

TO WHAT EXTENT IS THE HUMANITARIAN SPACE IN ARMED
CONFLICT PROTECTED BY LAW?

TINA RAMETSTEINER

E.MA – EUROPEAN MASTER'S DEGREE IN HUMAN RIGHTS AND DEMOCRATISATION
ACADEMIC YEAR 2011/2012

UNIVERSITY OF DEUSTO, BILBAO, SPAIN

SUPERVISOR: DR. JOANA ABRISKETA

ABSTRACT

The intensity of attacks against the humanitarian space has dramatically increased in the last decade. Due to the rise of incidents the physical and symbolic space for humanitarian actors in situations of armed conflict is shrinking. Many different actors are engaged in the humanitarian space and it is not always clear under which rules they are protected. Simultaneously, in order to enjoy protection provided for by law it is necessary to determine which rules actors have to respect and where legal boundaries are drawn. This thesis analyses the legal instruments that can be applied in order to improve the protection of the humanitarian space in contemporary situations of armed conflicts. Although the term 'humanitarian space' is frequently used it is not even mentioned in the international legal framework. The present legal study seeks to examine to what extent the humanitarian space is protected under the traditional International Humanitarian Law, which has been expanded by customary rules, the codification of war crimes in the Rome Statute and the increasing recognition of the applicability of human rights in armed conflicts.

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LIST OF ACRONYMS AND ABBREVIATIONS

ACHR	American Convention on Human Rights of 1969
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
Basic Principles	Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Human Rights Law
Bulletin	Secretary-General's Bulletin: Observance by United Nations forces of international humanitarian law
CERD	Committee on the Elimination of Racial Discrimination
CIHL	Customary International Humanitarian Law
Draft Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
GA	General Assembly
GC I	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.
GC II	Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.
GC III	Geneva Convention (III) relative to the Treatment of Prisoners of War
GC IV	Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War
GCs	Geneva Conventions
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social, and Cultural Rights.
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
MSF	Médecins Sans Frontières
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental Organisation
OAS	Organization of American States
OCHA	Office for the Coordination of Humanitarian Affairs
Res.	Resolution
Rule (number)	Rule (number) of the ICRC Study on Customary International Humanitarian Law
CIHL	
Safety Convention	Convention on the Safety of United Nations and Associated Personnel
SC	Security Council
SG	Secretary-General
SOFA	Model Status-of-Forces Agreement for Peacekeeping Operations
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
WMA	World Medical Association

I. INTRODUCTION

A. BACKGROUND

The number of attacks against the humanitarian space, the so called working space of humanitarian relief actions, has increased in the last decade. Humanitarian workers are confronted with more and more insecure working conditions. Serious harassment, killings, kidnapping, hostage-taking, disappearances and torture or other forms of cruel, inhuman or degrading treatment are constantly impeding humanitarian functions. Medical personnel often face punishment for treating the sick and wounded or opponents, for upholding medical confidentiality, or they are brought on trial for treating protesters. Humanitarian facilities are attacked and relief consignments are misused. Many times the fundamental humanitarian principles of independence and neutrality fail to be accepted.

In 2011 the number of attacks against aid workers reached a record, 151 incidents occurred with 308 victims in total. The most dangerous places for humanitarian workers are currently Afghanistan, Sudan and Somalia. The majority of victims are shot or kidnapped on the roads. While the International Committee of the Red Cross (ICRC) faces relatively few attacks, international Non-governmental Organisations (NGOs) and the United Nations (UN) agencies are confronted with higher numbers of incidents.¹ Nevertheless, most of the victims are nationals of the host country.² In some countries the number of incidents decreased in comparison to the years before. This development is attributable to the fact that the presence of international personnel has been reduced in the most dangerous countries and that international humanitarian organisations rely increasingly on national staff.³ It has further been identified that there is no link between

1 See The Aid Worker Security Database, available at <https://aidworkersecurity.org/incidents/report/summary> (consulted on 2 July 2012).

2 Stoddard & Harmer & Haver, 2006, p. 2.

3 Oxfam, 2010, p. 19.

incidents and the politico-military situation in the country where an incident happens, but that aid workers are associated with political motives by the local belligerents in these countries.⁴

Attacks against the humanitarian space have generally been condemned by states and international organisations.⁵ There is an urgent need to improve the protection of medical and humanitarian personnel. The ICRC, Médecins Sans Frontières (MSF), the World Medical Association and many other humanitarian organisations have repeatedly called upon parties to international and non-international armed conflicts to respect the provisions of International Humanitarian Law. But to what extent is the humanitarian space protected by International Humanitarian law?

B. OVERVIEW

The humanitarian space is a concept that includes many different actors. International Humanitarian Law does not even once mention the term humanitarian space. Who of these humanitarian actors enjoys special protection under International Humanitarian Law and under which conditions? When talking about protection of humanitarian personnel reference is usually made to the Geneva Conventions of 1949, which provide extensive protection of medical personnel and contain some regulations on relief operations. Alongside the Geneva Conventions humanitarian customary law develops itself further in adaptation to new challenges in the international environment. The collection of customary international humanitarian law by the ICRC provides important evidence of this development. With the adoption of the Rome Statute and the establishment of the International Criminal Court the recognition of individual responsibility for violations of International Humanitarian Law has been strengthened. Furthermore, the Statute contains a comprehensive list of war crimes, some of them are

⁴ Stoddard & Harmer & Haver, 2006, pp. 2-3.

⁵ For a detailed list see Henckaerts & Doswald-Beck, 2005, p. 107.

reaffirmations of grave breaches of the Geneva Conventions, but also new war crimes have been included and customary rules have been codified. And, last but not least, the evolving and increasing importance of human rights leads to enhanced awareness of fundamental rights of human beings and progressively complements the humanitarian legal framework. To what extent are these rules applicable to the humanitarian space? Who is protected by the law and who is responsible for the violations? Are non-state actors, such as individuals, international organisations, the UN and armed groups bound by international law?

C. RESEARCH QUESTION AND METHODOLOGY

This thesis identifies the main incidents in the humanitarian space and analyses the legal protection for each of them. For a long time the Geneva Conventions and their Additional Protocols were the main source for the regulation of the humanitarian space in times of armed conflict. In the last two decades new international legal instruments have become relevant, but to what extent are they applicable to the humanitarian space? How can they be used to protect it? Can human rights strengthen the protection under humanitarian law? These are the main questions that form the focus of the present study.

In order to enjoy the protection provided for by law it is necessary to identify to what extent the humanitarian space is determined by law and to identify if and where the legal boundaries of the humanitarian space are drawn. The legal research methodology used will analyse the legal framework governing the humanitarian space and will bring it in context with contemporary threats against the humanitarian space. The material used for the analysis includes international and regional instruments as well as case studies.

D. DEFINING THE PROTECTION OF THE HUMANITARIAN SPACE

As mentioned before, the term 'humanitarian space' cannot even once be found in International Humanitarian Law. Rony Baumann, the founder of MSF, mentioned the expression first, when he was talking about a 'space of freedom in which we are free to evaluate needs, free to monitor the distribution and use of relief goods, and free to have a dialogue with the people'.⁶ The ICRC, by contrast, bases 'the humanitarian space' on International Humanitarian Law (IHL). The Geneva Conventions provide for the establishment of special zones, which shall protect wounded and sick and civilians during armed conflict. They further constitute the responsibility of states or occupying powers to permit basic relief actions for the civilian population in need in case they are not able to provide for the basic needs by themselves. The relief actions are dependent on the consent of the state or occupying power and must be 'humanitarian and impartial in character and conducted without any adverse distinction'.⁷ For the UN Office for the Coordination of Humanitarian Affairs (OCHA) 'the humanitarian space' is a 'humanitarian operating environment' based on the principles of neutrality and impartiality as the 'critical means by which the primary objective of ensuring that suffering must be met wherever it is found, can be achieved'.⁸ Oxfam International refers to a space that 'allows humanitarian agencies to work independently and impartially to assist populations in need, without fear of attack or obstruction by political or physical barriers to their work. For this to be the case, humanitarian agencies need to be free to make their own choices, based solely on the criteria of need'.⁹ While Oxfam International and MSF refer to a space that provides freedom to the greatest extent possible in order to be able to carry out their work apart from political barriers, the OCHA perceives 'the humanitarian space' as an 'operating environment' which must ensure that suffering can be met wherever it is found. On the other hand, the ICRC

⁶ Esteves, 2010, p. 622.

⁷ United Nations High Commissioner For Refugees (hereinafter UNHCR), PDES/2010/01, February 2010, p. 3; Esteves, 2010, p. 622.

⁸ Thürer, 2007, p. 54.

⁹ UNHCR, PDES/2010/01, February 2010, p. 3.

attributes 'the humanitarian space' strictly to the provision of IHL. How does this go together?

The concept of 'humanitarian assistance' is usually understood as the provision of 'relief' or 'relief supplies' to the victims of armed conflicts, undertaken by states, international organisations such as the UN, NGOs and other non-state actors,¹⁰ while humanitarian action refers to international humanitarian organisations when they are delivering relief in times of conflict based on fundamental humanitarian principles.¹¹ But where do these principles come from, what do they mean and what is their legal basis?

The principle of humanity is inherently based on IHL. Assistance shall be brought to victims in respect for the human being in order to prevent human suffering and to protect life and health.¹² The principle of impartiality is laid down in the Geneva Conventions. Aid must be distributed on the basis of needs, without discrimination on the ground of nationality, race, religion, class or political attitude.¹³ From the UN perspective impartiality rather means that all parties to the conflict are treated in the same way and that humanitarian assistance is provided regardless of politics to the civilian population in need.¹⁴ According to the principle of independence, humanitarian organisations must be autonomous from states. IHL does not refer to independence. The ICRC interprets the principle of independence in a very strict sense. The National Red Cross Societies as well as the ICRC are autonomous from states, international organisations, other authorities and politics and act only on humanitarian grounds.¹⁵ Other humanitarian organisations interpret the principles differently, they usually seek to be autonomous from government control and observe the humanitarian principles.¹⁶

10 Mackintosh, 2010, p. 391.

11 Hilhorst & Jansen, 2010, p. 1118.

12 Thürer, 2007, pp. 56-57.

13 Eckroth, 2010, p. 90; Thürer, 2007, p. 57.

14 United Nations Department of Peacekeeping Operations, 2003, p. 167.

15 Thürer, 2007, p. 58.

16 Eckroth, 2010, p. 91.

For the UN the principle of independence is not that important.¹⁷

The principle of neutrality is the most important principle for the ICRC. It contains two elements: Humanitarian actors must not take sides in hostilities and must refrain from taking actions that would support or cause harm to a party to the conflict. Furthermore, they are not allowed to become engaged in political, racial, religious or ideological controversies.¹⁸ Consequently, the ICRC is not allowed to condemn actions undertaken by a party to the conflict or to inform the public about atrocities.¹⁹ This principle led to the foundation of MSF. In reaction to the war in Biafra former ICRC personnel decided to create a humanitarian organisation whose role is also to talk in public about atrocities in order to adequately protect civilians.²⁰ Thus, MSF and other NGOs do not dedicate themselves fully to the principle of neutrality,²¹ whereas for the ICRC the principle of neutrality is an indispensable requirement for gaining access to all victims in need.²²

In general terms it can be concluded that 'the humanitarian space' is the 'physical or symbolic space which humanitarian agents need to deliver their services according to the principles they uphold'.²³ It includes both the physical space for humanitarian actors, such as special protected zones, refugee camps and humanitarian corridors, as well as the symbolic space that enables them to work without fear and threat.²⁴ The interpretation of the fundamental humanitarian principles varies between the different humanitarian actors. The ICRC obeys them in a very strict sense while other humanitarian organisations use them rather as guiding principles.²⁵ But to what extent is this in conformity with humanitarian law?

17 Thürer, 2007, p. 55.

18 Eckroth, 2010, p. 90; Thürer, 2007, p. 58.

19 Thürer, 2007, p. 58.

20 Collinson & Elhawary, 2012, p. 6.

21 Thürer, 2007, p. 54.

22 Idem, p. 58.

23 Hilhorst & Jansen, 2010, p. 1117.

24 Idem, p. 1118.

25 Eckroth, 2010, p. 91.

How can the humanitarian space be protected by law? Protection by law refers primarily to the obligation of parties to a conflict to respect, prevent and punish acts against humanitarian personnel that enjoy a special status in situations of armed conflict. Protection by law entails not only a right, but also a responsibility: On the one hand the state has the right to protect its interests, to maintain law and order, and to prosecute perpetrators of crimes. On the other hand the state has also a responsibility to protect persons within its territory.²⁶

²⁶ Engdahl, 2006, p. 55.

II. LEGAL FRAMEWORK

A. INTERNATIONAL HUMANITARIAN LAW

1. Introduction

1.1. Background

The law of war is a legal framework regulating the conduct of states, individuals and other entities during times of armed conflict. It is divided into *ius ad bellum*, the legality of the war itself and *ius in bello*, regulating the conduct of war.²⁷ The Charter of the United Nations contains a general prohibition of war in Article 2 (4) which has resulted in *ius contra bellum*. If, nevertheless, an armed conflict takes place *ius in bello* seeks to limit the effects of the conflict for humanitarian reasons, accordingly it is also called IHL.²⁸ IHL applies by fact as soon as an armed conflict exists and irrespective of a declaration of war or an official recognition. The main sources of IHL are treaties, customary law and general principles.²⁹ The Hague Conventions of 1899 and 1907 regulate the means of combat with the aim to minimize unnecessary harm.³⁰ The four Geneva Conventions of 1949 (GC) and their three Additional Protocols (AP) of 1977 and 2005 protect persons who are not or no longer participating in hostilities and aim to restrict the means and methods of warfare.³¹

The Conventions have their origin in a period of time when armed conflicts

²⁷ Benison, 2000, p. 143.

²⁸ The International Committee of the Red Cross (hereinafter ICRC), What is International Humanitarian Law?, 31 July 2004 (b), available at www.icrc.org/eng/resources/documents/legal-fact-sheet/humanitarian-law-factsheet.htm (consulted on 7 May 2012).

²⁹ International Humanitarian Law Research Initiative, 2009.

³⁰ Benison, 2000, p. 144.

³¹ ICRC, 2004 (b).

almost entirely took place between states. Internal conflicts within the sovereign states such as civil wars should not be the conduct of international regulation.³² Although since the end of the cold war armed conflicts predominately have taken place within states rather than between states just few regulations on internal armed conflicts exist. Consequently the qualification of a conflict as international or non-international is crucial in order to know which laws apply.³³ Furthermore, the scope of application of IHL varies depending on the ratification of the Geneva Conventions and their Additional Protocols by the state concerned.

1.2. Custom and the ICRC Study on Customary International Humanitarian Law

However, the customary international humanitarian law (CIHL) has completed a series of rules applicable in both situations of armed conflict. The ICRC's mandate is to disseminate and work for greater understanding of international humanitarian law. In 2005 the ICRC published a comprehensive study on rules of the Geneva Conventions and their Additional Protocols, which have become customary international law due to consistent state practice and application by international tribunals. These rules are binding upon all states, not only upon those who have signed the treaties of IHL. Furthermore, the customary rules apply to any armed conflict, the distinction between international and non-international armed conflict is not necessary anymore. This study has not remained uncriticised. It has been argued that the ICRC went beyond the traditional approach of custom formation in order to consider rules as having become customary that are desirable for the protection of civilians and the humanitarian space.³⁴

The constitution of an international customary rule requires two elements, consistent state practice (*usus*) and *opinio iuris*. The International Court of Justice (ICJ) already held in 1986 that state practice is not required to be uniform, the consent of the

³² Saura, 2007, pp. 491-492.

³³ Greenwood, 1996, p. 199.

³⁴ Guldahl, 2008, p. 65.

majority of states is sufficient.³⁵ By *opinio iuris* is meant that states believe they have to comply with the practice because it is an international rule.³⁶ Once a customary rule is formed no hierarchy exists between treaty law and customary law, they are equally applicable. In regard to humanitarian law the status of customary law is even stronger than in general international law. The Martens Clause³⁷ states that 'Until a more complete code of the laws of war has been issued [...] the parties to the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.' Along these lines the 'dictates of public conscience' are equally important as 'usages' and 'laws of humanity'. If public conscience feels the need to protection under a rule the requirement of state practice may not be necessary or may be less stringent.³⁸

Since the formation of customary law is based on the consent of states it has been argued that a customary rule does not apply to a state that has objected in the early stage of the formation of a rule.³⁹ However, it is contentious whether the status of 'persistent objector' really exists in international law. The ICJ stated already in 1969 that customary rules 'by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its favour'.⁴⁰ Thus a state is not entitled to claim that it is not bound by a new customary rule, neither has a new state the possibility to object existing customary law.⁴¹ The question is rather whether a state is bound by a customary rule although it objected the rule in the progress of becoming customary law.⁴²

35 Cassese, 2005, p. 162.

36 ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), 27 June 1986, ICJ Reports 1986, p.14; Cassese, 2005, p. 157.

37 See the preambles of the 1899 Hague Convention II, 1907 Hague Convention IV and modified AP II.

38 Cassese, 2005, p. 161.

39 *Idem*, p. 153; Dumberry, 2010, p. 779.

40 ICJ, *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark/ Federal Republic of Germany v. Netherlands), 20 February 1969, ICJ Reports 1969, p. 38.

41 Cassese, 2005, p. 163.

42 Dumberry, 2010, p. 781.

Just few jurisdiction exist regarding the doctrine of 'persistent objector'. The ICJ referred to the doctrine only in its *obiter dicta*, after having already denied the existence of the customary rule in question.⁴³ Since the ICJ did not include the theory of 'persistent objector' in its decision but only mentioned it in the *obiter dictum* it has been argued by many scholars that just weak recognition of the doctrine exists.⁴⁴ It is even more important to note that so far no judicial body has ruled that the status of 'persistent objector' can prevent the application of a customary rule to the objecting state.⁴⁵ Furthermore, the concept of 'persistent objector' is not supported by state practice. Only those states which claim their status as 'persistent objector' are in support of the doctrine while other states do not recognise that status.⁴⁶ On the other hand, neither legal reasons nor state practice exist that would constrain the doctrine of 'persistent objector' in international humanitarian law.⁴⁷ Nevertheless, as already mentioned, a new trend in the international community can be observed, customary rules are more likely to be accepted if public conscience feels the need to protection based on considerations of humanity.

