36] In the following weeks, more and more governments issued similar statements ranging from recognition of the Coalition as "a legitimate representative of the aspirations of the Syrian people" to recognition as "the sole legitimate representative of the Syrian people".[37] At the December

[34] Responsibility while protecting: elements for the development and promotion of a concept, Annex to the letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, UN Doc. A/66/551–S/2011/701, 11 November 2011.

[35] GCC Recognises New Syrian Opposition Bloc, Al Jazeera, 12 November 2012, at http://www.aljazeera.com/news/middleeast/2012/11/20121112175539534504.html.

[36] Syria: France Backs Anti-Assad Coalition, BBC News, 13 November 2012, at http://www.bbc.co.uk/news/world-middle-east-20319787.

[37] Syria Conflict: UK Recognises Opposition, Says William Hague, BBC News, 20 November 2012, at http://www.bbc.co.uk/news/uk-politics-20406562; Council of the European Union, Council Conclusions on Syria, 16392/12, 19 November 2012. For a comprehensive analysis of the different statements see S. Talmon, supra note 7, pp. 219–230.

2012 ministerial meeting of the Group of Friends of the Syrian People, participants reiterated that Assad had lost legitimacy to govern Syria and should stand aside.[38] On this occasion, President Obama announced: "We've made a decision that the Syrian Opposition Coalition is now inclusive enough, is reflective and representative enough of the Syrian population that we consider them the legitimate representative of the Syrian people in opposition to the Assad regime."[39]

Treating an opposition as the legitimate representative of the people conveys a strong political message. Such declaration indicates that the group's aspirations are regarded as legitimate. It usually paves the way for financial aid and diplomatic initiatives, *inter alia*, for allowing the group to speak for the people in international fora. Offering an opposition group the prospect of being recognized as the representative of a people thus provides external actors with a certain negotiating leverage to influence the behaviour of the group. In the case of Syria, this move served as an incentive for the divided opposition to form a new umbrella organization in place of the discredited Syrian National Council, and to isolate extremist forces. By recognizing a certain faction as the *sole* representative, the recognizing States make clear that they do not maintain any other channels of political dialogue in these matters. Such a declaration, however, does not entail any direct consequences under international law. In particular, it is not suited to confer any legal rights on the group or to affect the *de jure* status of the incumbent government.

Most States that were willing to accord this kind of recognition to the Syrian Opposition Coalition did so because they considered the Assad government as having lost its legitimacy. As Stefan Talmon observed, these actions were linked to the expectation that the opposition would be representative and broad and would have a political, organizational and institutional structure enabling it to successfully start a new democratic beginning.[40] Although the Syrian Opposition Coalition was not truly representative, its recognition demonstrated that the Assad regime, by using excessive force against its own population, had forfeited any legitimate claim to represent the people.

In contrast to the premature recognition of an opposition group as the new governing authority of a State (as in the case of the NTC in Libya), acknowledgement of the group as a representative of the people does not *per se* amount to an unlawful intervention.[41] This threshold is exceeded, however, if the act is part of a

[38] The Fourth Ministerial Meeting of the Group of Friends of the Syrian People, Chairman's conclusions, Marrakech, 12 December 2012, at http://www.auswaertiges-amt.de/cae/servlet/contentblob/633604/publicationFile/175180/121212-Marrakesch-Freundesgruppe-Abschlusserklaerung.pdf.

[39] D. Dwyer/D. Hughes, Obama Recognizes Syrian Opposition Group, ABC News, 11 December 2012, at http://www.abcnews.go.com/Politics/OTUS/exclusive-president-obama-recognizes-syrian-opposition-group/story?id=17936599#.UXEYqXfc6s2. On the U.S. position regarding the status of the Syrian Opposition Coalition see U.S. Department of State, Office of the Legal Adviser, in: C. D. Guymon (ed.), Digest of United States Practice in International Law 2012, p. 281, at http://www.state.gov/s/l/2012/index.htm.

[40] S. Talmon, supra note 7, pp. 237–238.

[41] Id., pp. 234, 243, 247.

concerted effort to foment subversive activities, to isolate, sideline and incapacitate the incumbent government and to push for an accelerated regime change.