The formation of customary rules is of significant importance for victims of armed conflicts, since Additional Protocol I and II of 1977, where the main provisions for the protection of victims can be found, have much less state parties than the four Geneva Conventions.⁴⁸ Furthermore, a high number of reservations has been made by states to certain provisions of the two Protocols. By becoming customary law some of these provisions are generally applicable, regardless of whether the state concerned has signed the Protocols or not.

43 *Fisheries* (United Kingdom v. Norway), 18 December 1951, ICJ Reports 1951, p. 116; *Asylum* (Colombia v. Peru), 20 November 1950, ICJ Reports 1950, p. 395; Dumberry, 2010, p. 785.

44 Cassese, 2005, p. 163.

45 Dumberry, 2010, p. 790.

46 Cassese, 2005, p. 163; Dumberry, 2010, p. 791.

47 Guldahl, 2008, p. 86.

48 194 states are party to the four Geneva Conventions, 172 states are party to AP I and 166 states are party to AP II, available at <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp> (consulted 24 June 2012).

Even when customary rules are codified in a treaty it does not affect the stagnation of its evolution. The customary rule continues to exist alongside the treaty and is in any case binding upon all states, regardless of whether the state has signed the treaty. Although several customary humanitarian rules have been included in the Rome Statute of the International Criminal Court of 1998⁴⁹ they continue to be applicable upon all states and not only upon the signatories of the Statute. Conversely, some provisions of the Rome Statute have become custom and are now binding upon all states and not only on the signatories of the Statute.⁵⁰

1.3. Overview

As already mentioned in the beginning, the term 'humanitarian space' has so far not been defined in the legal framework of IHL. It is thus necessary to identify the provisions applicable to the many different actors within the humanitarian space. The Geneva Conventions lay the foundation for the delivery of aid to persons in need. A fundamental distinction is made between medical personnel and humanitarian relief actions although both groups enjoy special protection in times of armed conflict. While the special status of medical personnel is regulated extensively since the care for wounded and sick is inherent in the spirit of the Geneva Conventions, the protection of humanitarian relief personnel is less detailed and dependent on different factors. By having a look at the ICRC's collection of CIHL the already mentioned new trend in the formation of customary rules can be observed, since they give much more importance to the protection of humanitarian relief actions than the Geneva Conventions do.

This chapter identifies the main obstacles within the humanitarian space and provides the legal bases of each of them. The Geneva Conventions have been ratified almost universally while their Additional Protocols enjoy much less acceptance. For this

49 Rome Statute, Art. 8 (2) (b) and (e); see also Cassese, 1999, p. 152.

50 ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), 27 June 1986, ICJ Reports 1986, p.14; ICJ, *Fisheries* (United Kingdom v. Norway), 18 December 1951, ICJ Reports 1951, p.116; Grover, 2010, p. 566.

reason it is very important to read the provisions in connection with the respective document. Above all, a general distinction must be made between the provisions applicable in international armed conflict and those applicable in non-international armed conflict. Subsequently the relevant customary rules are analysed based on the ICRC's collection of CIHL,⁵¹ and on occasion additional interpretations are added.

2. Access and free passage

2.1. International armed conflicts

The first obstacle for the humanitarian space is to even get access to territories where an armed conflict takes place. Article 23 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 (GC IV) states that free passage has to be given to 'all consignments of medical and hospital stores' intended for civilians as well as to 'consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity'. However, the permission of passage is subject to conditions since 'the technical arrangements under which the passage is allowed' can be prescribed by the party to the conflict and the party has a right to exercise control over the relief actions.⁵²

This Article is extended by Article 70 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 1977 (AP I), which states that 'relief actions which are humanitarian and impartial in character and conducted without any adverse distinction' shall be undertaken if the civilian population 'is not adequately provided' with supplies. Since Article 70 AP I emphasises that priority must be given to the privileged persons mentioned by Article 23 GC IV it does not limit the beneficiaries of relief actions to them. However, although the parties to the conflict are required to

⁵¹ Dörmann & Doswald-Beck & Kolb, 2008.

⁵² GC IV, Art. 23.

'allow and facilitate the rapid and unimpeded passage' of all relief consignments it is still subject to their consent. The consent can be revoked if the terms of the mission are exceeded.⁵³

Either way, the parties may not regard offers of impartial humanitarian relief 'as interference in the armed conflict or as unfriendly acts'. They must facilitate the distribution of relief consignments 'even if it is destined for the civilian population of the adverse Party' and they are not allowed to divert them 'from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned'.⁵⁴ It should be noted that the provision calls on all parties to the Protocol and not only the party in which the relief actions are carried out, thus unimpeded passage must also be authorised by neighbour states or third states which are not parties to the conflict.⁵⁵

Only for occupied territories Article 55 GC IV establishes an obligation for the occupying power to agree on and facilitate relief schemes on behalf of the inadequately supplied population. Such relief schemes may be undertaken by both states and impartial humanitarian organizations such as the ICRC, and shall consist of the provision of consignments of foodstuffs, medical supplies and clothing. The obligation to permit free passage and guarantee protection must be fulfilled by all parties to the Convention. Nevertheless, the party concerned has the right to regulate and observe the relief consignments.⁵⁶

In addition, it should be noted that several other provisions of the Geneva Conventions indicate an obligation to allow and facilitate unimpeded access for humanitarian relief actions in certain situations. The ICRC has the exclusive right to regularly visit all persons deprived of their liberty in international armed conflicts and

53 API, Art. 71 (4).

54 API, Art. 70.

55 Henckaerts & Doswald-Beck, 2005, p. 198.

56 *Idem*, p. 197.

situations of occupation in order to verify the conditions of detention. Concerning non-international armed conflicts the ICRC does not enjoy this right, but it may offer its services.⁵⁷ Furthermore, Article 30 GC IV acknowledges the right of persons protected under GC IV to call on the ICRC, National Red Cross Societies or any other organisation for assistance.

The prohibition of starvation as a method of warfare, stated by Article 54 of AP I, may be used to argue that the party can not withhold its consent for arbitrary reasons since it is forbidden to deprive civilians of objects indispensable to their survival, such as food-stuffs, crops, drinking water installations and supplies.⁵⁸

2.2. Non-international armed conflicts

Concerning non-international armed conflicts Article 18 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 1977 (AP II) states that 'relief societies located in the territory' of a party to the Convention, such as the Red Cross, 'may offer their services for the performance of their traditional functions in relation to the victims of armed conflict'. Although the Article reaffirms that impartial humanitarian relief actions shall be allowed 'if the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival', it does not establish any obligation to allow or facilitate access of humanitarian relief to territories where internal armed conflicts are taking place.

Common Article 3 to the Geneva Conventions requires states to collect and care for the wounded and sick, in which 'an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services'. But again, humanitarian organisations can offer their assistance and the parties to the conflict can

⁵⁷ CIHL, Rule 124; GC III, Art. 126; GC IV, Arts. 76, 143.

⁵⁸ Dörmann & Doswald-Beck & Kolb, 2008, pp. 366-368.

deny it.⁵⁹ However, Article 14 AP II also states the prohibition of starvation in non-international armed conflicts so that consent may not be withheld on arbitrary grounds.⁶⁰

2.3. The ICRC Study on Customary International Humanitarian Law

The content of Article 70 (2) AP I is generally accepted by states, also by those that are not party to the Protocol or were not at that time.⁶¹ Thus, Rule 55 of the ICRC Study on Customary International Humanitarian Law (Rule 55 CIHL), applicable in international and non-international armed conflicts, reaffirms that 'the parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control'.⁶² The customary rule does not mention the requirement of consent. By reference to state practice it has been concluded that consent must not be refused on arbitrary grounds if the population is threatened with starvation and a humanitarian organisation is able to remedy the situation. However, the parties are allowed to search for relief consignments and to exercise control over their delivery, but they can not 'deliberately impede' the delivery,⁶³ or change their purpose or destination.⁶⁴

Furthermore, Rule 53 CIHL confirms the prohibition of the 'use of starvation of the civilian population as a method of warfare' in international and non-international armed conflicts. The prohibition of starvation under CIHL does not include siege warfare for military purposes not even if it affects the civilian population, as long as starvation of the civilian population is not the primary purpose. In this case Rule 55 must be respected.⁶⁵

59 Dinstein, 2000, p. 83.

60 Henckaerts & Doswald-Beck, 2005, p. 197.

61 *Idem*, pp. 194-195.

62 *Ibidem*.

63 *Idem*, pp. 198-199.

64 Stoffels, 2004, p. 540.

65 Henckaerts & Doswald-Beck, 2005, p. 188.

2.4. Conclusion

To summarise, humanitarian relief actions have to be impartial and must be conducted in a non-discriminative manner, proportionate to the needs of all civilians. Distinction between the beneficiaries is only permitted on the basis of humanitarian criteria. Whenever a party arrives at the conviction that relief actions are not carried out in compliance with the fundamental principles of humanity it has the right to refuse or revoke the authorisation.⁶⁶ On the occasion that the provision of aid is motivated not exclusively on humanitarian grounds but also by economic interests, it may be permitted as long as it is for the benefit of the civilian population in need.⁶⁷ However, since only civilians have the right to receive relief, humanitarian personnel must do everything within their capacity to achieve that the supplies are not for the benefit of combatants. Even if it is impossible to prevent that relief supplies directly or indirectly support one of the belligerent parties the humanitarian relief action does not lose its status of protection, but the party to the conflict has the right to revoke its authorisation.⁶⁸

Humanitarian actors should have access to all people in need. If they can only reach certain areas or if they have to stay within a definite zone the most needy persons often remain without supply which constitutes a breach of the principle of impartiality.⁶⁹ If humanitarian actors are operating without the consent of the state concerned they must not be the objects of military targets since they still enjoy protection under the status of civilians. Nevertheless, the government may confiscate relief supplies, impose sanctions or even deport the personnel.⁷⁰

66 Stoffels, 2004, p. 540.

67 Idem, pp. 539-540.

68 Idem, pp. 542-543.

69 Von Pilar, 1999, p. 7.

70 Stoffels, 2004, pp. 535-536.

3. Freedom of movement

3.1. International armed conflicts

As soon as personnel of the humanitarian space has access to a territory it should also have the possibility to move freely in order to be able to carry out their duties and to have unhindered contact with the civilian population in need.⁷¹ According to Article 71 (3) AP I the parties to the Convention, thus also states not party to the conflict, 'shall, to the fullest extent practicable, assist the relief personnel' in carrying out their mission and may only limit or restrict their movements temporarily in case of imperative military necessity. At the same time relief personnel has to observe the security requirements of the party. Apart from this provision there is no explicit obligation for the state concerned to ensure the freedom of movement of relief personnel. However, since the party has the duty to assist relief personnel it cannot restrict its freedom movement as it is obvious that relief functions can only be carried out successfully if the personnel is able to move in an uninhibited manner. Furthermore, the party must not refuse access on arbitrary grounds, consequently this may also indicate an implicit obligation to ensure the freedom of movement of the personnel as soon as authorisation has been given.⁷²

3.2. Non-international armed conflicts

In regard to non-international armed conflicts, Article 18 (2) of Additional Protocol II does not mention the obligation to grant freedom of movement to relief personnel, although this should be an inherent duty in order to guarantee the adequate provision of humanitarian aid.⁷³

71 Von Pilar, 1999, p. 7.

72 CIHL, Rule 55; Henckaerts & Doswald-Beck, 2005, pp. 201-202.

73 Henckaerts & Doswald-Beck, 2005, p. 201.

3.3. The ICRC Study on Customary International Humanitarian Law

According to customary humanitarian law 'the parties to the conflict must ensure the freedom of movement of authorised humanitarian relief personnel essential to the exercise of their functions', although their movements can be temporarily restricted in case of imperative military necessity.⁷⁴ The restriction of movement in situations of imperative military necessity can only be of temporary nature in order to avoid interference of military operations with humanitarian relief personnel. In either case they cannot be conducted in violation of the Rules 52-55 CIHL, which regulate the prohibition of starvation and the protection of the civilian population in need.⁷⁵

3.4. Conclusion

Since also the ICRC's special position concerning the adequate relief to prisoners of war has become customary law, they must be granted regular access to persons deprived of their liberty in international armed conflicts.⁷⁶ For that reason the party to the conflict can under no circumstances arbitrarily restrict the freedom of movement of the ICRC. In regard to the United Nations and associated personnel and their equipment Article 5 of the Convention on the Safety of United Nations and Associated Personnel (Safety Convention) explicitly requires that transit states have to facilitate the unimpeded transfer of personnel to and from the host state.

⁷⁴ CIHL, Rule 56.

⁷⁵ Henckaerts & Doswald-Beck, 2005, p. 202.

⁷⁶ CIHL, Rule 124; GC III, Art. 125; GC IV, Art. 142.

4. Protection against insecure working conditions, threats, capture, killings and disappearances

4.1. Protection of medical personnel

Medical personnel participating in humanitarian missions enjoy specific protection under IHL.⁷⁷ The term 'medical personnel' is defined in Article 8 (c) AP I, which has become generally accepted by state practice. The term covers not only military and civilian medical personnel of the state concerned but also recognised and authorised medical personnel of national Red Cross Societies and other national voluntary aid societies. This provision explicitly includes also medical personnel, which is made available to a party of the conflict for humanitarian purposes: either by a neutral or by another state (not party to the conflict), by a recognised and authorised aid society of such a state, or by an impartial international humanitarian organisation. Medical personnel must be exclusively assigned to medical purposes and have to obey the principle of strict neutrality.⁷⁸ Consequently they lose their protection when they commit hostile acts or acts harmful to the enemy outside their humanitarian duties, although the protection can only be ceased after an unheeded due warning.⁷⁹ However, they do not lose their protection if they care for enemy wounded and sick military personnel or when they are wearing enemy military uniforms, but they must not be incorporated in combat units, bear arms and participate directly in hostilities.⁸⁰ Medical personnel must be assigned to medical duties by a party to the conflict otherwise they are not allowed to wear the distinctive emblems of the Geneva Conventions.⁸¹ If medical personnel are assigned to medical duties only for a certain time they enjoy protection under this provisions just during this period.⁸²

77 Dörmann & Doswald-Beck & Kolb, 2008, pp. 155-156.

78 Henckaerts & Doswald-Beck, 2005, p. 85.

79 AP I, Art. 13.

80 GC I, Art. 21; AP I, Art. 13; AP II, Art. 11; CIHL, Rule 25.

81 Henckaerts & Doswald-Beck, 2005, p. 82.

82 Ibidem.

The distinctive emblem of the Geneva Conventions protects medical personnel, units and establishments in armed conflict and facilitates their distinction.⁸³ The distinctive emblem can be displayed exclusively by civilian or military personnel entitled to be respected under the Convention.⁸⁴ The distinctive emblems can only provide its protective effects adequately if they are respected in all circumstances, therefore their improper use is prohibited.⁸⁵ Although medical personnel are not obliged to wear the distinctive emblem,⁸⁶ the parties to the Protocol must make sure that medical personnel are identifiable.⁸⁷ In any case, medical personnel enjoy protection as long as they are assigned to medical duties, regardless of whether they are wearing the emblem. However, it only constitutes a breach of the Geneva Conventions if the persons 'attacked are protected and use the distinctive emblem in conformity with international law.⁸⁸ NGOs such as MSF are not allowed to wear the distinctive emblems, but may wear other recognizable symbols. Nevertheless, as long as they do not participate in hostilities they are protected by their status as civilians.⁸⁹

4.1.1. International armed conflicts

According to Article 26 of the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) both National Red Cross Societies and other Voluntary Aid Societies⁹⁰ enjoy the same legal status as army medical staff⁹¹ if they have been authorised by the government to help the armed forces. The National Red Cross Societies were established in order to support the medical services of parties to the conflict by sending duly authorised volunteers,⁹² even

83 Dörmann & Doswald-Beck & Kolb, 2008, p. 447.

84 Baccino-Astrada, 1982, p. 21; GC I, Arts. 36, 39- 44; GC II, Arts. 42-44; GC IV, Arts. 18-22; AP I, Arts. 12, 15, 18, 23-24.

85 CIHL, Rule 59.

86 Dörmann & Doswald-Beck & Kolb, 2008, p. 450.

87 API, Art. 18.

88 Dörmann & Doswald-Beck & Kolb, 2008, p. 451.

89 Henckaerts & Doswald-Beck, 2005, p. 82.

90 Such as the Knights of Malta and the Order of St. John of Jerusalem.

91 See GC I, Arts. 24-25; GC II, Art. 36.

92 See GC 1864, Art. 2; GC 1906, Arts. 9–10; GC 1929, Arts. 9–10.

though the primary responsibility for assistance to victims of armed conflicts lies within the state. In order to enjoy this special protection they must be recognised by the party concerned and by the ICRC.⁹³ Article 20 GC IV extends this protection to permanent or temporary staff of civilian hospitals, even when they leave the hospital in order to conduct relief operations provided they are wearing the distinctive emblem.⁹⁴ Article 15 AP I finally grants the same protection to all civilian medical personnel: 'All available help shall be afforded' to them if needed and access to places where their services are needed must be given subject to the necessary 'supervisory and safety measures'.

In the event of capture medical personnel enjoy a privileged status. Medical personnel of a state not party to the conflict assigned to medical duties by a party to the conflict must not be detained by the adverse Party. In case of capture they have the permission to return to their country or to the territory they were assigned to as soon as a route for their return is open and military considerations allow it. During detention they have to be supplied with adequate food, lodging, allowances and pay.⁹⁵ Personnel of National Red Cross Societies or civilian medical personnel must be retained if it is required considering the state of health, the spiritual needs and the number of prisoners of war. Although they are not prisoners of war they benefit from the same protection.⁹⁶

4.1.2. Non-international armed conflicts

Concerning non-international armed conflicts the Geneva Conventions do not mention the special status of medical personnel. However, since common Article 3 of the four Geneva Conventions states that 'wounded and sick shall be collected and cared for' it is a precondition to this obligation that medical personnel must be respected and protected.⁹⁷ Furthermore, Article 9 (1) AP II establishes the obligation to respect and

⁹³ International Committee of the Red Cross, 1983, p. 140.

⁹⁴ International Committee of the Red Cross, Commentary to Art. 20 GC IV, available at <http://www.icrc.org/ihl.nsf/COM/380-600024?OpenDocument> (consulted on 11 June 2012).

⁹⁵ GC I, Art. 32; GC II, Art. 36.

⁹⁶ GC I, Arts. 28, 30; GC III, Art. 33; GC IV, Arts. 35-46, 79-141, AP I, Arts. 15-16.

⁹⁷ Henckaerts & Doswald-Beck, 2005, p. 80.

protect medical personnel and to grant them 'all available help for the performance of their duties'. In addition the parties must refrain from making them carrying out tasks incompatible with their humanitarian mission or giving priority to persons except on medical grounds.

4.1.3. The ICRC Study on Customary International Humanitarian Law

Due to consistent state practice it has become a customary rule that 'medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances', in international and non-international armed conflicts.⁹⁸ They must not be knowingly attacked, fired upon, or unnecessarily prevented from discharging their proper functions. It has also been discussed that the state may have a duty to defend, assist and support medical personnel when needed.⁹⁹ Additionally also the prohibition of 'attacks directed against medical and religious personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law' has become customary law.¹⁰⁰ On the battlefield they may fulfil their medical duties in accordance with their medical ethics and must not be attacked.¹⁰¹

4.1.4. Medical personnel and the use of arms

As stated by Article 22 GC I medical personnel is allowed to use arms in their own defence, or in that of the wounded and sick in their charge. Hence it is not considered to be an act harmful to the enemy if the personnel is 'equipped with light individual weapons' for its 'own defence or for that of the wounded and sick in their charge', if 'the unit is guarded', if they are carrying arms 'taken from the wounded and sick, not yet handed' over, or if 'members of armed forces or other combatants' are with them for

98 CIHL, Rule 25.

99 Henckaerts & Doswald-Beck, 2005, pp. 83-84.

100 CIHL, Rule 30.

101 GC I, Arts. 24-25; GC II, Arts. 36-37; AP I, Arts. 15-16; Sassòli & Bouvier, 1999, p. 164.

medical reasons.¹⁰² Although this provision does not apply to non-international armed conflicts it may have become customary law, since state practice does not indicate that the protected status of medical personnel ceases if they are equipped with light individual weapons for self-defence or that of the wounded and sick in their charge.¹⁰³

4.2. Protection of humanitarian relief personnel

4.2.1. International armed conflicts

'Relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments', as defined by Article 71 AP I. The Geneva Conventions do not contain any provisions regarding the protection of relief personnel, but Article 71 AP I emphasises that the personnel must be respected and protected and that every party receiving relief consignments has to assist them in carrying out their mission 'to the fullest extent practicable'. However, the participation of the personnel should be approved by the party 'in whose territory they will carry out their duties' and their activities or movements can be limited or temporarily restricted in case of imperative military necessity. If the personnel exceed the terms of their mission or they do not take account of the security requirements the mission can be terminated.¹⁰⁴ This provision also guarantees protection to UN peacekeeping personnel engaged in relief operations.¹⁰⁵

In this context it is worth noting that all personnel within the humanitarian space always enjoy protection under their status as civilians as long as they are not taking directly part in hostilities, so that the provisions determining the protection of civilians can be used as a supplement.¹⁰⁶ In order to ensure the protection of civilians the parties to the conflict have a duty to undertake precautionary measures and to remove the

102 AP I, Art. 13.

103 Henckaerts & Doswald-Beck, 2005, pp. 85.

104 Idem, p. 105.

105 Greenwood, 1996, p. 190.

106 AP I, Arts. 50, 51; Greenwood, 1996, p. 191.

population from the vicinity of military objectives.¹⁰⁷ Furthermore, relief personnel do not enjoy special protection in the case of capture. If they are deprived of their liberty they enjoy the general protection for civilians in the power of a party to the international armed conflict.¹⁰⁸

4.2.2. Non-international armed conflicts

Article 18 (2) AP II concerning non-international armed conflicts does not specifically mention the protection of relief personnel. However, since relief actions should be undertaken when the civilian population is suffering undue hardship, provided that they are of an exclusively humanitarian and impartial nature, the provision contains an immanent obligation to respect and protect the personnel.¹⁰⁹ Moreover, the obligation to protect relief personnel may also be inherent in the prohibition of starvation and the obligation to collect and care for the wounded and sick.¹¹⁰

On the other hand, the minimum clause of common Article 3 of the Geneva Conventions states that each party to the conflict must in all circumstances, as a minimum, 'treat persons taking no active part in the hostilities humanely'. Particularly mentioned is the absolute prohibition of 'violence to life and person, murder, mutilation, cruel treatment and torture, taking of hostages, outrages upon personal dignity, in particular humiliating and degrading treatment, the passing of sentences and the carrying out of executions without previous judgement'.¹¹¹ Since everyone who is not a combatant is benefiting from the protection of civilians provided for by law,¹¹² the general protection of civilians against dangers arising from military operations under Article 13 (2) AP II applies, which states that 'the civilian population as well as individuals must not be the object of attack 'unless and for such time as they take direct

¹⁰⁷ AP I, Arts. 57, 58.

¹⁰⁸ Greenwood, p. 190.

¹⁰⁹ Henckaerts & Doswald-Beck, 2005, p. 106.

¹¹⁰ CIHL, Rules 53, 109, 110.

¹¹¹ GCs, common Art. 3.

¹¹² Sassòli & Bouvier, 1999, p. 203.

part in hostilities'.

4.2.3. The ICRC Study on Customary International Humanitarian Law

Due to consistent state practice it has become a customary humanitarian rule that 'humanitarian relief personnel must be respected and protected'.¹¹³ The rule does not only include the prohibition of attacks, but also harassment, intimidation and arbitrary detention. Besides, mistreatment, physical and psychological violence, murder, beating, abduction, hostage-taking, harassment, kidnapping, illegal arrest and detention have also been condemned by states and international organisations.¹¹⁴ Furthermore, the majority of state practice does not see prior authorisation by the state as a requirement for the obligation to respect and protect relief personnel, which enjoys in any case the protection under the prohibition of attacks against civilians.¹¹⁵

In addition, Amended Protocol II to the Convention on Certain Conventional Weapons of 1980 protects the humanitarian space against the effects of mines, booby-traps and other devices. The parties to the Convention have the duty to take 'such measures as are necessary' to provide safe passage or clear a lane through minefields.¹¹⁶

4.2.4. Humanitarian relief personnel and the right to self-defence

In contrast to the provisions on medical personnel neither the Geneva Conventions and their Addition Protocols nor customary rules explicitly allow humanitarian relief personnel the use of force in self-defence. However, it is common that humanitarian actors protect themselves by light weapons or enjoy protection provided by private security personnel or by the security framework of the UN.¹¹⁷ Consequently the question arises to which extent this could be considered as hostile conduct. Although it has been

113 CIHL, Rule 31.

114 See, e.g., UN SC Res. 1265 (1999), S/Res/1265; UN GA Res. 55/116 (2001), A/55/116.

115 Henckaerts & Doswald-Beck, 2005, pp. 108; Dörmann & Doswald-Beck & Kolb, 2008, p. 453.

116 Amended Protocol II to the Convention on Certain Conventional Weapons of 1980, Art. 12.

117 Stoffels, 2004, pp. 542-543.

acknowledged in all legal systems that every individual has an inherent right to self-defence against immanent danger, the right to use weapons for self-defence has not been generally recognised and depends on the authorisation provided by the domestic law of each country.¹¹⁸ It is thus not clear whether humanitarian relief personnel is allowed to use armed protection for self-defence.¹¹⁹

4.2.5. The principle of neutrality

In consideration of the fact that according to the Geneva Conventions relief actions must be humanitarian and impartial in character, also humanitarian relief personnel is required to be impartial and neutral. The principle of neutrality has been deduced from the humanitarian nature of relief actions under IHL. Since only civilians are entitled to receive relief the personnel always has to distinguish between civilians and combatants and is not allowed to directly or indirectly support one of the belligerent parties. In any case, they must refrain from engaging in hostile activities, such as providing aid in the knowledge that it is benefiting a belligerent party.¹²⁰ In no way are they allowed to transport or store weapons or to provide belligerent parties with means of communication or logistical information.¹²¹

The principle of neutrality has been applied differently by humanitarian actors since it requires that relief personnel do not express their opinion or give information to the advantage of one of the belligerent parties. While many humanitarian actors do not dedicate themselves to strict neutrality and consider it possible to give information concerning humanitarian issues to institutions in a position to provide remedy,¹²² strict neutrality is the fundamental principle of the ICRC, which is thus relatively cautious in reporting.¹²³ Due to the special position of the ICRC under the Geneva Conventions it is

118 Banza, 2012, p. 155.

119 For a more detailed analysis see Banza, 2012.

120 Stoffels, 2004, p. 542.

121 Idem, p. 543.

122 Stoffels, 2004, p. 543.

123 Another fundamental principle of the ICRC is the universality of humanitarian action, which will not be discussed in this context due to the limited scope of this thesis.

many times the only actor who has access to certain areas of armed conflict so that its presence is often crucial for the survival of civilians in need. Inasmuch access of the ICRC is dependent on authorisation, the party to the conflict may not give its consent if it is concerned that confidential or delicate information could become of public knowledge.¹²⁴ For this reason the ICRC gives access to victims priority over blaming a certain party to the conflict in public, unless it is convinced that a public statement may be more effective.¹²⁵

5. Punishment for treating the sick and wounded or opponents

The punishment of a person for performing medical duties compatible with medical ethics or compelling a person engaged in medical activities to perform acts contrary to medical ethics is prohibited.¹²⁶ Although states have the right to adopt legislation which obliges medical personnel to provide confidential medical information, the punishment of persons for acts carried out in compliance with their medical duties would violate the obligations to respect and protect medical personnel and to protect and care for the wounded and sick.¹²⁷

124 Kellenberger, 2005, p. 44.

125 *Idem*, pp. 45-46.

126 GC I, Art. 18; AP I Art. 16; AP II, Art. 10; CIHL, Rule 26.

127 Henckaerts & Doswald-Beck, 2005, pp. 86-87.

6. Protection of humanitarian facilities and objects against military attacks

6.1. Medical establishments and objects

6.1.1. International armed conflicts

The protection of 'hospitals and places where the sick and wounded are collected' was already stated in Article 27 of the Hague Conventions of 1899 and 1907. According to the GC I fixed establishments and mobile medical units of the Medical Service, as well as medical transports of wounded and sick or of medical equipment must not be the objects of attack and must be respected and protected at all times by the parties to the conflict.¹²⁸ In addition, the responsible authorities must ensure that medical establishments and units are, 'as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety'.¹²⁹ Civilian hospitals, convoys or vehicles or hospital trains enjoy protection under GC IV, which further states that the protection can not be ceased unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy.¹³⁰

AP I extends the previous provisions to civilian medical units, vehicles and transports organised for medical purposes, provided that they belong to one of the Parties to the conflict or are recognised and authorised in conformity with the Geneva Conventions.¹³¹ Medical units can be fixed or mobile, permanent or temporary and serve for the collection, transportation, diagnosis or treatment of the wounded, sick and shipwrecked, or for the prevention of diseases.¹³² It is further prohibited to use medical units 'in an attempt to shield military objectives from attack'. In general, previous authorisation of civilian medical units is required in order to enjoy special protection,

¹²⁸ GC I, Arts. 19, 35.

¹²⁹ GC I, Art. 21.

¹³⁰ GC IV, Arts. 18, 19, 21.

¹³¹ AP I, Arts. 8 (f)–(g), 12, 21.

¹³² AP I, Art. 8 (e).

but unauthorised units enjoy the same protection as civilian objects.¹³³

6.1.2. Non-international armed conflicts

Concerning non-international armed conflicts the obligation to protect medical units and transports is inherently based in common Article 3 of the four Geneva Conventions since wounded and sick can only receive medical care if medical objects are respected. In addition Article 11 (1) AP II explicitly states that 'medical units and transports shall be respected and protected at all times and shall not be the object of attacks'.¹³⁴

6.1.3. The ICRC Study on Customary International Humanitarian Law

CIHL Rule 30 reaffirms that 'medical units exclusively assigned to medical purposes must be respected and protected in all circumstances'.¹³⁵ They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy.¹³⁶ Medical transports 'assigned exclusively to medical transportation' are protected by Rule 29 CIHL. The conditions for loss of protection apply to medical units and to medical transports in the same manner. The transport of healthy troops, arms or munitions and the collection or transmission of military intelligence can lead to loss of protection.¹³⁷ Moreover, and as already mentioned, the prohibition of attacks against objects 'displaying the distinctive emblems of the Geneva Conventions in conformity with international law' has also become customary law.¹³⁸

133 Henckaerts & Doswald-Beck, 2005, pp. 91-92.

134 Ibidem.

135 CIHL, Rule 28.

136 Henckaerts & Doswald-Beck, 2005, pp. 92-93.

137 Idem, pp. 102-103.

138 CIHL, Rule 30.

6.2. Humanitarian relief objects

6.2.1. *International armed conflicts*

The Geneva Conventions require only in regard to occupied territories that the occupying power agrees and facilitates relief schemes when the whole or part of the population is inadequately supplied.¹³⁹ When states or impartial humanitarian organisations such as the ICRC undertake the provision of consignments of foodstuffs, medical supplies and clothing, free passage and protection shall be granted to the consignments, even if they are destined for a territory occupied by an adverse party. However, the party has the right to regulate the passage according to prescribed times and routes and can deny the passage of consignments if it is not reasonably satisfied by the occupying power that the goods will be used for the relief of the needy population and not for the benefit of the occupying power.

Article 70 (4) AP I extends the scope of application to any territory where the civilian population is not adequately provided with basic supplies: Impartial humanitarian relief actions must be undertaken subject to the agreement of the parties concerned, which are not allowed to 'divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned'. The parties to the conflict have the duty to protect the relief consignments and must facilitate their rapid distribution. Moreover, each party to the Protocol has the duty to encourage and facilitate effective international co-ordination of the relief actions.¹⁴⁰ This provision also grants protection to relief operations undertaken by UN peacekeeping personnel.¹⁴¹ As a complement to this, attacks against civilian objects are prohibited and can not be justified by military necessity.¹⁴²

139 GC IV, Art. 59.

140 Henckaerts & Doswald-Beck, 2005, pp. 109-110.

141 Greenwood, 1996, p. 190.

142 AP I, Art. 52 (1).

Furthermore, the prohibition of starvation as a method of warfare, stated in Article 54 AP I, forbids the parties to the conflict to deprive civilians of objects indispensable to their survival and further expressly prohibits to 'attack, destroy, remove or render useless objects indispensable to the survival of the civilian population' such as food-stuffs or water supplies.¹⁴³ If the objects are used in support of the adverse party, they are not entitled to protection.¹⁴⁴

6.2.2. Non-international armed conflicts

Additional Protocol II does not contain any specific provision for the protection of objects of humanitarian relief in non-international armed conflicts, since Article 18 (2) AP II only states that exclusively humanitarian and impartial relief actions shall be undertaken subject to the consent of the party concerned. However, it could be concluded that the protection of relief objects is inherently contained in this provision once authorisation is given.¹⁴⁵ Further, Article 14 AP II protects objects which are 'indispensable to the survival of the civilian population'. Contrary to international armed conflicts, it is not clear whether the protection also ceases in internal armed conflicts if the object supports military actions. Article 14 does not provide any exception.¹⁴⁶

6.2.3. The ICRC Study on Customary International Humanitarian Law

According to customary humanitarian law all 'objects used for humanitarian relief operations must be respected and protected' in international as well as in non-international armed conflicts.¹⁴⁷ By application of state practice on the protection of civilian objects, which must not be attacked,¹⁴⁸ humanitarian relief objects enjoy also protection against destruction, misappropriation and looting. Furthermore, state practice

¹⁴³ Dörmann & Doswald-Beck & Kolb, 2008, pp. 364-365.

¹⁴⁴ AP I, Art. 54 (2).

¹⁴⁵ Henckaerts & Doswald-Beck, 2005, pp. 110-111.

¹⁴⁶ *Idem*, p. 193.

¹⁴⁷ CIHL, Rule 32.

¹⁴⁸ CIHL, Rule 7.

indicates that all parties have to respect and protect humanitarian objects, not only the parties to the conflict.¹⁴⁹ Since humanitarian relief objects are often crucial for the survival of the starving civilian population offences against consignments destined for the civilian population further correlate with the prohibition of starvation¹⁵⁰ and the prohibition of deliberately impeding the delivery of humanitarian relief.¹⁵¹ 'Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population' can not be justified,¹⁵² which may include medicines and blankets according to state practice.¹⁵³ In any case, the objects are only entitled to protection as long as they do not contribute effectively to military actions.¹⁵⁴

7. Protected zones

The parties to a conflict have the possibility to conclude agreements on the establishment of hospital zones, safety zones and localities in order to protect the wounded and sick and special protected persons from the effects of war,¹⁵⁵ where the ICRC has a right to offer their good offices. There is also the possibility to establish either directly through a neutral state or through a humanitarian organisation, neutralised zones in regions where fighting is still taking place in order to give shelter to wounded, sick and civilians. In that event a written agreement shall be concluded between the parties to the conflict that determines the beginning and the duration of the neutralisation of the zone.¹⁵⁶ While hospital and safety zones are far off from regions where fighting is taking place, neutralised zones are located inside the fighting zones.

These provisions have become a customary rule which states the general

149 Henckaerts & Doswald-Beck, 2005, p. 111.

150 CIHL, Rule 53.

151 CIHL, Rule 55; Henckaerts & Doswald-Beck, 2005, p. 109.

152 CIHL, Rule 54.

153 Henckaerts & Doswald-Beck, 2005, p. 193; this rule was reaffirmed in Paragraph 6.7. of the Secretary-General's Bulletin of 1999.