3.2 *Arming and Training Opposition Forces in Syria*

In 2012, President Barack Obama reportedly signed a secret order authorizing the C.I.A. and other U.S. agencies to support Syrian rebel groups seeking to depose the Assad government.[42] At the Doha meeting of 22 June 2013, members of the Friends of Syria Core Group agreed to take urgent practical steps to provide the opposition with all necessary material and equipment in order "to change the balance of power on the ground".[43] The United Kingdom and France quickly achieved a partial lifting of the EU arms embargo on Syria; and Saudi Arabia, Qatar, Turkey and the United Arab Emirates were the first countries to provide military aid to Syrian rebels.[44] According to various media sources, U.S. and British intelligence services as well as the government of Jordan have played a key role in these activities.[45] A program that is currently run by the C.I.A. is said to have turned out between 50 and 100 "vetted" rebels a month.[46] Although top legal advisers from across the administration have cautioned against a more comprehensive training effort involving the U.S. military,[47] the latest ideas seem to include training missions conducted by U.S. Special Operations Forces under the authority of the Department of Defense.[48]

Taking into account the position of the ICJ in its *Nicaragua* judgment, it is difficult to see how such action could be justified under international law.[49] The UN Friendly Relations Declaration of 1970 is explicit in confirming that States are

[42] M. Hosenball, Exclusive: Obama Authorizes Secret U.S. Support for Syrian Rebels, Reuters, 1 August 2012, at www.reuters.com/article/2012/08/01/us-usa-syria-obama-order-idUSBRE8701OK20120801.

[43] Friends of Syria Core Group, 22 June 2013, at www.gov.uk/government/news/friends-of-syria-core-group-final-communique.

[44] C. J. Chivers/E. Schmitt, Arms Airlift to Syria Rebels Expands, With Aid from C.I.A., The New York Times, 24 March 2013, at www.nytimes.com/2013/03/25/world/middleeast/arms-airlift-to-syrian-rebels-expands-with-cia-aid.html?pagewanted=all.

[45] See, e.g., E. Londoño/G. Miller, U.S. Weapons Reaching Syrian Rebels, The Washington Post, 11 September 2013, at http://articles.washingtonpost.com/2013-09-11/world/41972742_1_lethal-aid-syrian-rebels-chemical-weapons; A. Barnard, Syrian Rebels Say Saudi Arabia Is Stepping Up Weapons Deliveries, The New York Times, 12 September 2013, at www.nytimes.com/2013/09/13/world/middleeast/syrian-rebels-say-saudi-arabia-is-stepping-up-weapons-deliveries.html?_r=0; B. Hubbard, Warily, Jordan Assists Rebels in Syrian War, The New York Times, 10 April 2014, at http://www.nytimes.com/2014/04/11/world/middleeast/syria.html.

[46] A. Entous/J. E. Barnes, supra note 2.

[47] A. Entous, Legal Fears Slowed Aid to Syrian Rebels, The Wall Street Journal, 14 July 2013, at http://online.wsj.com/news/articles/SB10001424127887323848804578606100558048708.

[48] A. Entous/J. E. Barnes, supra note 2.

[49] See C. Henderson, The Provision of Arms and 'Non-lethal' Assistance to Governmental and Opposition Forces, in: UNSW Law Journal 36 (2013), pp. 642–681.

generally prohibited from organizing and assisting armed activities directed towards the violent overthrow of a foreign regime. This includes the provision of funds, logistics, training, weapons and intelligence to opposition forces.[50] In the view of the ICJ, it does not matter whether the assisting State itself pursues the objective of overthrowing the government. What does matter, however, is that such assistance is intended to have a coercive effect on the government.

In August 2013, when it became clear that chemical weapons had been used again in Syria, President Obama informed the public that military airstrikes against the Assad regime were a valid option for the United States. It is interesting that the White House classified the chemical attack by the Assad regime against the Syrian people as a serious danger to U.S. national security. In the relevant draft legislation designed to authorize a possible use of military force in Syria it was stated that the objective of such use of force would be "to deter, disrupt, prevent, and degrade the potential for, future uses of chemical weapons or other weapons of mass destruction" and to "protect the United States and its allies and partners against the threat posed by such weapons".[51] Consequently, President Obama announced that he was comfortable going forward even in the absence of an approval by the UN Security Council.[52]

The current initiative of the Obama administration to revisit old and new options for a more decisive engagement in Syria also reflects U.S. concerns that radical Islamist groups such as the Al Nusra Front and ISIS (Islamic State of Iraq and Syria) are using Syrian territory to recruit fighters and to expand their influence in the region.[53] The latest campaign by ISIS to gain control over large parts of Northern Iraq illustrates the severity of this threat. In light of these events the U.S. administration may be even more inclined to support moderate opposition groups in Syria in order to build a local front-line defense against ISIS and other terrorist elements, which are perceived as a threat to the United States. The standard line of argumentation is that the United States may use force in self-defence wherever States are unwilling or unable to effectively eliminate such a threat on their territory. Whether it is an admissible option under the law of self-defence to

[50] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (UN General Assembly Resolution 2625 [XXV], 24 October 1970, Annex, principle III, para 2); see also International Court of Justice, Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, ICJ Reports 2005, p. 280.

[51] The White House, Draft legislation regarding Authorization for Use of United States Armed Forces in connection with the conflict in Syria, 31 August 2013, at www.whitehouse.gov/the-press-office/2013/08/29/letter-president-authorization-use-united-states-armed-forces-connection.

[52] Statement by the President on Syria, 31 August 2013, at www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria.

[53] E. Schmitt, Qaeda Militants Seek Syria Base, U.S. Officials Say, The New York Times, 25 March 2014, at www.nytimes.com/2014/03/26/world/middleeast/qaeda-militants-seek-syria-base-us-officials-say.html?_r=0.

train and equip certain Non-State actors on foreign soil is an interesting question beyond the scope of this article.

4 Outlook: The Humanitarian Focus

In justifying a more robust engagement in Syria, the United Kingdom seems to pursue a different path. The UK government also holds the view that limited military action in Syria in response to the use of chemical weapons would be permissible without a Security Council mandate. Unlike Washington, however, it explicitly invoked the doctrine of humanitarian intervention as the legal basis for such action. In an official guidance setting out the government's position regarding the legality of military action in Syria, it is stated that "[i]f action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria" provided that three conditions were met: (1) convincing and generally accepted evidence of extreme humanitarian distress on a large scale, requiring immediate and urgent relief; (2) no practicable alternative to the use of force; and (3) necessity, proportionality and strict limitation in time and scope of the use of force in light of the humanitarian purpose.[54] By bluntly invoking the doctrine of humanitarian intervention, the UK government revived an old debate, which had its peak following NATO's operations in Kosovo in 1999. During and after the Kosovo war, States were cautious not to advance any arguments that could be understood as an expression of *opinio juris* in favour of a new customary right of unilateral humanitarian intervention.[55] Even the United States has never expressly acknowledged a right of humanitarian intervention although it relied *de facto* on the doctrine as an exceptional justification for its actions in Kosovo.[56] In the debate over a possible intervention in Syria, the administration has now been criticized for "talking around the issue".[57]

[54] Prime Minister's Office, Chemical weapon use by Syrian regime: UK government legal position, 29 August 2013, at www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position.

[55] Even Belgium which was most forward in advancing the idea of armed humanitarian intervention in the ICJ proceedings on the legality of use of force in Kosovo concentrated on the specific circumstances of the case and stopped short of invoking a general right to intervene, International Court of Justice, Legality of Use of Force [Serbia and Montenegro v. Belgium], Oral Proceedings, Public sitting, CR 99/15, 10 May 1999.

[56] M. N. Schmitt, The Syrian Intervention: Assessing the Possible International Law Justifications, in: International Law Studies 89 (2013), pp. 744–756 (755); see also H. H. Koh, Syria and the Law of Humanitarian Intervention, Part II: International Law and the Way Forward, 2 October 2013, at http://justsecurity.org/2013/10/02/koh-syria-part2.

[57] M. N. Schmitt, supra note 56, p. 754.

At least it has become obvious that R2P is not considered by either the U.S. or the UK government as a legal basis for action. R2P is a political concept, which has not led to a modification of customary international law so far. While its invocation may provide a Chapter VII Security Council mandate with an additional layer of moral legitimacy, it does not make non-authorized military action against another State lawful.[58] This article is not the right place to delve into the debate about the legality of unilateral humanitarian interventions. Even if the doctrine as formulated by the UK government is embraced, it is evident that an intervention must not have effects worse than the consequences of inaction. Right now it is too early to forecast the further development of the conflict in Syria. The cases of Iraq and Libya, however, serve as alarming and deterrent examples for how an enforced regime change (no matter for what purpose) can easily create an environment of insecurity and instability conducive to the further spread of domestic and international terrorism.