154 Dörmann & Doswald-Beck & Kolb, 2008, p. 455.

155 GC I, Arts. 14, 23.

156 GC IV, Art. 15.

prohibition of 'directing an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities'.¹⁵⁷ In this context the UN General Assembly Resolution 2675 adopted in 1970 on basic principles for the protection of civilian populations in armed conflicts shall be quoted, it emphasises that 'places and areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations'.¹⁵⁸

8. The prohibition of reprisals

Belligerent reprisals are actions against the adversary in reaction to its breach of international humanitarian law. They are unlawful under international law if they do not meet with stringent conditions.¹⁵⁹ According to Article 33 of the GC IV reprisals against protected persons and against their property are prohibited. Article 45 GC I and Article 46 GC II explicitly refer to the prohibition of reprisals against medical objects. In addition, AP I requires protection for objects indispensable to the survival of the civilian population,¹⁶⁰ and states the prohibition of taking reprisals against civilians during the conduct of hostilities.¹⁶¹ In non-international armed conflicts the fundamental guarantees of common Article 3 of the four Geneva Conventions and Article 4 AP II may indirectly forbid reprisals. In the same sense Rule 146 CIHL reaffirms that 'belligerent reprisals against persons protected by the Geneva Conventions are prohibited'. Furthermore, parties to non-international armed conflicts are not allowed to resort to belligerent reprisals or to other countermeasures against persons who do not take a direct part in hostilities.¹⁶²

In this context other documents shall be quoted, such as the aforementioned Resolution 2675 which reaffirms that 'civilian populations, or individual members

157 CIHL, Rule 35.

158 Henckaerts & Doswald-Beck, 2005, pp. 119-120.

159 CIHL, Rule 145.

160 AP I, Art. 54.

161 AP I, Art. 5 (6); see also Protocol II to the Convention on Certain Conventional Weapons, Art. 3 (2).

162 CIHL, Rule 148.

thereof, should not be the object of reprisals'. Moreover, Article 50 (1) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts states that countermeasures must not affect obligations of humanitarian character and fundamental human rights. Nevertheless, the United States expressed its opposition to a total ban of reprisals. Further the United Kingdom, Germany, Italy, France and Egypt made reservations or declarations when ratifying AP I. Consequently it remains unclear whether a customary rule exists that bans reprisals against civilians during the conduct of hostilities.¹⁶³

9. Responsibility for violations of International Humanitarian Law

9.1. State responsibility

The violation of IHL by an individual entails both, the individual criminal responsibility and the responsibility of the state to whom the act of the individuals can be attributed. Hence the same act can simultaneously constitute a violation of an international obligation by a state and the commission of a crime under international criminal law. Under international law traditionally only states were responsible for violations of international law, while individuals could be held responsible only under national law.¹⁶⁴ However, although the responsibility of states has not been determined in an international treaty, international customary rules provide that states can be responsible if they violate an obligation by an international rule.¹⁶⁵

The Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001 determines the responsibility of states for breaches of international obligations committed by individuals attributable to it.¹⁶⁶ The State is even responsible for wrongful acts committed by organs that exceed its

¹⁶³ Henckaerts & Doswald-Beck, 2005, pp. 513-514.

¹⁶⁴ Nollkaemper, 2003, p. 617.

¹⁶⁵ Cassese, 2005, p. 242.

¹⁶⁶ Draft Articles, Art. 2.

authority or contravene instructions, as well as for private persons or entities that are in fact acting on the instructions or under the control of the state.¹⁶⁷ If a state is responsible for a violation of an international obligation it can have several obligations towards the victim state, such as ceasing the wrongful doing or making reparation for the injury caused.¹⁶⁸ The Draft Articles also included a new form of 'aggravated' state responsibility, which arises when a state commits a serious breach of a fundamental international obligation; any other state can invoke the responsibility of the state on behalf of the community interest regardless of whether it has been damaged.¹⁶⁹

Although the Draft Articles have not been codified in a treaty yet, some provisions have been reaffirmed in customary international law. Rule 149 CIHL emphasises that states are responsible for violations of IHL attributable to it. This includes violations committed by its organs, armed forces, persons or entities empowered with governmental authority, persons or groups acting in fact under its instructions or control and violations committed by private persons or groups which it adopts as its own conduct. According to Rule 150 CIHL, a state responsible for violations of IHL has to make full reparation for the loss or injury caused. Furthermore, all serious violations of IHL are war crimes, which states have to investigate when they are committed by their nationals or armed forces, or on their territory.¹⁷⁰

Traditionally only states had the right to exercise jurisdiction and they only could exercise it over individuals and objects within their territorial borders. However, due to the development of international criminal law universal jurisdiction has been recognised.¹⁷¹ Under the Geneva Conventions every state party to the Conventions has to undertake effective penal sanctions for persons committing grave breaches of the Geneva Conventions; therefore, states have to search for persons who are suspected for

167 Draft Articles, Art. 8; Cassese, 2005, p. 248.

168 Draft Articles, Arts. 30, 31, 34, 35.

169 Draft Articles, Art. 48; Cassese, 2005, p. 262.

170 CIHL, Rules 156, 158.

171 Reinisch, 2005, p. 59.

having committed grave breaches and should bring them, regardless of their nationality, before their own courts,¹⁷² or can decide to hand them over for trials to a state that has made out a 'prima facie' case.¹⁷³ The customary humanitarian rules complement these provisions: According to Rule 157 CIHL states have the right to exercise universal jurisdiction over war crimes in their national courts. Thus, every state can prosecute the perpetrators of core international crimes regardless of any link to the territory or persons concerned. However, states often do not prosecute perpetrators of international crimes since this may negatively affect their diplomatic relations.¹⁷⁴

9.2. Individual criminal responsibility

Although states are primarily responsible for violations of IHL it is now generally recognised that individuals also have rights and obligations under international law.¹⁷⁵ On the other hand, the responsibility of individual organs of the state does not exclude the responsibility of the state.¹⁷⁶ During the Second World War the first international military tribunals were created in order to prosecute individuals for violations of the laws of war. The trials of Nuremberg and Tokyo were the first enforcement mechanisms of the laws of war that weakened the principles of state sovereignty and impunity of state officials. Although they were rather bringing victor's justice it was the starting point for the recognition of individual criminal responsibility and for the development of international war crimes.¹⁷⁷ International criminal liability was set forth in the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), established by resolutions of the UN Security Council, which have jurisdiction over serious violations of humanitarian law and may also apply customary law and refer to general principles of law.¹⁷⁸ In the *Karadzic* and

¹⁷² GC I, Art. 49; it remains contentious whether this Article imposes an obligation on the state to undertake investigations.

¹⁷³ GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146.

¹⁷⁴ Langer, 2001, p. 2.

¹⁷⁵ Clapham, 2010, p. 27.

¹⁷⁶ Nollkaemper, 2003, p. 620.

¹⁷⁷ Benison, 2000, p. 146.

¹⁷⁸ Goy, 2012, p. 3

Mladic cases at the ICTY the accused were charged for taking United Nations peacekeeping personnel hostage and using them as 'human shields'.¹⁷⁹ However, the ad hoc tribunals have a very narrow scope of jurisdiction. They are limited to specific territories, periods of time and just a few perpetrators of international crimes.¹⁸⁰ Finally, in 2002, the universal jurisdiction over perpetrators of war crimes has been made possible through the establishment of the International Criminal Court (ICC).

10. Conclusion

In conclusion, the humanitarian space is extensively regulated under the provisions of IHL, although open questions remain, such as the consent of the host state and the right to self-defence of humanitarian personnel. In particular with regard to non-international armed conflicts sufficient regulation is lacking. Although the most important rules for the protection of the humanitarian space can be found in the two Additional Protocols to the Geneva Conventions, which have a smaller number of state parties, the ICRC Study on Customary International Humanitarian Law demonstrates that they are generally accepted by states. However, the responsibility of the state for violations of IHL has not been highly developed. The next chapter seeks to analyse to what extent the International Criminal Court and its universal jurisdiction over perpetrators of war crimes can contribute to the protection of the humanitarian space.

¹⁷⁹ *Prosecutor v. Karadzic and Mladic*, Initial Indictment 'Bosnia and Herzegovina', 24 July 1995, IT-95-5-I, para. 48.

¹⁸⁰ Langer, 2011, p. 4.

B. INTERNATIONAL CRIMINAL LAW - THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

1. Introduction

States have the primary responsibility to prosecute and investigate international crimes. With the adoption of the Rome Statute in 1998 and the establishment of the ICC in 2002 a complementary organ to national criminal jurisdiction for the prosecution of international crimes has been created.¹⁸¹ This chapter examines the relevance of the Rome Statute and shows the interrelation between the jurisdiction of the ICC over serious violations of the law of war and the protection of the humanitarian space provided for by IHL.

The Court can exercise jurisdiction only over states that have signed and ratified the Statute or that have accepted the jurisdiction of the Court.¹⁸² The ICC has jurisdiction either over the state of which the person accused is a national or over the state of the territory on which the crime occurred.¹⁸³ The Court has only jurisdiction over natural persons, based on the principle of individual criminal responsibility.¹⁸⁴ Armed groups, NGOs and international organisations can not be prosecuted. However, individuals in the capacity as commanders or other superiors of these entities can be held criminally responsible for crimes 'committed by subordinates under his or her effective authority and control'.¹⁸⁵

Only states and the UN Security Council can refer cases to the Court, not

181 Zwanenburg, 1999, pp. 130-131.

182 Currently 121 countries are state parties to the Rome Statute, see <http://www.icc-cpi.int/Menus/ASP/states+parties/> (consulted on 21 may 2012).

183 Rome Statute, Art. 12

184 Rome Statute, Art. 25.

185 Rome Statute, Art. 28.

individuals nor NGOs.¹⁸⁶ Furthermore, the Courts jurisdiction is complementary, it can only be exercised when the responsible state is unable or unwilling to prosecute the offender.¹⁸⁷ Although some of the major states like the United States, Russia or China have not ratified the Statute it is of significant importance, because for the first time a list of war crimes, in international and non-international armed conflicts, has been included in an international instrument.¹⁸⁸ The Court has jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression.¹⁸⁹

2. Crimes against humanity

Crimes against humanity are multiple committed acts of murder, torture, enforced disappearances, or other similar inhumane acts. In addition, they must be knowingly 'committed as part of a widespread or systematic attack directed against any civilian population'.¹⁹⁰ 'Isolated' crimes against humanity are therefore not within the scope of the Statute,¹⁹¹ but they remain being war crimes under the 'definition of international law'.¹⁹² It is necessary that crimes against humanity contain the mental element of knowingly committing the crime in a widespread and systematic manner.¹⁹³ In consequence attacks against the humanitarian space can only be qualified as a crime against humanity if they are part of a widespread or systematic attack. It is further worth noting that the ICC has jurisdiction over crimes against humanity even if they did not occur in a situation of armed conflict,¹⁹⁴ since states often do not admit that an internal armed conflict is taking place and rather refer to internal disturbances with criminals or

186 Rome Statute, Arts. 13, 14.

187 Rome Statute, Art. 17.

188 La Rosa, Anne-Marie, ICRC legal adviser, 'ICRC and ICC: two separate but complementary approaches to ensuring respect for international humanitarian law', interview on ICRC Website, 3rd March 2009 available at www.icrc.org/eng/resources/documents/interview/international-criminal-court-interview-101008.htm (consulted on 16 May 2012).

189 Rome Statute, Art. 5.

190 Rome Statute, Art. 7.

191 Zwanenburg, 1999, p. 134.

192 Cassese, 1999, pp. 149-150.

193 Frulli, 2001, p. 333.

194 Doswald-Beck, 2002, p. 3.

terrorists.

3. War crimes

Most importantly, the Rome Statute contains a comprehensive list of war crimes. Some of these war crimes have become customary law and are now binding upon all states, regardless of whether they are party to the ICC. Article 8 establishes the Courts' jurisdiction over war crimes when they are 'committed as part of a plan or policy or as part of a large-scale commission'. This restriction excludes the prosecution of isolated crimes from the competence of the ICC and limits the courts' jurisdiction to large-scale crimes, which are committed mainly 'by leaders and organizers'¹⁹⁵ who threaten in this way the international public order. For that reason attacks against the humanitarian space constitute a war crime if they are committed as part of a plan or policy of a large-scale commission. Further, the composition of Article 75 is very remarkable as it establishes the right of victims of international crimes to reparation against convicted persons.¹⁹⁶

The Statute defines war crimes as grave breaches of the Geneva Conventions and lists some of them subsequently, namely wilful killing, torture, wilfully causing suffering or serious injury to body or health, extensive destruction of property, forced service of protected persons in the forces of a hostile power, deprivation of the rights of a fair trial, unlawful deportation or transfer or confinement, and taking of hostages. Pursuant to the Geneva Conventions acts committed against protected persons or property constitute grave breaches if they are not justified by military necessity and are carried out unlawfully and wantonly.¹⁹⁷ The act must be excessive given the circumstances in order to be considered as a grave breach of the Geneva Conventions.¹⁹⁸ The Statute further refers to war crimes that consist in 'any other serious violations of the laws and customs applicable in armed conflicts, within the established framework of

¹⁹⁵ Cassese, 1999, p. 149.

¹⁹⁶ Van Boven, 2007, p. 728.

¹⁹⁷ Four GCs, Arts. 50, 51, 130, 147.

¹⁹⁸ Benison, 2000, p. 161.

international law'.¹⁹⁹ Some of the listed war crimes go back to the Hague Conventions,²⁰⁰ but more importantly also crimes deriving from CIHL have been included in the list of war crimes.²⁰¹ A number of the crimes enumerated in the Rome Statute have been generated in a broader sense, whereas others are reproduced in a more restrictive way than in the Geneva Conventions.²⁰² However, the Statute did not include all war crimes that have been recognised under CIHL so that not all customary war crimes are punishable before the ICC.²⁰³ Paragraphs (b) and (e) of Article 8 (2) refer to 'other serious violations of the laws and customs applicable in armed conflicts [...] within the established framework of international law', whereas the other paragraphs do not mention this criteria. It has been discussed that this phrase may require the Court to examine if the codified war crime has already been recognised as a war crime by international law. However it appears more likely that the drafters of the Statute wanted to make up a specific list of war crimes, 'laying down the substantive criminal rules to be applied by the ICC'.²⁰⁴ The detailed reenumeration of war crimes may have been undertaken in consideration of the principle of legality so that the state parties are provided with a detailed and clear list of crimes.²⁰⁵ In line with this interpretation the war crimes under paragraph (b) and (e) are only a written reaffirmation of international customary law,²⁰⁶ intended to substantiate the codification of war crimes.

It is very important to note that the Rome Statute also included a list of war crimes that consist in serious violations of international humanitarian law perpetrated in non-international armed conflicts.²⁰⁷ This indicates that the drafters of the Statute took account of the recent rise of non-international armed conflict. Offenders of large-scale crimes in internal armed conflicts became punishable at the international level

199 Rome Statute, Art. 8 (2) (a) and (b).

200 Benison, 2000, p. 162.

201 Grover, 2010, p. 564.

202 Zwanenburg, 1999, p. 135.

203 Grover, 2010, p. 565.

204 Cassese, 1999, p. 151.

205 Grover, 2010, p. 552.

206 Cassese, 1999, p. 151.

207 Idem, p. 150.

regardless of the traditional principles of state sovereignty and immunity. However, the distinction has not been given up, Article 8 still distinguishes between war crimes committed in international and non-international armed conflicts.²⁰⁸

According to Article 10 of the Rome Statute nothing in the second part of the Statute 'shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'. Furthermore, Article 22 states that 'this Article shall not affect the characterization of any conduct as criminal under international law independently of this Statute'. These Articles prevent that crimes of international law, which have not been codified in the Rome Statute, are considered as not to be criminal, since the list of crimes in the Rome Statute is not aimed to be 'a universally binding criminal code for the international community'.²⁰⁹ The provisions further avoid that the development of crimes under CIHL comes to a standstill owing to their codification.²¹⁰ As CIHL continues to exist alongside its codification in a treaty it is binding on all states and individuals, not just on the signatories of the Statute.²¹¹ The codification of customary rules in the Statute can not hamper the development of CIHL.²¹²

On the other hand, Article 21 states that the Court may apply, 'where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'. Therefore CIHL may be used to interpret the crimes of the Statute, if 'customary meaning can be reasonably accommodated'.²¹³ However, these provisions lay down the starting point for the development of two different standards of international law.²¹⁴ As the Court is expected to apply 'applicable treaties and principles and rules of international law' only 'in the

208 Cassese, 1999, p. 150.

209 Grover, 2010, p. 571.

210 *Idem*, p. 570.

211 *Idem*, pp. 566-567.

212 *Idem*, pp. 572-573.

213 Grover, 2010, p. 574.

214 Cassese, 1999, pp. 157-158.

second place',²¹⁵ its case law will be developed in a more restrictive way, which might narrow in the future 'the scope of general principles and rules'.²¹⁶ This may especially have a negative effect on the consideration of internationally recognised human rights which may not be taken into account by the Court in the future.²¹⁷

4. Access and Starvation

When the civilian population is in need, access for humanitarian relief is often crucial and may not be denied on arbitrary grounds. It is a war crime to intentionally use 'starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions'.²¹⁸ However, this prohibition applies only in international armed conflicts. The term starvation should be understood in a broad sense since the provision does not only include food and water supplies, but also medicine, blankets and eventually other indispensable goods to life.²¹⁹ Furthermore, the commission of extermination constitutes a crime against humanity under the Rome Statute when committed knowingly as part of a widespread or systematic attack.²²⁰ By definition extermination includes the 'intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population'.²²¹

215 Rome Statute, Art. 21.

216 Cassese, 1999, pp. 157-159.

217 Grover, 2010, p. 560.

218 Rome Statute, Art. 8 (2) (b) (xxv).

219 Dörmann & Doswald-Beck & Kolb, 2008, pp. 363-364.

220 Henckaerts & Doswald-Beck, 2005, p. 195.

221 Rome Statute, Art. 7 (2) (b).

5. Protection against insecure working conditions, threats, killings or disappearances

5.1. Medical personnel

The Rome Statute protects medical personnel in international and non-international armed conflicts that is entitled to use the distinctive emblem:²²² 'Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law'²²³ constitutes a war crime. This provision does not contain a result requirement, which means that the war crime does not require as a result actual damage so that the attack can also be prosecuted if no damage was caused.²²⁴ Persons or objects using the distinctive emblem or other methods indicating the protection under the Geneva Conventions are entitled to protection.²²⁵ Furthermore, attacks have to be interpreted in accordance with the definition provided for in the Geneva Conventions, which states that attacks are 'acts of violence against the adversary, whether in offence or in defence'.²²⁶ Thus, the term 'attack' must be understood in relation to the use of armed force in the context of military operations which are carried out during armed conflicts. Although the medical personnel is not obliged to use the distinctive emblem, the offender commits only a war crime when the personnel is actually wearing the distinctive emblem or using other methods indicating the protection²²⁷.

222 Henckaerts & Doswald-Beck, 2005, p. 80.

223 Rome Statute, Art. 8 (2) b (xxiv) international armed conflicts, Art. 8 (2) (e) (ii) non-international armed conflicts.

224 Dörmann & Doswald-Beck & Kolb, 2008, pp. 349-350.

225 *Idem*, p. 350.

226 AP I, Art. 49 (1); Dörmann & Doswald-Beck & Kolb, 2008, p. 350; the authorisation of use of force in offence and self-defence under Chapter VII of the UN Charter has a different meaning, this will be discussed in more detail in Chapter II.E.

227 Dörmann & Doswald-Beck & Kolb, 2008, p. 451.

5.2. Humanitarian relief personnel

Attacks against personnel engaged in the humanitarian space may result in the commission of several war crimes. As already mentioned, Article 8 (2) (a) of the Rome Statute refers specifically to grave breaches of the Geneva Conventions. The following acts against persons protected under the Geneva Conventions can be considered as a war crime: Wilfully causing great suffering or serious injury, torture or inhuman treatment, deprivation of the right to fair trial, unlawful deportation or transfer or unlawful confinement and taking of hostages. Since paragraph (a) refers to grave breaches of the Geneva Conventions the act has to be balanced against the criteria of military necessity. The act is considered to be unlawful if the commission is not justified by military necessity. The mental element, which is expressed in the term 'wilfully', requires intent or recklessness of the accused person, ordinary negligence is not sufficient for constituting a war crime.²²⁸

According to Article 8 (2) (b) (iii) it is considered as a war crime to intentionally direct attacks 'against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict'. This war crime exists also for non-international armed conflicts.²²⁹ Due to the special status of UN peacekeeping personnel²³⁰ it has not been clear whether they lose the protection given to civilians if they use force in self-defence, until the ICC confirmed in 2010 that the war crime applies to peacekeeping personnel even when it is authorised to use force to protect civilians and their mandate.²³¹ On the other hand, when peace-enforcement personnel or ordinary members of armed forces are delivering aid they do not enjoy protection under

228 Dörmann & Doswald-Beck & Kolb, 2008, p. 43.

229 Rome Statute, Art. 8 (2) (e) (iii).

230 For the special status of UN personnel see Chapter II.E.

231 ICC, *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09.

this Article.²³²

Medical, humanitarian and peacekeeping personnel also enjoy protection under their status as civilians: 'Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities' constitutes a war crime in international and non-international armed conflict.²³³ Deriving from the Geneva Conventions the prohibition of attacks directed against civilians is absolute, it can not be justified by military necessity.²³⁴ This war crime must be interpreted in a very broad sense, it is not limited to particular attacks against civilian persons or objects and is rather to be understood as the prohibition of any attacks against objects. It constitutes already a failure if no precise information about the nature of the targeted object was sought or if not all necessary precautions were taken.²³⁵ However, collateral civilian damage can be justified by the principle of proportionality.²³⁶ It is further worth noting that war crimes under the Rome Statute committed in armed conflicts not of an international character exclude by definition 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature'.²³⁷

Finally, and only in international armed conflict, it constitutes a war crime to use 'the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations'²³⁸ The prohibition includes the movement of military objectives to a place where civilians or other protected persons are located or vice versa, even if the movement is voluntary.²³⁹

Article 8 (2) (c) refers to violations of common Article 3 to the Geneva

232 Henckaerts & Doswald-Beck, 2005, p. 105; Gadler, 2010, p. 607.

233 Rome Statute, Art. 8 (2) (b) (i) and (e) (i).

234 AP I, Art. 52; Dörmann & Doswald-Beck & Kolb, 2008, p. 149.

235 Dörmann & Doswald-Beck & Kolb, 2008, p. 132.

236 *Idem*, p. 136.

237 Rome Statute, Art. 8 (2) (d).

238 Rome Statute, Art. 8 (2) b (xxiii).

239 Dörmann & Doswald-Beck & Kolb, 2008, p. 344.

Conventions. Thus, 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture' constitutes a war crime in non-international armed conflicts.²⁴⁰ The justification by military necessity must be interpreted differently than in international armed conflict, since 'the need to defend against internal disturbances and tensions'²⁴¹ must be taken into consideration. Consequently the balance of military necessity may reach a different conclusion. In this context human rights should be taken into consideration in order to set the standards.²⁴²

6. Military attacks against protected facilities

6.1. Medical establishments

It is considered as a war crime in both international and non-international armed conflicts to intentionally attack protected objects, such as hospitals and places where the sick and wounded are collected, provided they are not military objectives.²⁴³ Places where the sick and wounded are collected include also hospital ships and aircraft.²⁴⁴ The objects lose their protection if they become military objectives.²⁴⁵ As already mentioned, also attacks intentionally directed 'against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law' constitute a war crime in international and non-international armed conflicts.²⁴⁶

6.2. Humanitarian relief objects

Contrary to the Geneva Conventions the Rome Statute criminalizes explicitly

240 Rome Statute, Art. 8 (2) (c) (I).

241 Benison, p. 162.

242 Benison, p. 162.

243 Rome Statute, Art. 8 (2) (b) (ix) and (e) (iv).

244 Dörmann & Doswald-Beck & Kolb, 2008, p. 222.

245 AP I, Art. 52 (2).

246 Rome Statute, Art. 8 (2) (b) (xxiv) and (e) (ii).

intentional directed attacks against '[...]installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict'.²⁴⁷ This is considered as a war crime in international and non-international armed conflicts.²⁴⁸ In addition, special protected objects enjoy the same protection as civilian objects. Thus, attacks intentionally directed 'against civilian objects, that is, objects which are not military objectives', are classified as a war crime.²⁴⁹ However, this war crime exists only in international armed conflicts. It is further a grave breach of the Geneva Convention and liable to prosecution under the Rome Statute if 'extensive destruction and appropriation of property, not justified by military necessity' is 'carried out unlawfully and wantonly'.²⁵⁰

7. Conclusion

This chapter has demonstrated that the establishment of the ICC and especially the adoption of the Rome Statute have strengthened the framework of IHL. The Rome Statute provides an extensive list of crimes that have become punishable and go beyond the scope of the Geneva Conventions. Crimes against humanity can even be prosecuted when the threshold for an internal armed conflict has not been reached. In comparison to the Geneva Conventions the Rome Statute makes more references to the humanitarian space and protects specifically humanitarian assistance and peacekeeping missions. Furthermore, many times these war crimes apply also in non-international armed conflicts. Also the inclusion of war crimes that have been recognised under CIHL strengthen the position of these customary rules. However, Article 21 of the Statute, which gives humanitarian law priority over treaties, principles and rules of international law, may have a negative effect on the consideration of human rights during armed

247 Rome Statute, Art. 8 (2) (b) (iii).

248 Rome Statute, Art. 8 (2) (e) (iii).

249 Rome Statute, Art. 8 (2) (b) (ii).

250 Rome Statute, Art. 8 (2) (a) (iv).

conflict. The next chapter seeks to examine to what extent the human rights framework could be applicable in times of armed conflict.

C. HUMAN RIGHTS

1. On the relationship between International Humanitarian Law and Human Rights

Although IHL and human rights seem to be two different legal frameworks they 'share a common humanist ideal of dignity'.²⁵¹ While IHL guarantees the minimal protection of humanity during situations of armed conflict and occupation,²⁵² human rights law grants protection of the individual against state interference at all times, in times of peace and in times of war. IHL seeks to balance between military necessity and humanity, while human rights balance between the individual and the state. IHL originates from the mid-nineteenth century, whereas human rights have been adopted in response to the Second World War.²⁵³ But both have been adopted in reaction to gross atrocities and human suffering, the one from a principle of charity, the other one from a struggle of rights-claimants against the state.²⁵⁴ Furthermore, both frameworks seem to be imperfect in a certain way: IHL does not grant sufficient protection in all situations of armed conflict, such as intrastate conflicts, civil wars and terrorism. Additionally, IHL does not provide for sufficient remedies. Human rights can be derogated from in certain situations, IHL is non-derogable. The ratification of human rights treaties varies depending on the country or the region. And not all human rights enjoy the same degree of protection: while civil and political rights are generally recognised, economic, social and cultural rights enjoy less acceptance.²⁵⁵

With regard to the extent of the protection of the humanitarian space the most important international human rights documents are the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and

²⁵¹ Droege, 2007, p. 310.

²⁵² Tomuschat, 2010, p. 16.

²⁵³ Doswald-Beck, 2002, p. 1.

²⁵⁴ Droege, 2007, p. 313.

²⁵⁵ Doswald-Beck, 2002, pp. 1-2; Saura, 2007, pp. 487-488; Droege, 2007, pp. 310-312; Tomuschat, 2010, pp. 15-17.

Cultural Rights (ICESCR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The ICCPR is the most relevant document, as it includes the right to life, the prohibition of torture, the right to liberty and security of person, the prohibition from arbitrary detention, the right to human treatment, freedom from arbitrary arrest and detention, the freedom of movement and freedom of expression.²⁵⁶ The Covenant is of specific relevance for the protection of human rights on the international level, as it provides individual complaint mechanisms.²⁵⁷ Also economic, social and cultural rights can be relevant for the protection of the humanitarian space, for the reason that they may complement the provisions concerning health care and the supply of relief and food.²⁵⁸ However, the enforcement mechanisms for the ICESCR are much less developed.

Since the foundation of humanitarian law was laid in a period of time when human rights did not exist, no reference to the applicability of human rights alongside humanitarian rules was made.²⁵⁹ Due to the foundation of the United Nations in the last century universal human rights have become progressively recognised within the UN system and among the member states. Universal and regional human rights instruments increased and monitoring mechanisms as well as individual complaints mechanisms have been established. Human rights have become an additional legal framework for the protection of human beings at all times and therefore also in situations of armed conflict.²⁶⁰

In the context of the UN it has been repeatedly emphasised that even during the periods of armed conflicts fundamental human rights should be respected.²⁶¹ In two reports the UN Secretary-General highlighted that human rights instruments, such as the

256 ICCPR, Arts. 6,7,9,10,12, 19.

257 167 states are currently parties to the ICCPR, available at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (consulted on 11 July 2012).

258 Droege, 2007, p. 343.

259 Benison, 2000, p. 155.

260 Droege, 2007, p. 312.

261 UN GA Res. 1312 (XIII) (1958); UN SC Res. 237 (1967), S/Res/237; UN GA Res. 2444 (XXIIi) (1968).

ICCPR, provide more comprehensive protection to persons in times of armed conflict than only the Geneva Conventions.²⁶² Subsequently General Assembly Resolution on basic principles for the protection of civilian populations in armed conflict underlines that 'fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict'.²⁶³

Taking this development into account the two Additional Protocols to the Geneva Conventions, adopted in 1977, subsequently incorporated a number of human rights. By the codification of human rights in the Geneva Conventions no derogation can be made any more from the codified rights during armed conflict as this would have been possible under human rights law.²⁶⁴ For example, the derogable human right to fair trial, enshrined in Article 14 ICCPR has been taken up by Article 75 (4) AP I, which does not allow any derogations so that the right to fair trial must be guaranteed at all times.²⁶⁵ The next subchapters will discuss to what extent the applicability of human rights in times of armed conflict has been recognised.

2. Applicability of Human Rights in times of armed conflict

For the first time, the ICJ had to scrutinize the applicability of human rights in times of armed conflict in an advisory opinion on the legality of the threat or use of nuclear weapons. The question sent to the Court was whether the prohibition of arbitrary deprivation of life under Article 6 ICCPR could be violated by the use of nuclear weapons. The Court came to the conclusion that the Covenant is also applicable in times of war, but that 'arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced

²⁶² Report on Respect for Human Rights in Armed Conflict, A/7729, 20 November 1969; Report on Respect for Human Rights in Armed Conflict, Annex 1, A/8052, 18 September 1970.

²⁶³ UN GA Res. 2675 (XXV) (1970).

²⁶⁴ Droege, 2007, p. 316.

²⁶⁵ Idem, p. 341.

from the terms of the Covenant itself.²⁶⁶ Hence humanitarian law was found to be *lex specialis* in comparison to general human rights rules. *Lex specialis* means a legal framework that prevails over the general law, as it is more specific regarding its scope of application.²⁶⁷ By interpreting the Courts conclusion it might be deduced that the ICCPR may be applicable in times of armed conflict but that it shall be interpreted in accordance with IHL.²⁶⁸

In the advisory opinion on the lawfulness of the construction of a wall in the occupied Palestinian territory the ICJ went even further and confirmed the general application of human rights law in times of armed conflict. In this context it identified three possible situations for the relationship between IHL and human rights: '[...]some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law'.²⁶⁹ Therefore, it was concluded that the construction of a wall caused violations of human rights enshrined in both, the ICCPR and the ICESCR.²⁷⁰ The ICJ confirmed this opinion in its judgement on Armed Activities on the Territory of the Congo.²⁷¹ Furthermore, in an order on the application of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) to a conflict between Georgia and Russia the ICJ determined this opinion and stated that the CERD is applicable in times of armed conflict, even if certain issues might also be covered by humanitarian law.²⁷²

Also the UN Human Rights Committee,²⁷³ the UN Committee on Economic and

266 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, p. 226.

267 Chevalier-Watts, 2010, p. 586.

268 Tomuschat, 2010, p. 17.

269 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 136; Droege, p. 322; Tomuschat, 2010, p. 18.

270 Orakhelashvili, 2008, p. 163.

271 ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), 19 December 2005, ICJ Reports 2005, p. 168.

272 ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, (Georgia v. Russia), Order, 15 October 2008, ICJ Reports 2008, p. 353, para. 112.

273 See, e.g., Human Rights Council: CCPR/C/COD/CO/3, 6 April 2006; CCPR/CO/79/LKA, 1

Social Rights,²⁷⁴ the Committee on the Elimination of Racial Discrimination²⁷⁵ and the Committee on the Rights of the Child²⁷⁶ upheld the applicability of the ICCPR in armed conflicts, in international and non-international ones, as well as in situations of occupation. Although this process has been generally accepted by states, certain states, such as the United States and Israel, objected the practice.²⁷⁷

It can therefore be concluded that during armed conflict some rights may be exclusively matters of IHL, others exclusively matters of human rights law and others may be overlapping. Thus, depending on the situation and on the right concerned, human rights law might either be complementary to IHL, or IHL might be *lex specialis*.²⁷⁸ With regards to the protection of the humanitarian space the right to freedom from torture and other cruel, inhuman, or degrading treatment or punishment, the right to life, certain economic and social rights as well as the rights of persons deprived of liberty are overlapping and affect both systems,²⁷⁹ while the rights for prisoners of war are exclusively matters of IHL.

3. Derogation in times of war

In times of public emergency, which may refer also to the times of armed conflict, states can derogate some of their human rights obligations. Some human rights treaties specifically provide for the possibility of derogation in armed conflict.²⁸⁰ Article 4 ICCPR does not mention the situation of armed conflict, but permits derogation when 'the life of the nation and the existence of which is officially proclaimed' is threatened.²⁸¹ Furthermore, since the derogation must be strictly required by the exigencies of the

December 2003; CCPR/C/55/D/563/1993, 13 November 1995.

274 See, e.g., UN Committee on Economic and Social Rights, E/C.12/1/Add.74, 30 November 2001.

275 See, e.g., UN Committee on the Elimination of Racial Discrimination, CERD/C/304/Add.45, 30 March 1998.

276 See, e.g., UN Committee on the Rights of the Child, CRC/C/15/Add. 153, 9 July 2001.

277 Droege, 2007, p. 324.

278 *Idem*, p. 348.

279 *Idem*, p. 336.

280 ICCPR, Art. 4; ECHR, Art. 15; ACHR, Art. 27.

281 Droege, 2007, p. 319.

situation and can not be inconsistent with other obligations under international law,²⁸² derogation may not be allowed to the extent that it is inconsistent with obligations under IHL. As already mentioned, certain fundamental rights can not be derogated from. Most importantly, the Covenant provides that no derogation is permissible to the right to life, the freedom from torture and other cruel, inhuman or degrading treatment or punishment.²⁸³

The European Convention on Human Rights expressly refers to derogation in times of war or other public emergency, which is permitted to the extent that it is required by the exigencies of the situation and provided that the measures are not inconsistent with other obligations under international law.²⁸⁴ One can conclude from this that all human rights under the ECHR are applicable during armed conflict, as long as the Convention is not being derogated. In regard to the humanitarian space, the right to life, except in respect of deaths resulting from lawful acts of war, and the right to no punishment without law are non-derogable, furthermore no derogation is permissible on the prohibition of torture.²⁸⁵

In this context it should be noted that these derogation clauses do not imply that human rights treaties without a specific derogation clause are not applicable in situations of armed conflict.²⁸⁶ They still apply, but have to be balanced against the particular circumstances during armed conflict. In the same manner, the scope of derogation from human rights is limited by the basic principles of humanitarian law, such as the distinction between civilian and military targets, necessity and proportionality and human treatment of protected persons.²⁸⁷ And although states can not suspend the recognition of non-derogable rights, they still have to be balanced

282 ICCPR, Art. 4(3); Droege, 2007, p. 319.

283 ICCPR, Art. 4 (2).

284 ECHR, Art. 15 (1); Orakhelashvili, 2008, p. 165.

285 ECHR, Art. 15.

286 Droege, 2007, p. 318.

287 Orakhelashvili, 2008, p. 165.

against the specific conditions of armed conflict.²⁸⁸

4. The right to life in armed conflicts

The right to life as an absolute human right is contradicting the situations of armed conflict and the legal framework of IHL.²⁸⁹ According to Article 6 ICCPR and Article 2 ECHR 'no one shall be arbitrarily deprived of his life'. Article 2 (2) ECHR provides for the justification of deprivation of life only, if 'it results from the use of force, which is no more than absolutely necessary'. While under IHL a planned operation with the purpose of killing and the incidental killing and wounding of civilians may be justified by the principle of proportionality, under human rights intentional killing is only the last resort, when it is strictly unavoidable to protect life.²⁹⁰

By reference to the already mentioned Advisory Opinion on the Use of Nuclear Weapons the ICJ referred to Article 6 ICCPR as a non-derogable right and emphasised that it also applies in armed conflict. Nevertheless, by reason of special circumstances during armed conflict it must be interpreted in accordance with IHL, which is *lex specialis*.²⁹¹ If deprivation of life is 'arbitrary' it shall thus be defined in compliance with the principles of IHL.²⁹²

In his report²⁹³ the UN Special Rapporteur on Human Rights in the Occupied Palestinian Territories interprets Article 6 ICCPR as the general clause, which must be complemented by the principles of IHL. Along these lines humanitarian law specifies under which conditions the right to life may be limited by means of the distinction

288 Benison, 2000, p. 172.

289 Droege, 2007, p. 344.

290 Idem, pp. 344-345.

291 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, p. 226.