[58] See, e.g., A. Randelzhofer/O. Dörr, Article 2 (4), in: B. Simma et al. (eds.), The Charter of the United Nations – A Commentary Vol. I, 3rd edn., New York 2012, pp. 200–234 (224); S. Chesterman, 'Leading from Behind': The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya, in: Ethics & International Affairs 25 (2011), pp. 279–285; C. Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?, in: American Journal of International Law 101 (2007), pp. 99–120.

Civil–Military Relations and International Law

Daniel-Erasmus Khan

1 Historical Background

150 years ago, Geneva hosted an International Conference to lobby political and military leaders to take action to protect war victims. The driving force behind this unprecedented move was a recently founded small charity committee with a rather important name: "Comité international et permanent de secours aux militaires blessés", at the time chaired by retired General Henri-Guillaume Dufour. In his opening address to the conference, Dufour declared: "[. . .] it is . . . the duty of the intelligent and liberal minds of all nations to unite in endeavoring to mitigate, as far as possible, the horrors of [armed] conflicts." And then he made an offer, which the assembled Governments could hardly reject: voluntary relief associations should be placed at the unrestrained disposal of army commands—free of charge and without "any interference with the consecrated military code of nations."[1]

At first sight, this was indeed a classic win-win-situation: with the replacement in the late eighteenth/early nineteenth century of professional armies by a system of national conscription for young men, war had made its way into the very heart of society. No wonder that civil society—at the time bursting with self-confidence due to economic success—began to show growing awareness and humanitarian concern

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[1] Translation of the original French version of the speech from Report of Charles S.P. Bowles, Foreign Agent of the United States Sanitary Commission, upon the International Congress of Geneva for the Amelioration of the Condition of the Sick and Wounded Soldiers of Armies in the Field, Convened at Geneva, 8 August 1864, pp. 33, 34. This report contains another memorable, yet prophetic phrase: "It [the Geneva Convention of 1864] will be marked by the future historian as a forward step in the civilization of the 19th century", p. 16.

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for the military sphere in general and the fate of citizen soldiers in particular. Henry Dunant placed this general public sentiment central stage in his seminal 'A Memory of Solferino': "There is no coldness or indifference among the public when the country's sons are fighting [...]."[2] The Geneva initiative tried to absorb and channel these widespread concerns for the benefit of all: Victims of warfare, military strategists, war-mongering politicians, philanthropic activists—with sweeping success, as we all know: "Is there any Government that would hesitate to give its patronage to a group endeavoring [...] to preserve the lives of useful citizens [...]?"[3] Indeed, a rather rhetorical question: Who would dare to answer it in the affirmative? Hence, at the very moment when in the remote early 1860s actors from civil society decided to extend their welfare activities to the battlefield and Governments were formally willing to allow them to do so, the broad and complex issue of "Civil-Military Relations" entered the agenda of national and international law and politics—where it has held a prominent place ever since.[4]

It may be worth recalling that the first, 1864, Geneva Convention[5] purposed virtually nothing else but to establish a legal framework for civil-military cooperation in wartime. And, to a certain degree, General Dufour himself personifies this new cooperative approach: It is him (again) who is heading the treaty's list of signatures—this time acting on behalf of the Swiss Confederation.

2 Humanitarians and the Military

Was this the beginning of a wonderful friendship—between humanitarians[6] and the military? No it was not. Or, should I better say, it should not have been?

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[2] H. Dunant, A Memory of Solferino, Geneva 1862, reprinted by the ICRC, p. 127.

[3] Id., pp. 126 f.

[4] For a comprehensive overview see V. Metcalfe/S. Haysom/S. Gordon, Trends and Challenges in Humanitarian Civil–military Coordination. A Review of the Literature – HPG Working Paper, May 2012, at https://docs.unocha.org/sites/dms/Documents/05-12%20Literature%20Review%20-%20Trends%20and%20challenges%20in%20humanitarian%20civil-military%20coordination.pdf (all accessed on 5 June 2014) and with a rich account of relevant (State) practice V. Wheeler/A. Harmer (eds.) Resetting the Rules of Engagement Trends and Issues in Military–humanitarian Relations – HPG Research Report, March 2006, at https://docs.unocha.org/sites/dms/Documents/Humanitarian%20Policy%20Group%20Report%20Civil-Military%20Coordination.pdf. For further references to policy papers and similar publications see http://www.unocha.org/what-we-do/coordination-tools/UN-CMCoord/publications.