292 Heintze, 2004, p. 796.

293 UN Commission on Human Rights, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967, E/CN.4/2003/30, 17 December 2002, at 5.

between civilians and combatants and especially by the imperatives of the protection of civilians under Articles 51 and 57 AP I.²⁹⁴ Although IHL shall be understood as *lex specialis*,²⁹⁵ the right to life may still apply fully in certain situations of armed conflicts: If the use of force does not take place in the context of hostilities, but as an act of law enforcement, the right to life is applicable.²⁹⁶ Furthermore, according to the jurisdiction of the ECtHR the right to life is violated when security operations exceed the use of force in terms of 'feasible precautions in the choice of means and methods.'²⁹⁷ This reasoning of the Court encompasses considerations of humanitarian law, namely Article 57 (2) (ii) AP I. In addition, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials of 1990 require that the 'intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life'.²⁹⁸

It shall be mentioned in this context that human rights had also significant influence on the development of the prohibition of torture in humanitarian law. The prohibition of torture is now absolute under both, human rights law and international humanitarian law and has also been codified in the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 1984.²⁹⁹

5. Responsibility and Jurisdiction

By ratifying international human rights instruments states have accepted the duty to respect, protect and fulfil their human rights obligations. They are required to adopt the necessary legislative measures in order to ensure compliance of non-state actors with human rights and to investigate alleged violations.³⁰⁰ If states can not prevent individuals from committing human rights violations because of a lack of due diligence

294 Orakhelashvili, 2008, p. 169.

295 Droege, 2007, p. 344.

296 *Idem*, p. 346.

297 ECtHR, *Ozkan v. Turkey*, para. 297.

298 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Art. 10.

299 Droege, 2007, p. 342.

300 Reinisch, 2005, p. 53.

they can be held responsible.³⁰¹

In the first place, states have the duty to investigate all serious violations of human rights and to prosecute and punish individual perpetrators within the national court systems.³⁰² Beyond that, victims of violations of human rights, as enshrined in the ICCPR, have the possibility to file individual complaints with the Human Rights Committee, provided they have exhausted domestic remedies and the state concerned has ratified the Optional Protocol to the ICCPR. However, complaints about violations of human rights can only be submitted by individuals, not by groups, such as NGOs.³⁰³ The Human Rights Committee can only apply the 'rights set forth in the Covenant',³⁰⁴ thus it is not allowed to apply humanitarian law. If serious violations of human rights are registered, the Human Rights Committee has the possibility to put pressure on the state by issuing a public statement.³⁰⁵

Regional human rights complaints mechanisms have the capacity to go beyond the 'public blame effect'. The decisions of the ECtHR and the Inter-American Court on Human Rights (IACtHR) are binding upon the state concerned. And furthermore, both Courts have already recognised that they can apply IHL under certain circumstances.³⁰⁶ It is worth noting, that Article 34 of the ECHR provides for individual applications 'from any person, non-governmental organisation or group of individuals claiming to be the victim'. Equally any person, group of persons or non-governmental entity recognised in one or more member states of the Organization of American States (OAS) can file an individual communication to the Inter-American Commission of Human Rights, provided the state has ratified the American Convention on Human Rights.³⁰⁷ If the state concerned has accepted the Courts' jurisdiction, the Inter-American Commission may

301 IACtHR, *Velásquez Rodríguez v. Honduras*, Preliminary Objections, 26 June 1987, Serie C No. 1; Reinisch, 2005, p. 80.

302 Droege, 2007, p. 351.

303 Optional Protocol to the ICCPR, Art. 1; Nowak, 2009, p. 289.

304 Optional Protocol ICCPR, Art. 1.

305 Heintze, 2004, p. 801.

306 Ibidem.

307 Hennebel, 2009, pp. 813-814.

send the communication to the Inter-American Court, which can review the Commission's findings.³⁰⁸ The following cases shall indicate to what extent regional human rights bodies have decided on violations of human rights in armed conflicts and recognised the applicability of IHL.

In the *Tablada* case the Inter-American Commission found that it had the competence to directly apply humanitarian law on the grounds that the provisions of the ACHR are insufficient for the understanding of hostilities in armed conflicts since IHL affords victims a greater or more specific protection³⁰⁹ The Commission based the applicability of IHL on the arguments that Article 29 of the American Convention on Human Rights (ACHR) prohibits that the Convention is interpreted in a way that restricts the 'enjoyment or exercise of any right or freedom recognised [...] by virtue of another convention to which one of the said states is a party'. The Commission further referred to Article 25 of the American Convention, which states that everyone has a right to a suitable legal remedy for the violation of his or her basic rights, plus to Article 27, according to which derogations from duties entrenched in the Convention must not stand in the way of other international legal obligations. The Commission accordingly found that it should apply humanitarian law, if that rule provides a higher standard.³¹⁰

The Inter-American Court on Human Rights had to scrutinize in the *Las Palmeras* case whether humanitarian law was applicable in conjunction with deprivation of life in a situation of internal armed conflict. It denied the applicability of Article 3 common to the four Geneva Conventions on the grounds that the Court has only a mandate to apply the ACHR, although the Inter-American Commission had done so before.³¹¹ Nevertheless, at the merits stage the Court found that the right to life under Article 4 of the American Convention had been violated. In this manner the Court

308 Hennebel, 2009, pp. 841-842.

309 IACHR, *Juan Carlos Abella v. Argentina (Tablada)*, 11.137, 18 November 1997, OEA/Ser.L/V/II.98.

310 Idem; IACHR, *Tablada*, Advisory Opinion, 24 September 1982, OC-1/82; Heintze, 2004, p. 803.

311 IACtHR, *Las Palmeras* Case, Judgment on Preliminary Objections, 4 February 2000, Serie C No. 67.

autonomously applies human rights in situations of internal conflicts.³¹² Subsequently, in the *Bamaca-Velasquez* case the Inter-American Court found that Article 3 common to the Geneva Conventions is applicable, if the state is party to the treaty and human rights would otherwise be interpreted and applied in an unlawful and restricted manner. Furthermore, the Court came to the conclusion that states have to respect and guarantee human rights during internal armed conflicts.³¹³

The European Court of Human Rights identified the applicability of the European Convention on Human Rights to the internal armed conflict in Chechnya straight up.³¹⁴ It found that the death of civilians as a consequence of attacks by Russian forces had been violations of the right to life under Article 2 ECHR. In the *Isayeva* case the ECtHR reasoned its judgement by principles of humanitarian law.³¹⁵ Although the Court considered that the state was permitted to undertake exceptional measures within the scope of Article 2 (2) ECHR in this situation, it found that the massive use of indiscriminate weapons was in contrast with the protection of lives from unlawful violence.³¹⁶ The wording of this judgement implies a reference to the humanitarian principles of necessity and proportionality.³¹⁷ Since the ECtHR applies the European Convention on Human Rights to situations of non-international armed conflicts or of occupation in international armed conflict,³¹⁸ it appears that the protection of life under the ECHR applies equally in times of war and in times of peace. The considerations of proportionality, necessity and legitimate aim allow to conform human rights to the specific circumstances in armed conflicts.³¹⁹ However, human rights abuses during non-international armed conflicts are not equally protected by jurisdiction at the

312 Orakhelashvili, 2008, p. 169.

313 IACtHR, *Bámaca Velásquez Case*, Judgment, 25 November 2000, Serie C No. 70; Heintze, 2004, p. 805.

314 ECtHR, *Khashiyev and Akayeva v. Russia*, 24 February 2005, 57942/00 and 57945/00; *Isayeva v. Russia*, 24 February 2005, 57950/00.

315 Tomuschat, 2010, p. 20.

316 ECtHR, *Isayeva v. Russia*, 24 February 2005, 57950/00, at 189–191.

317 Orakhelashvili, 2008, p. 171.

318 Droege, 2007, p. 321.

319 Orakhelashvili, 2008, p. 170.

intergovernmental level.³²⁰

6. Extraterritorial application of Human Rights

Under the traditional concept of international law states have only jurisdiction over persons and objects within their territory.³²¹ However, especially in times of armed conflict violations of human rights do not only take place within the territory of a state party to a human rights treaty, but also beyond its territorial border and territorial jurisdiction.³²² When a state is taking part in military actions outside its territory human rights instruments may be applicable.³²³ As already demonstrated, each human rights instrument has a specific scope of application and does not refer to extraterritorial application.³²⁴ However, according to jurisprudence of the Human Rights Committee, the ECHR and the IACHR, the extraterritorial application of human rights in internal and international armed conflicts has been recognised under certain circumstances:

According to General Comment No. 31 of the Human Rights Committee the requirement for extraterritorial application of human rights is either effective control over a territory or power over a person.³²⁵ The Human Rights Committee applies the ICCPR in situations of military occupation and to troops taking part in peacekeeping operations.³²⁶ Although this approach has been widely accepted by states, several countries have objected the extraterritorial application of the ICCPR.³²⁷

The ECtHR applies human rights extraterritorially whenever the state has

320 Tomuschat, 2010, p. 23.

321 Reinisch, 2005, p. 59.

322 Droege, 2007, p. 335; Modirzadeh, 2010, p. 355.

323 Modirzadeh, 2010, p. 355.

324 ICCPR, Art. 2 (1); ECHR, Art. 1; ACHR, Art.1.

325 Human Rights Committee, CCPR/ C/74/CRP.4/Rev.6, 21 April 2001.

326 Human Rights Committee: CCPR/C/79/Add.39, 21 September 2004; CCPR/CO/78/ISR, 21 August 2003; CCPR/C/79/Add.99, 9 November 1998; CCPR/CO/72/NET, 27 August 2001; for further sources see Droege, 2007, p. 326.

327 See, e.g.; Human Rights Committee, CCPR/C/ISR/2001/2, 4 December 2001; Committee against Torture, CAT/C/CR/33/3, 10 December 2004; Human Rights Committee, CCPR/C/USA/3, 28 November 2005; for further sources see Droege, 2007, p. 326.

effective overall control over a territory. It is not necessary that the state has control over every act or part of the territory, which can be exercised through governmental forces or through a subordinate local administration.³²⁸ However, in the *Bankovic* case the ECtHR did not decide to hold states accountable for the violation of Article 2 ECHR by a NATO bombardment of a Serbian radio-television station. The Court based its judgement on the argument that the states did not have effective control over the territory where the bombardment took place.³²⁹ It is worth noting that in the *Ocalan v. Turkey* case the ECtHR arrived at the conclusion that the Convention is also applicable outside the 'European legal space',³³⁰ consequently the detention of a person by Turkish authorities in Kenya was found to be within its scope of jurisdiction.³³¹

The IACHR's approach is different from the ECtHR, it applies human rights extraterritorially based on the argument that human rights are inherent to all human beings by virtue of their humanity. Consequently, states have to guarantee human rights to all persons subject to its authority and control.³³²

In conclusion, the term 'control over a territory' does not limit the extraterritorial application of human rights to situations of occupation,³³³ it is rather dependent on the circumstances and on the degree of control the state has over the territory or over the person.³³⁴ Certain violations of human rights taking place during armed conflicts, such as abduction, detention and ill-treatment can be subordinated under the criteria of effective control over a territory or power over a person, more difficult is the subordination of extraterritorial killings, since the criteria of effective control or power may not be met.³³⁵

328 ECtHR, *Loizidou v. Turkey*, 23 February 1995, 40/1993/435/514.

329 Droege, 2007, p. 330.

330 *Idem*, p. 328.

331 *Ocalan v. Turkey*, 12 May 2005, 46221/99.

332 See e.g., *Coard et al. v. United States*, 29 September 1999, 10.951, Report No. 109/99.

333 Droege, 2007, p. 332.

334 *Idem*, p. 330.

335 *Idem*, p. 334.

7. Human Rights application by institutions of International Humanitarian Law

Besides the application of human rights in armed conflict and the consideration of humanitarian principles by human rights bodies, institutions of IHL have also applied human rights. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has on many occasions applied human rights law to 'determine the content of customary international law in the field of humanitarian law'.³³⁶ In the *Kunarac* judgement the ICTY stated that 'with regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law'.³³⁷ Subsequently the Court states that 'the role and position of the state as an actor is completely different in both regimes'.³³⁸ Hence the 'notions developed in the field of human rights' can be applied to IHL only' if they take into consideration the specificities of the latter body of law'.³³⁹

8. Cumulative application of Human Rights and IHL

On many occasions the cumulative application of human rights and IHL have led to a clearer understanding of both legal frameworks since the mutual application contributes to a higher degree of adaptability to the specific circumstances of armed conflict. The cumulative application of human rights, IHL and refugee law has also been recommended by the UN Secretary-General in his Report 'On the Protection of Civilians in Armed Conflict' in order to ensure adequate protection of civilians.³⁴⁰ By applying the human rights framework during situations of armed conflict the meaning of humanitarian principles, such as proportionality, distinction, precautionary measures and occupation change,³⁴¹ since the balancing of these principles would go into a more protective direction, for civilians as well as for humanitarian actors. In regard to the humanitarian space the human rights framework can strengthen the special protection

336 Orakhelashvili, 2008, p. 164.

337 ICTY, *Prosecutor v. Kunarac*, 22 February 2001, IT-96-23-T, para. 467.

338 *Idem*, para. 470 (i).

339 *Idem*, para. 471.

340 Report of the Secretary-General on the Protection of Civilians in Armed Conflict, S/1999/957, 8 September 1999, para. 35.

341 Modirzadeh, 2010, p. 394.

under IHL.

Sometimes the rules of IHL are imprecise or do not provide enough protection, by applying human rights these gaps can be filled. For example common Article 3 of the Geneva Conventions, which states the protection of civilians during non-international armed conflict and prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment', can only be applied adequately by interpretation with respect to human rights law. Article 55 of the Fourth Geneva Convention, concerning the provision of food and medical supplies for the population of occupied territories may be interpreted more appropriately in line with the right to health under the ICESCR. In reverse, IHL may also complement human rights. The prohibition of 'inhuman treatment' under human rights law, for example, should be interpreted in accordance with the more detailed provisions in the Fourth Geneva Convention.³⁴² Furthermore, the disappearance of a person is not specifically regulated under human rights law although it causes several violations of human rights, whereas under IHL states must provide information about detained persons and search for persons whose fate is unknown.³⁴³ Moreover, often it is difficult to determine whether an armed conflict exists within the scope of common Article 2 of the Geneva Conventions and if humanitarian rules apply. Thus, especially in the event of internal disturbances or terrorism, or when the existence of armed conflict has not been recognised yet, human rights grant protection.³⁴⁴

During the last two decades individuals have increasingly been recognised as subjects of international law. They can be hold accountable for serious violations of international law, but they also enjoy rights under IHL and the human rights framework.³⁴⁵ Thus, individuals are not anymore just passive objects of protection. Although IHL does not grant victims a right to effective remedy, reparation can be claimed under certain circumstances. Noteworthy, Article 75 of the Rome Statute

342 Heintze, 2004, p. 795.

343 Idem, p. 795; CIHL, Rules 117, 123; GC III, Arts. 122; 123; GC IV, Arts. 26, 136, 140; AP I, Art. 33.

344 Orakhelashvili, 2008, p. 166.

345 Reinisch, 2005, p. 70.

establishes the right to reparation for victims of international crimes. The increasing recognition of rights of victims to remedy and reparation under IHL has been influenced by the more progressive development of individual complaint mechanisms in human rights.³⁴⁶ Moreover, the judicial procedures of human rights law have additional procedural requirements, such as the publicity of the inquiry and effective participation of the victim.³⁴⁷

In this context mention can also be made to the Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Human Rights Law (Basic Principles), adopted by the UN General Assembly in 2005, which are taking account of the recent development. According to the Basis Principles states are obliged to effectively investigate violations of human rights or IHL and if necessary, take action against the perpetrators in accordance with domestic and international law. Thus they are not allowed to randomly hold accountable suspected persons under this provision. Furthermore, states must provide victims effective access to remedies and reparation.³⁴⁸ Victims of gross violations of human rights law and serious violations of IHL are 'persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights'.³⁴⁹ They have the right to equal and effective access to justice, as well as to adequate, effective and prompt reparation for harm suffered.³⁵⁰ The Basic Principles seek to represent the increasing recognition of individual rights in international law, but they are not of a binding nature.³⁵¹

However, the human rights framework is not perfect. Human rights standards and judicial procedures vary among the different instruments within the UN and on the

346 Bílková, 2007, p. 9.

347 Droege, 2007, p. 354.

348 Basic Guidelines, Art. 3.

349 Basic Guidelines, Art. 8.

350 Basic Guidelines, Art. 11 (a) and (b).

351 Bílková, 2007, p. 7.

regional level.³⁵² The most effective courts have just a limited range since they were established within regional systems. Universal judicial mechanisms have only restricted power, they are often optional, limited to certain issues and not compulsory.³⁵³ State reporting mechanisms have rather been ineffective. Furthermore, human rights traditionally protect only against state interference, they do not apply to non-state actors.³⁵⁴ It is another obstacle in the way of effective implementation of human rights in armed conflict, that the legal systems of states party to a conflict are often very weak and do not have sufficient capacities for the monitoring and enforcement of human rights.³⁵⁵

On the other hand, international monitoring mechanisms under human rights are much more developed than under IHL, and international armed conflicts monitoring mechanisms of IHL for the supervision of the belligerent parties have rarely been used and they are not even foreseen in non-international armed conflicts. Contrarily, human rights mechanisms apply during international and non-international armed conflicts and can usually be used without consent of the parties to the conflict.³⁵⁶ Judicial and monitoring mechanisms contribute to a better understanding and recognition of fundamental human rights. In the words of Navanethem Pillay, 'Accountability has been accepted as an important element of the protection of civilians' during armed conflict.³⁵⁷

9. Conclusion

To summarise, although human rights bodies are not that coherent and effective yet they provide an adequate alternative to the less advanced mechanisms of IHL.³⁵⁸ Since human rights seek to ensure respect for humanitarian dignity and freedom to the greatest

352 Benison, 2000, p. 152.

353 Shany, 2009, p. 80.

354 Benison, 2000, p. 157.

355 Modirzadeh, 2010, p. 397.

356 Kellenberger, 2010, pp. 799-802.

357 Pillay, 2009.

358 Heintze, 2004, pp. 798, 813.

extent possible, they grant a broader protection against criminal offences.³⁵⁹ Also the involvement of non-state actors in human rights procedures has improved the quality of judicial mechanisms, as they have become much more popular.³⁶⁰ While the development of humanitarian law stagnated, the applicability of human rights in armed conflict achieved an increasing level of recognition.³⁶¹

359 Grover, 2010, p. 550.

360 Shany, 2009, p. 79.

361 Droege, 2007, p. 315.

D. ARMED GROUPS AND INTERNATIONAL LAW

1. Introduction

In the last years there has been an increasing number of armed conflicts not of international character. Nowadays, most of the armed conflicts are taking place within states.³⁶² Internal armed conflicts are fought between governmental forces and armed groups or between several armed groups within a state. Thus, armed groups play an important role since they are usually at least half of the belligerents of current armed conflicts.³⁶³ However, IHL is primarily addressed to states,³⁶⁴ as it was created in a time when international armed conflicts were the major concern of the international community. Due to the traditional principle of state sovereignty, states did not want to recognise any rights for armed groups within their territory in a legal document.³⁶⁵ Therefore just few regulations on non-international armed conflicts and armed groups exist. Internal armed conflicts may even become international when other states support one of the belligerent parties or when the international community becomes involved in the conflict.

The recent development of CIHL indicates that the rules applicable in non-international armed conflict and the rules of international armed conflict are merging into each other,³⁶⁶ which would also entail the applicability of this set of rules to armed groups. However, since IHL primarily refers to states it has not been tailored for non-state actors such as armed groups. Thus, humanitarian law is not adjusted to the development of new situations of armed conflicts in the last decades and can not cope appropriately with all different types of armed groups, especially with transnational

362 Sassòli, 2010, p. 5.

363 Idem, p. 6.

364 Idem, p. 7.

365 Idem p. 12.

366 Idem, p. 17.

armed groups.³⁶⁷ The next chapters illustrate to what extent international law is applicable to armed groups.

2. International Humanitarian Law

The Geneva Conventions do not provide a definition of non-international armed conflicts. Only Article 1 (2) AP II states that the 'Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'. Acts of violence committed by individuals or by a group of individuals do not automatically implicate the existence of an armed conflict.³⁶⁸ A certain degree of persistent violence must be reached so that the reality of an internal armed conflict is being recognised. Moreover, Article 1 (4) AP I states that an armed conflict exists when peoples are fighting against colonial domination, alien occupation or racist régimes 'in the exercise of their right of self-determination'. It is not clear whether this paragraph refers only to national liberation movements against colonial powers or also to attempts at changing political regimes.³⁶⁹ For the ICTY an armed conflict not of an international character takes place when there is 'protracted armed violence [...] between governmental authorities and organised armed groups or between such groups within a State'.³⁷⁰

As soon as an armed conflict exists, common Article 3 to the four Geneva Conventions and CIHL Rule 139 apply, which state that 'each party to the conflict must respect and ensure respect for international humanitarian law'. Consequently IHL applies not only to states but also to organized armed groups when they become a party to the armed conflict.³⁷¹ Article 1 of AP II explicitly develops and supplements common

367 Sassòli, 2010, p. 21.

368 Hampson, 2008, p. 555.

369 Abrisketa, 2004, p. 250.

370 *Prosecutor v. Kunarac, Kovac and Vokovic*, 12 June 2002, Appeals Chamber, IT-96-23 and IT-96-23/1, para. 56, citing *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, Case No. IT-94-1, para. 70.

371 Kleffner, 2011, p. 443.

Article 3 to all situations of armed conflict that are not covered by the rules of international armed conflict within the scope of Article 1 AP I. This provision refers to conflicts that take place within the territory of a party to the conflict, either fought between governmental forces and dissident armed forces or between other organized groups that control parts of the territory. Besides, Article 8 (2) (f) of the Rome Statute refers explicitly to internal armed conflicts that take place 'between governmental authorities and organized armed groups or between such groups'.

3. Compliance with International Humanitarian Law

Armed groups can be a threat to the humanitarian space. Often they do not respect the provisions of IHL and do not adhere to the principle of distinction.³⁷² Compared to states, armed groups have fewer means and are not so well organised.³⁷³ Due to this imbalance of resources they often decide to attack civilians instead of superior state forces in anticipation of preventing them from further supporting the government. Although many organized armed groups are open for dialogues with humanitarian actors about access and contribution of relief operations they usually are not willing to talk about compliance with IHL.³⁷⁴ Marco Sassòli discusses the problem as follows: 'Why should armed groups be bound by rules created by the practice and *opinio iuris* of their enemies?'.³⁷⁵ When a member of an armed group in a non-international armed conflict falls into the hands of the government he is always a criminal and subject to criminal prosecution under domestic law.³⁷⁶ Although he might have had obeyed IHL he is not a prisoner of war and can be punished for the fact of being part of the armed group. For this reason it does not make any difference for him if he respects IHL during the armed conflict or not seeing that the punishment will not be heavier.³⁷⁷ Hence the rejection of IHL by armed groups may also be a result of insufficient legal protection for

372 Sassòli & Shany, 2011, p. 428.

373 Idem, p. 425.

374 Idem, p. 428.

375 Ibid.

376 Saura, 2007, p. 492.

377 Sassòli, 2010, p. 26.

the members of armed groups.

The applicability of IHL to armed groups has been reasoned from different ways of argumentations. A common explanation is that IHL applies to organized armed groups, because the state on whose territory they operate has accepted IHL. The state has legislative jurisdiction over its citizens and can impose obligations under international law also on them.³⁷⁸ Another line of argument is that individuals have obligations under IHL themselves, deriving from the fact that they can be held personally accountable for the commission of war crimes.³⁷⁹ A further construction is that organized armed groups are de facto exercising governmental functions when they have control over a territory.³⁸⁰ Moreover, they have international legal personality and are therefore bound by CIHL.³⁸¹ It has also been argued that organised armed groups are bound by IHL because they gave their consent to be bound by it.³⁸²

Traditionally states are responsible to ensure the compliance with international law of individuals within its jurisdiction, but it is the nature of internal armed conflict that states do not have sufficient control over armed groups. The state responsibility diminishes as soon as the state considers individuals as terrorists.³⁸³ When armed groups have exclusive control over a territory the governmental authority is not anymore able to fulfil its responsibilities under international law.³⁸⁴ However, every member of an armed group is also individually responsible under international criminal law.³⁸⁵

378 Kleffner, 2011, p. 445.

379 Idem, p. 449.

380 Idem, p. 451.

381 Idem, p. 454.

382 Idem, p. 456.

383 Geneva Academy of international humanitarian law and human rights, *Armed Non-State Actors and International Norms: Towards a Better Protection of Civilians in Armed Conflicts*, Summary of initial research and discussions during an expert workshop in Geneva in March 2010, p. 2.

384 Engdahl, 2006, p. 55.

385 Saura, 2007, pp. 525.

4. Human Rights

While government forces are bound by human rights since they are operating on behalf of the state, armed groups are not directly under international human rights obligations. Only states, not armed groups or individuals, are parties to human rights instruments and they have the primary obligation to ensure and respect human rights. Under certain circumstances human rights instruments also apply to non-state actors since some human rights instruments do not limit their scope of application to states.³⁸⁶ The Committee on Economic, Social, and Cultural Rights emphasised in its General Comment No. 14 on the right to the highest attainable standard of health that not only states have responsibilities towards the right to health, but also individuals.³⁸⁷ Over time it has been recognised to a great extent that non-state actors also have to respect human rights and that violations of human rights shall be prosecuted.³⁸⁸ Nevertheless, within the human rights framework no direct accountability of non-state actors exists,³⁸⁹ since armed groups are not subject to current human rights enforcement mechanisms.³⁹⁰

5. Codes of conduct

Several armed groups have adopted codes of conduct that include provisions of human rights and IHL. Although codes of conducts are nothing more than self-binding instruments and therefore monitoring mechanisms and enforceability are lacking, they often seem to be effective. Armed groups have an interest to comply with fundamental principles of humanity in order to gain the respect of the civilian population and to counteract external pressure.³⁹¹ By respecting basic principles of armed conflict and human rights armed groups may avoid coercive measures undertaken by neutral actors,

³⁸⁶ Reinisch, 2005, p. 71.

³⁸⁷ Committee on Economic Social and Cultural Rights, General Comment No. 14, E/C.12/2000/4, 11 August 2000.

³⁸⁸ Reinisch, 2005, p. 67.

³⁸⁹ *Idem*, p. 82.

³⁹⁰ *Idem*, p. 68.

³⁹¹ *Idem*, p. 53.

such as arms embargoes, travel bans and the freezing of assets.³⁹²

³⁹² Geneva Academy of international humanitarian law and human rights, *Armed Non-State Actors and International Norms: Towards a Better Protection of Civilians in Armed Conflicts*, Summary of initial research and discussions during an expert workshop in Geneva in March 2010, p.4.

E. A SPECIAL LEGAL FRAMEWORK FOR UN PEACE OPERATIONS

1. UN peace operations and humanitarian assistance

United Nations peacekeeping missions have initially been deployed in international armed conflicts only. The peacekeeping forces should perform their duties impartially subject to the consent of the parties concerned,³⁹³ and aimed for pacifying conflicts between sovereign states through observation and monitoring functions.³⁹⁴ The fighting parties were then supposed to be able to reach peace agreements on their own.³⁹⁵ Humanitarian assistance was given alongside the peacekeeping operations through specialized UN humanitarian agencies, funds and programmes.³⁹⁶ Due to the rise of intrastate conflicts since the end of the Cold War, peacekeeping operations have been entrusted with broader and more complex mandates.³⁹⁷ The integrated or multidimensional peacekeeping missions also provide emergency relief to the civilian population and undertake coordination of humanitarian crisis management.³⁹⁸

UN peacekeeping operations shall primarily provide a secure and stable environment for humanitarian actors, which may include escorts of convoys or transportation of humanitarian objects or personnel.³⁹⁹ Meanwhile specialized agencies, funds and programmes of the UN as well as local or international NGOs undertake the provision of humanitarian assistance.⁴⁰⁰ Depending on the mandate, military and humanitarian actions may overlap to a certain extent.⁴⁰¹ As defined in the Brahimi Report 'United Nations peace operations' refer to three activities: conflict prevention

393 Janzekovic, 2006, p. 80.

394 Ibidem.

395 Saura, 2007, p. 481.

396 UN Department of Peacekeeping Operations, 2003. p. 159.

397 Abrisketa, 2009, p. 85.

398 UN Department of Peacekeeping Operations, 2003. p. 159; Saura, 2007, p. 481.

399 UN Department of Peacekeeping Operations, 2008, p. 30.

400 Ibidem.

401 Palwankar, 1994, p. 83.

and peacemaking, peacekeeping and peacebuilding.⁴⁰²

UN peacekeeping missions are subsidiary organs of the UN, established by a Security Council Resolution in accordance with Article 7 (2) of the UN Charter.⁴⁰³ The missions may be established under Chapter VI or under Chapter VII of the UN Charter. Whereas peaceful settlement is provided in Chapter VI, Chapter VII allows peace enforcement in situations of threats to the peace, breaches of the peace and acts of aggression.⁴⁰⁴ Most of the recent peacekeeping missions have been established under Chapter VII.⁴⁰⁵ Among scholars it has been discussed whether, as soon as the UN Security Council authorises force through a Resolution, an international armed conflict takes place alongside the internal armed conflict, fought between the state forces and the states participating in the intervention.⁴⁰⁶ Moreover, it has even been considered that the law of occupation may apply in situations when UN mandated forces operate in a territory without the consent of the state concerned.⁴⁰⁷

UN peacekeeping forces are allowed to use force in self-defence only; however, the term 'self-defence' has been interpreted by the UN in a very broad sense: The use of force is not only allowed when peacekeepers are attacked, but also when they are prevented from carrying out their mission, which may be understood in a very wide sense.⁴⁰⁸ When peacekeeping operations are established under Chapter VII of the UN Charter the mission can undertake 'action as it deems necessary in order to maintain or restore international peace and security',⁴⁰⁹ which might also include the use of force in response to armed resistance.⁴¹⁰

402 Report of the Panel on United Nations Peace Operations, A/55/305-S/2000/809, 21 August 2000, para. 10.

403 Saura, 2007, p. 484.

404 Abrisketa, 2009, p. 86.

405 UN Department of Peacekeeping Operations, 2008, p. 14.

406 Lehmann, 2012, p. 121.

407 Faite, 2004, p.72.

408 Saura, 2007, pp. 482-483.

409 UN Charter, Art. 51; Saura, 2007, p. 483.

410 Greenwood, 1996, p. 198.

2. The protection of UN peacekeeping personnel engaged in the humanitarian space

2.1. Responsibility of the state

The government hosting a peacekeeping operation has the primary responsibility for the security and protection of UN peacekeeping personnel and objects due to its inherent obligation of maintaining law and order within its jurisdiction. Before establishing the mission, the UN shall reach an agreement with the host state. The responsibility of the state is detailed in the status-of-forces agreement or in the status-of-mission agreement between the UN and the host government.⁴¹¹ The agreement shall determine the privileges and immunities of the personnel on the ground.⁴¹²

2.2. International Humanitarian Law

UN peacekeeping personnel are not specifically protected under the Geneva Conventions. Most of the UN peacekeeping personnel are military professionals, 'equipped with the means to defend themselves', but they can also be civilians or unarmed civilian police personnel.⁴¹³ It has sparked a controversial debate on whether they enjoy protection under the status of civilians. However, considering that they are not party to the conflict it can be concluded that they enjoy the same protection as civilians under IHL as long as they are not taking part directly in hostilities.⁴¹⁴ On the other hand, if peacekeeping personnel become involved in the armed conflict as belligerents they lose their civilian status and enjoy the same legal protection as other combatants.⁴¹⁵ Accordingly they are subject to humanitarian law and have the duty to comply with it.⁴¹⁶

411 UN Department of Peacekeeping Operations, 2003, p. 135; UN Department of Peacekeeping Operations, 2008, pp. 79-80.

412 Saura, 2007, p. 484.

413 UN Department of Peacekeeping Operations, 2003, pp. 136-138.

414 Henckaerts & Doswald-Beck, 2005, p. 112; Gadler, 2010, p. 589.

415 Greenwood, 1996, p. 189.

416 Saura, 2007, p. 520; The special legal status of peacekeeping personnel engaged in hostilities is also

In this context the question arises at what point UN peacekeeping personnel become involved in an armed conflict. As I have already demonstrated, unlike medical personnel humanitarian relief personnel is not authorised by IHL to use force in self-defence. Contrarily, peacekeeping personnel engaged in peace operations are authorised to use force in a very broad sense, in offence and in self-defence, in order to defend the missions mandate, while under IHL self-defence is interpreted in a much more restrictive manner. It is now widely accepted that due to the special status of peacekeeping personnel the use of force in self-defence does not turn peacekeepers automatically in combatants, although it still remains unclear where the line between self-defence and engagement in hostilities should be drawn.⁴¹⁷ On this occasion, it is worth noting that civilian personnel attached to belligerent peacekeeping forces do not lose their protection as long as they themselves are not directly taking part in hostilities.⁴¹⁸

Under humanitarian law the only reference to UN peacekeeping personnel can be found in customary law: Rule 33 CIHL states that it is prohibited to direct attacks against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law. Correspondingly, objects involved in peacekeeping operations enjoy the same protection as civilian objects.⁴¹⁹ This customary rule does not establish any protection to peace-enforcement operations, since those are considered as combatants, according to the UN Secretary-General's Bulletin, and must respect international humanitarian law.⁴²⁰ This distinction has also been made by the ICC, when it had to decide on the application of war crimes to peacekeeping and peace-enforcement personnel.⁴²¹

regulated in the UN Secretary-General's Bulletin, which will be discussed in more detail below.

417 International Committee of the Red Cross, Report on the Expert meeting on multinational peacekeeping operations, Geneva, 11-12 December 2003, p. 208; Gadler, 2010, p. 591.