[5] Art. 1 of the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1864, explicitly provides: "Each country shall have a Committee whose duty it shall be, in time of war and when the need arises, to assist the Army Medical Services by every means in its power."

[6] Term popularized by D. P. Forsythe, The Humanitarians: The International Committee of the Red Cross, Cambridge 2005.

It is certainly true: The legal "duty to cooperate" has been reconfirmed time and again ever since. The 1949 Geneva Conventions[7] and the Statutes of the Movement are unmistakable on this issue[8]—as is pertinent national legislation.[9] In scenarios covered by these provisions—in concrete terms "armed conflicts"—national societies are—at least as a matter of principle—under a legal obligation to cooperate with "their" military authorities: and in fact, the disposition to enter into such cooperation, is the actual "raison d'être" for the very existence of these societies.

The ICRC on its part is under no direct legal obligation to cooperate with any military actors at all. However, digging in to total denial mode *vis-à-vis* the military would be incompatible both with the vast array of tasks the State community has entrusted to the ICRC for the implementation and enforcement of international (humanitarian) law, and its privileged position as a unique Non-State actor on the international plane. Dialogue with military commanders on various levels is thus of the essence for the fulfillment of the ICRC's humanitarian mandate.[10] How else could the ICRC—to give just one example—carry out effectively one of its most important tasks, the visiting and interviewing of prisoners of war?

For the components of the International Red Cross/Red Crescent Movement the maintenance of relations with the military is thus not just an option—which they may chose or not at their own discretion. Rather, the direct embedment of these civil actors *sui generis* into an international legal environment basically concerned with military activities of States—and the rights and duties arising thereof—

[7] Art. 26 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949: "The staff of National Red Cross Societies and that of other Voluntary Aid Societies, duly recognized and authorized by their Governments [. . .], are placed on the same footing as the personnel named in the said Article, provided that the staff of such societies are subject to military laws and regulations."

[8] Art. 4 of the Statutes of the Movement, 1998: "In order to be recognized [. . .] as a National Society, the Society shall meet the following conditions: [. . .] 3. Be duly recognized by the legal government of its country on the basis of the Geneva Conventions and of the national legislation as a voluntary aid society, auxiliary to the public authorities in the humanitarian field."

[9] See e.g. the recently redrafted Act on the German Red Cross: Chapter I – Section 2 – TASKS: (1) As voluntary aid society, the "Deutsches Rotes Kreuz e.V." assumes the tasks that arise from the Geneva Conventions of 1949 and their Additional Protocols, in particular 1. *rendering assistance to the regular medical service of the German armed forces* as defined in Article 26 of the First Geneva Convention" [emphasis added]; for a commentary on this special relationship, H. Spieker, Die zivil-militärische Zusammenarbeit zwischen Bundeswehr und Deutschem Roten Kreuz, in: Humanitäres Völkerrecht – Informationsschriften 1 (2012), p. 4; see also Deutsches Rotes Kreuz Generalsekretariat, Positionspapier: Zivil-Militärische Zusammenarbeit des Deutschen Roten Kreuzes, 10 July 2003.

[10] ICRC functions include: (a) visiting and interviewing prisoners of war and civilian internees; (b) providing relief to protected civilians, prisoners of war and the population of occupied territories; (c) searching for missing persons and to forward family messages to prisoners of war and civilians; (d) offering its good offices to facilitate the institution of hospital zones and safety zones; (e) receiving applications from protected persons; (f) offering its services in other situations and especially in time of non-international armed conflicts, Art. 3, 9, 23 Geneva Convention I, Art. 3, 9 Geneva Convention II, Art. 73, 123, 125, 126 Geneva Convention III, Art. 3, 9, 10, 14, 30, 59, 61, 140, 143 Geneva Convention IV.

account for the unique position the Red Cross holds in the humanitarian world.[11] Humanitarian and other branches of international law do not (yet) provide any specific hard law framework for the activities of "proper" NGOs, such as e.g. Médecins sans Frontières, working side by side with State authorities, international organizations and the members of the Red Cross family in all kind of emergency situations around the globe. However, from an international law perspective, too, separating lines between the various humanitarian actors become increasingly blurred.

In recent years, encounters of actors of military and humanitarian provenance have multiplied: for the last 150 years, humanitarian concern has not only led civil actors to the various theatres of war—including those labeled with the controversial term "humanitarian intervention". It has rather become an everyday phenomenon, that—due to their transport, logistics and engineering capacities—armed forces play an important role in supporting relief efforts in non-belligerent situations, such as natural disasters. From an international law perspective, the presence of members of armed forces in the humanitarian landscape is *per se* not a matter of concern—provided they act upon invitation and under the ultimate authority of the territorial State affected. And then we finally have encounters in a whole range of complex emergency situations in a grey area between war and peace[12]—from East Congo and Libya to Pakistan[13] and Mali.

With regard to these multifaceted encounters between humanitarians and the military, legal questions of principle are rare. What is at issue, and in need of clarification, is basically questions of delimitation of competencies and coordination of activities.[14] Documents such as the 2007 OCHA Oslo Guidelines[15] are intended to reduce frictions to a minimum and provide a fairly reliable—albeit not legally binding—framework in ever more complex relief operations.

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[11] See e.g. M. Studer, The ICRC and Civil-military Relations in Armed Conflict, in: International Review of the Red Cross 83 (2001), p. 367.

[12] For an in-depth analysis of civil-military cooperation processes in disciplines such as logistics, construction and security based on multiple holistic case studies see S. J. H Rietjens, Civil-military Cooperation in Response to a Complex Emergency: Just Another Drill?, Leiden 2008; see also S. Hutchinson, Civil-Military Cooperation in Complex Emergencies, in: Australian Army Journal 1 (2009), p. 77.

[13] See particularly on this scenario A. Madiwale/K. Virk, Civil-military Relations in Natural Disasters: a Case Study of the 2010 Pakistan Floods, in: International Review of the Red Cross 93 (2011), p. 1085.

[14] For a rather technical and practice-oriented approach, see United Nations (ed.), Civil-Military Coordination Officer Field Handbook, 10 March 2008, at http://www.refworld.org/pdfid/47da7da52.pdf.

[15] OCHA, Guidelines on the Use of Foreign Military and Civil Defence Assets in Relief Operations, OSLO Guidelines, November 2007, at https://docs.unocha.org/sites/dms/Documents/Oslo%20Guidelines%20ENGLISH%20%28November%202007%29.pdf; see also United Nations, Guidelines on the Use of Foreign Military and Civil Defence Assets in Complex Emergencies, MCDA Guidelines, New York 2008, at https://docs.unocha.org/sites/dms/Documents/ENGLISH%20VERSION%20Guidelines%20for%20Complex%20Emergencies.pdf.

Exception has to be made for one specific issue, which is indeed of crucial importance for the entire system of international humanitarian law. Various field activities may look very much the same: the evacuation of prisoners of war by an ICRC aircraft in the Iraq war and the evacuation of refugees by a military aircraft in the aftermath of the Tsunami—for example. Yet, militaries and humanitarians belong to different worlds and the border between them should be clearly delineated—also *de jure*.

By using the word "humanitarian", Military TV commercials in the UK and the Netherlands try to reinforce the public's understanding that militaries are hardly anything else but humanitarian workers in uniform. This is a regrettable and—for the sake of humanitarism—a most dangerous distortion of reality. Even when coming in sheep's clothing, Militaries remain militaries—they do not become temporary "Humanitarians"—and the other way round. Interactions are possible and they are necessary—in particular in complex emergencies. However, it should not fall into oblivion that, as a matter of principle, militaries represent the antithesis of the humanitarian concern for human well-being—at least regarding their primary functional purpose. The *raison d'être* of armed forces is the application of physical, ultimately deadly, violence in the political interest of their respective home country.

3 Humanitarian Principles

Militaries may in certain situations and for pragmatic reasons be willing to adhere to basic principles of humanitarism, originating in the tool box of Red Cross Law—and today they may even be expected to do so when stepping into the humanitarian landscape. According to GA Resolution 46/182: "Humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality."—by all those involved in humanitarian relief activities—including the military and NGOs.[16] Still, at least for the components of the Red Cross/Red Crescent movement (but ultimately also for all other humanitarian actors), it is a matter of utmost importance, to rank first in civil-military relations the principle of distinction[17] or distance—not only in a Geneva law situation—but also in a non-belligerent context. Any "blurring of lines" between military/political and humanitarian actors would not only carelessly jeopardize the 150 year old brand image of the Red Cross: as the genuine neutral and impartial actor. It would also seriously impair the successful fulfillment of its mandate—if not in the given situation, in all likeliness on some future occasion.[18]

[16] United Nations General Assembly, A/RES/46/182, 19 December 1991.

[17] Not to be misread and confused with the humanitarian law "principle of distinction", as enshrined *inter alia* in Art. 48 Additional Protocol to the Geneva Conventions I, 8 June 1977.

[18] The 2001 ICRC Guidelines on Civil-Military Relations are unambiguously clear, both on fundamental differences between the humanitarian and military worlds and the need for an

The OCHA Guidelines are sensitive of this issue, too—although they treat it only from a rather limited perspective: "As a matter of principle, the [. . .] assets of forces that may be perceived as belligerents or of units that find themselves actively engaged in combat in the affected country or region shall not be used to support UN humanitarian activities."[19]

Fortunately enough, these imperatives are taken more and more seriously in the daily work of humanitarian actors. In 2010, for example, the German Red Cross refused an offer by the German Bundeswehr for an airlift to Pakistan of a water purification plant—justifying the refusal on the grounds of the geographic proximity of the Afghan theatre of war, in which German armed forces were actively involved at the time. The crucial yardstick in the case by case decision-making process is the perception of the German Red Cross as an independent and neutral humanitarian actor.

Is this issue not so self-evident and uncontroversial that it hardly needs mention? Unfortunately enough, this is not the case. Modern CIMIC Doctrines and politics still contain a number of concepts that are hardly compatible with the idea of neutral and independent humanitarian action[20]: Amongst those, two are of particular concern—and we find them in NATO doctrine, but also in pertinent policy statements of the US, France, the UK and others:

- Subordination of humanitarian and development assistance to political/military goals
- Assumption of a "common goal" uniting political, military and humanitarian actors[21]

Even under the assumption that these doctrines are to produce little or even no effect in practice, it is important to insist that the humanitarian world is not willing to accept any rules and concepts, which would infringe upon the key principles of impartiality and non-partisanship. Fortunately enough, the ICRC has recently done so quite bluntly:

adequate institutional distance between them: "The objective of the ICRC's humanitarian action is not to settle conflicts but to protect human dignity and save lives. ICRC humanitarian activities cannot in any way be subordinated to political and/or military objectives and considerations. [. . .] The ICRC works independently of any objective of a political or military nature." Printed in: International Review of the Red Cross 86 (2004), p. 588 as an Annex to R. Rana, Contemporary Challenge in the Civil-military Relationship: Complementarity or Incompatibility?, p. 565; it is hardly astonishing that NATO sponsored publications are not as categorical on this point, see e.g. C. M. Schnaubelt (ed.), Towards a Comprehensive Approach: Integrating Civilian and Military Concepts of Strategy, Rome 2011.

[19] OCHA, supra note 16.

[20] Well-founded concerns have been raised, *inter alia*, by the Geneva-based Steering Committee for Humanitarian Response, SCHR Position Paper on Humanitarian-Military Relations. January 2010, at http://www.alnap.org/resource/11212.

[21] Id., p. 4 with reference to e.g. NATO, NATO Civil-Military Cooperation (CIMIC) Doctrine, AJP-9, June 2003.

> Particularly in contexts where there is a trend towards integrating humanitarian action into a wider political and military framework, it is essential for the Movement to retain its identity as an independent, neutral and impartial humanitarian force. [. . .] the Movement need to clearly delineate their humanitarian activities from those carried out by military bodies [. . .].[22]

4 Conclusion

Civil-Military relations is a subject, which is very high on the agenda of international academic, political and military strategic debate, and the purpose of this paper was only to briefly highlight some core elements of this debate. However, a closer look at the vast literature, the numerous policy statements and recent State practice reveals that international law as it stands today does indeed provide very little guidance in this debate. Policy and strategy considerations clearly dominate the discourse. What we can observe, however, is that the "guiding principles" of humanitarism are obviously gaining ground also beyond their original, rather narrow scope of application in the Red Cross world. They may even, over time, evolve into binding rules for the conduct of international humanitarian assistance operations in general. Obviously, this is a most welcome development—which deserves further attention, from academia in general and under an international law perspective in particular.

[22] Council of Delegates of the International Red Cross and Red Crescent Movement, Resolution 7, Guidance Document on Relations between the Components of the Movement and Military Bodies, Seoul, 16–18 November 2005.