418 Greenwood, 1996, p. 189.

419 Henckaerts & Doswald-Beck, 2005, pp. 112-113.

420 Idem, p. 114.

421 Rome Statute, Arts. 8 (2) (b) (iii) in international armed conflict; 8 (2) (e) (iii) in non-international armed conflict; ICC, *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of

2.3. The Convention on the Safety of UN and Associated Personnel 1994

UN personnel delivering humanitarian relief enjoy special protection under the Convention on the Safety of United Nations and Associated Personnel (Safety Convention), adopted by the General Assembly in 1994, which entered into force on 15 January 1999.⁴²² The Convention has been adopted in reaction to an increasing number of attacks against UN peacekeeping personnel,⁴²³ and establishes a duty for all states party to the Convention to ensure the safety and security of UN personnel. The Convention applies to international peace and security operations established by 'the competent organ of the UN in accordance with the Charter of the United Nations and conducted under United Nations authority and control' and to other operations where an exceptional risk to the safety of the personnel participating in the operation has been declared by the Security Council or the General Assembly.⁴²⁴ While peacekeeping operations established under Chapter VII are within the scope of application,⁴²⁵ Article 2.2. explicitly states that the Convention does not apply to peace-enforcement operations under Chapter VII 'in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies'.⁴²⁶ Furthermore, the Convention does not apply to operations that are under the control of states or of regional organisations, although they may have been authorised by the United Nations.⁴²⁷

The 2005 Optional Protocol extends the application of the Safety Convention to personnel engaged in peacebuilding operations delivering humanitarian, political or development assistance and to emergency humanitarian assistance operations.⁴²⁸ Operations providing emergency humanitarian assistance must be established by a

Charges, 8 February 2010, ICC-02/05-02/09.

422 Henckaerts & Doswald-Beck, 2005, p. 105.

423 Saura, 2007, p. 495.

424 Safety Convention, Art. 1.

425 Llewellyn, 2006, p. 3.

426 Saura, 2007, p. 519.

427 Greenwood, 1996, p. 195.

428 Optional Protocol Safety Convention, Art. II (1); Llewellyn, 2006, p. 728.

competent organ of the UN and must be conducted under UN authority and control. Within the scope of application are operations established by the OCHA as well as operations established by the UNHCR, the UN Children's Fund (UNICEF), the UN Development Programme and the World Food Programme. On the other hand, operations established by the Specialised Agencies of the UN and by autonomous organisations, such as the World Health Organization (WHO) do not enjoy protection under this Convention.⁴²⁹

The term 'UN personnel' is to be understood as military, police and civilian persons engaged or deployed by the Secretary-General as members of a UN operation as well as other officials and experts on mission of the United Nations or its specialized agencies who are in an official capacity present in the area of a UN operation. Personnel associated with the United Nations are persons assigned by a state or an intergovernmental organisation with the agreement of the UN and persons engaged by the Secretary-General. The term also includes persons which have been deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General in order to carry out activities in support of the fulfilment of the mandate of a UN operation.⁴³⁰

The Convention prohibits attacks or any other actions against the United Nations and associated personnel, their equipment and premises that prevent them from discharging their mandate.⁴³¹ Article 7 of the Safety Convention establishes a duty on the state parties to take all appropriate steps to ensure the safety and security of United Nations and associated personnel and their equipment. They must not be attacked and no action may be taken which prevents them from carrying out their duties under the mandate. Furthermore, the state parties have to prevent the commission of crimes against United Nations and associated personnel, such as murder, kidnapping, attacks

429 Llewellyn, 2006, p. 725.

430 Safety Convention, Art. 1.

431 Dörmann & Doswald-Beck & Kolb, 2008, p. 453; UN Department of Peacekeeping Operations, 2003, p. 135.

upon official premises, private accommodation or means of transportations.⁴³²

If UN personnel is captured they do not benefit from the protection for prisoner of war under the Geneva Conventions,⁴³³ therefore Article 8 of the Safety Convention imposes a duty to release or return United Nations and associated personnel captured or detained. During imprisonment they may not be subjected to interrogation and 'shall be treated in accordance with universally recognised standards of human rights and the principles and spirit' of the Geneva Conventions. All states party to the Convention are required to make a number of crimes punishable under their national law and have to ensure that those who have attacked UN personnel are being prosecuted or extradited.⁴³⁴

In this context it is important to note that Article 14 of the Convention establishes a principle of universal jurisdiction.⁴³⁵ When a state has jurisdiction over an alleged offender it must either prosecute that person or permit his or her extradition. This means that every state has the obligation to prosecute perpetrators of crimes against UN personnel, not only the host state. Regarding the protection of UN personnel the establishment of universal jurisdiction is of major importance since it opens up the possibility to legally enforce the protected status 'through national courts throughout the international community'.⁴³⁶

In addition, Article 20 (a) emphasises that nothing in the Safety Convention shall affect the applicability of IHL and universally recognised standards of human rights, which protect UN personnel but must also be respected by them. UN personnel enjoy the same protection under the international human rights framework as other individuals.

432 Safety Convention, Arts. 9,11.

433 GC III, Arts. 129-30; GC IV, Arts. 146-47; Greenwood, 1996 p. 194.

434 Safety Convention, Arts. 9-10.

435 Saura, 2007, p. 516.

436 Engdahl, 2006, p. 69.

2.4. Conclusion

UN personnel enjoy a much higher standard of protection than other humanitarian relief actors within the humanitarian space. Especially the agreement with the host state, the Safety Convention and the establishment of universal jurisdiction over alleged perpetrators of crimes against peacekeeping personnel engaged in the humanitarian space strengthen the enforceability of the legal protection and complement the general protection provided under IHL.⁴³⁷ However, the broad authorisation of UN personnel to use force in self-defence makes it difficult to justify their status of civilians and to determine at what point the personnel becomes involved in the conflict. This can also have a negative effect on the perception of peacekeeping personnel by nationals of the host state.

3. The responsibility of UN peacekeeping forces

UN peacekeeping personnel may not only be victims of violations of humanitarian law and human rights, they can also take actions, which pose a threat to the humanitarian space, since UN forces may exceed the use of force in self-defence or might target facilities where humanitarian actors or objects are present. However, for a long time the UN refused to apply IHL to UN peace operations as it was not commonly accepted that international organisations, such as the UN, have obligations under international law. Among other things it was argued that IHL applies only to states, not to international organisations; that the UN is not party to the Geneva Conventions and that the blue helmets can not be equated with combatants.⁴³⁸ Thus, only in 1978 the UN formally recognised its obligation to comply with 'the principles and spirit' of IHL.⁴³⁹

437 Saura, 2007, p. 530.

438 Abrisketa, 2009, p. 87.

439 Saura, 2007, p. 495.

3.1. The Secretary General's Bulletin on the Observance by the United Nations Forces of International Humanitarian Law

Finally the Secretary General issued the Bulletin on the Observance by United Nations Forces of International Humanitarian Law of 1999, which establishes that the fundamental principles and rules of international humanitarian law may be applicable to UN peacekeeping and peace-enforcement personnel.⁴⁴⁰ The Bulletin refers to operations that are commanded and controlled by the UN and is applicable when UN forces are actively engaged as combatants, to the extent and only for the duration of their engagement; as well as in peacekeeping or peace-enforcement operations when the use of force is permissible in 'self-defence'.⁴⁴¹

As mentioned above, it has been difficult to determine at what point UN personnel become engaged as combatants. If UN soldiers use force only in self-defence they may not be considered as combatants. However, since self-defence has been interpreted in a very broad sense UN forces may be considered as combatants by the UN authorities only then when the use of force reaches a very high level.⁴⁴² Unfortunately, the Bulletin does not determine the responsibilities under IHL of UN personnel that are not engaged as combatants.⁴⁴³

The Bulletin is a self-binding mechanism, this has the consequence that supervision and enforcement mechanisms are lacking.⁴⁴⁴ UN personnel is bound by the Bulletin as a result of its character as an internal UN document, which constitutes an internal legal obligations, as well as under consideration of the fact that the UN itself has obligations under customary international law,⁴⁴⁵ while the Bulletin does not

440 UN Department of Peacekeeping Operations, 2008, pp. 15-16.

441 Secretary General of the United Nations, ST/SGB/1999/13, 6 August 1999, Bulletin on the Observance by the United Nations Forces of International Humanitarian Law, Section 1, Art. 1.1; Wills, 2009, p. 6.

442 Wills, 2009, p. 6.

443 *Idem*, p. 17.

444 Reinisch, 2005, p. 52.

445 Saura, 2007, p. 497.

constitute a legal obligation upon states.⁴⁴⁶

The Bulletin establishes a duty on United Nations forces to respect the fundamental principles of humanitarian law when carrying out their mission.⁴⁴⁷ UN forces have to make in all circumstances a clear distinction between combatants and civilians.⁴⁴⁸ They must protect the civilian population, have to avoid incidental loss of civilian life and may not locate military objects within or near densely populated areas.⁴⁴⁹ Furthermore, it is prohibited to attack objects indispensable to the survival of the civilian population.⁴⁵⁰ It is also explicitly mentioned that UN forces have to respect and protect wounded and sick in all circumstances and are not allowed to attack medical establishments and mobile medical units, 'unless they are used, outside their humanitarian functions', against the UN force. Consequently attacks against medical establishments may be justified if it can be shown that they were used against the UN force.⁴⁵¹ The Bulletin also establishes a duty on UN forces to respect personnel, vehicles and premises involved in humanitarian relief operations and to facilitate their work.⁴⁵²

However, in regard to accountability of UN forces the Bulletin states that members of the military personnel of a UN force are subject to prosecution in their national courts when they commit violations of IHL.⁴⁵³ This contradicts the principle of universal jurisdiction and the establishment of jurisdiction for the ICC over war crimes under the Rome Statute.⁴⁵⁴ Nevertheless, the provision has been reaffirmed in several UN Security Council Resolutions that excluded the jurisdiction of the ICC over UN personnel.⁴⁵⁵

446 ICRC, 2004 (a), p. 209.

447 Saura, 2007, p. 498.

448 Bulletin, Section 5.

449 Bulletin, Section 5.

450 Bulletin, Section 6.7.

451 Bulletin, Section 9.

452 Bulletin, Section 9.

453 Bulletin, Section 4.

454 Abrisketa, 2009, p. 90.

455 UN SC Res. 1422 (2002); UN SC Res. 1487 (2003); UN SC Res. 1497 (2003); see also Jain, 2005, p. 240.

Thus, accountability of UN forces is of doubtful merit. Subsequent to the adoption of the Bulletin it was still or even more unclear whether the Geneva Conventions apply to UN personnel.⁴⁵⁶ It has been generally recognised that UN personnel and other international organisations must respect IHL. Although it is not specifically tailored for international organisations such as the UN and some rules are difficult to apply outside 'the state structure',⁴⁵⁷ humanitarian law should be applicable to the extent that it puts into effect the principles and spirit of IHL.⁴⁵⁸

3.2. Immunity of UN personnel

As already mentioned, before establishing the mission, the UN shall reach agreements with the troop-contributing states and with the host states.⁴⁵⁹ The rights and duties of the personnel on the ground is further determined in the mandate under which the operation is being established.⁴⁶⁰ Although troops are contributed by the member states they are deployed under the direct authority of the UN.⁴⁶¹ The troops become officials of the UN and are protected by Article 105 of the UN Charter and by the 1946 Convention on the Privileges and Immunities of the United Nations.⁴⁶² Officials and experts of the UN enjoy immunity 'from legal process in respect of words spoken or written and all acts performed by them in their official capacity'. 'Experts performing missions', such as military observers, civilian police and civilian staff, enjoy functional immunity, but can be subject to the civil and criminal jurisdiction of the host state when they commit acts outside their official functions. Personnel contracted with humanitarian agencies of the UN is not covered by the Convention on the Privileges and Immunities of the United Nations.⁴⁶³

456 Reinisch, 2005, p. 46.

457 Porretto & Vite, 2006, p. 26.

458 Idem, p. 22.

459 Saura, 2007, p. 484.

460 Siekmann, 2002, p. 122.

461 Abrisketa, 2009, p. 87.

462 Saura, 2007, p. 484.

463 Abrisketa, 2009, p. 89.

3.3. Accountability

Primarily UN personnel is subject to the local law of the host state, but they are also subject to the law of the UN and further to the law of the domestic state. Beyond that also international law, such as IHL and human rights apply to international military operations.⁴⁶⁴ The agreement with the host state shall further determine the privileges and immunities of the personnel on the ground.⁴⁶⁵ The General Assembly adopted model agreements about the relationship between the troop-contributing states and the UN and about the status of the peacekeeping forces in the host state. The 'Model Status-of-Forces Agreement for Peacekeeping Operations' (SOFA) also states that 'members of the UN peacekeeping operation [...] shall be immune from legal process'. In the case that the members of peacekeeping operations are suspected of having committed a crime, they 'shall be subject to the exclusive jurisdiction of their respective participating States'. This rule must also be applied to the commission of war crimes.⁴⁶⁶

To summarise, the UN is responsible for breaches of international obligations and IHL committed by personnel acting on behalf of the organisation.⁴⁶⁷ Domestic courts do not have jurisdiction over international organisations such as the UN.⁴⁶⁸ The troop-contributing states are only responsible if the commission of violations is attributable to the state. Simultaneously, every member of a peacekeeping mission is individually responsible under international criminal law. Peacekeepers are usually under the criminal jurisdiction of the troop-contributing states. If they can be held personally accountable under national jurisdiction or for the commission of a war crime under the Rome Statute is doubtful and depends on the mandate and the status of the personnel.⁴⁶⁹

464 Siekmann, 2002, pp. 104-105.

465 Saura, 2007, p. 484.

466 Idem, p. 485.

467 Idem, p. 525.

468 Reinisch, 2005, p. 87.

469 Saura, 2007, pp. 525.

3.4. Human Rights

In regard to the obligation of UN personnel to respect human rights, the situation is even more difficult. Since only states are usually parties to human rights instruments they have the primary obligation to ensure and respect human rights, but human rights instruments may under certain circumstances also apply to non-state actors. Some human rights instruments do not limit their scope of application to states,⁴⁷⁰ such as the Committee on Economic, Social, and Cultural Rights emphasised in its General Comment No. 14 on the right to the highest attainable standard of health that not only states have responsibilities towards the right to health, but all member of society, such as individuals, intergovernmental organisations and NGOs.⁴⁷¹

Member states of the UN have obligations under the international human rights instruments they are parties to. Almost all member states have signed the ICCPR and the ICESCR. However, not all states are parties to the same human rights treaties. Furthermore, the host state of a peace operation may not be party to the relevant instruments. Nevertheless, states that are bound by human rights instruments may not take actions in violation of their human rights obligations. They should assure that all operations they undertake with contract partners comply with their obligations under human rights instruments. Thus, when peace operations are established by the UN and its member states they should underly in the same manner the human rights framework.⁴⁷²

Although by the time international organisations have been recognised as subjects of international law, it is not clear yet whether they also have obligations under international law and human rights.⁴⁷³ It is commonly accepted that human rights must

470 Reinisch, 2005, p. 71.

471 Committee on Economic Social and Cultural Rights, General Comment No. 14, E/C.12/2000/4, 11 August 2000.

472 Howland, 2006, pp. 462, 465.

473 Reinisch, 2005, p. 46.

be respected and that violations must be prosecuted,⁴⁷⁴ but international organisations are not subject to current human rights enforcement mechanisms.⁴⁷⁵ The ECtHR once decided to hold member states accountable for violations of human rights committed by international organisations, namely the European Union.⁴⁷⁶ However, according to the subsequent jurisprudence of the ECtHR it is not possible to hold international organisations accountable for violations of human rights if they have not signed the relevant treaties, even if the member states have done so.⁴⁷⁷ Theoretically it would be possible that a member state files a claim against the member states of the UN before the ICJ.⁴⁷⁸ However, this way is not open to individuals or humanitarian entities.

474 Reinisch, 2005, p. 67.

475 Idem, p. 68.

476 ECtHR, *Matthews v. the United Kingdom*, 18 February 1999, 24833/94.

477 Reinisch, 2005, p. 83.

478 Howland, 2006, p. 472.

III. CONCLUSIONS

This thesis examines to what extent the humanitarian space is protected by law. The recent developments in Customary International Humanitarian Law, the new war crimes in the Rome Statute and the increasing recognition of the applicability of human rights also during times of war strengthen the special legal protection laid down in the Geneva Conventions. Customary International Humanitarian Law harmonizes the applicability of humanitarian law in international and non-international armed conflicts and is capable of adapting to the new challenges of armed conflicts. With the adoption of the Rome Statute and the establishment of the ICC a permanent court for the prosecution of war crimes has been set up, which has jurisdiction over all individuals. Human Rights have the ability to complement humanitarian rules that do not provide sufficient protection. Furthermore, the more developed enforcement mechanisms of human rights with its individual complaint mechanisms and the recognition of a right to remedy and reparation for victims strengthen enforceability and accountability of violations of human rights and humanitarian law. Last, the binding decisions of regional human rights courts are of significant importance for the strengthening of legal protection. Coupled with the concept of universal jurisdiction over violations by human rights courts give reason for hope that the prosecution of offenders will become more likely in the future.

The rise of attacks against the humanitarian space must be seen in context. Contemporary armed conflicts are increasingly taking place within states rather than between states. Belligerents are not always aware of humanitarian rules governing armed conflicts and protecting the humanitarian space. For the weaker party of an armed conflict humanitarian personnel or civilians are often perceived as 'soft targets' since they are easier to attack than enemy forces and cause fewer losses. Those attacks further bring greater attention to the conflict and are a focal point for the media.⁴⁷⁹ In the last decades more and more humanitarian actors have gone into areas where

⁴⁷⁹ Eckroth, 2010, p. 92; Wasznik, 2011, p. 12.

conflicts are taking place and humanitarian organisations have expanded into more dangerous places.⁴⁸⁰ The different humanitarian organisations compete over funds, territory, programmes, people and staff.⁴⁸¹ Often they do not obey the principles of impartiality and neutrality or they distribute relief only to one group while ignoring another.⁴⁸² In some situations humanitarian organisations even found themselves in contributing to atrocities of war. During the Barre regime in Somalia refugee camps served for the recruitment of combatants and consignments delivered by UNHCR and NGOs were used in support for the military. Although the organisations were aware of this process they could not inform the public.⁴⁸³ In Sri Lanka humanitarian organisations were used to support the detainment of civilians in camps run by the government,⁴⁸⁴ in Zaire humanitarian organisations were unintentionally handing over civilians to be massacred⁴⁸⁵ and in Rwanda humanitarian workers found themselves assisting in genocide.⁴⁸⁶ Often governments blame humanitarian organisations for pursuing political motives or not obeying humanitarian principles.⁴⁸⁷ Several humanitarian organisations were expelled from North Sudan after the ICC issued an arrest warrant against the Sudanese President Al Bashir. They were accused for exceeding the terms of their mission and for handing incriminating information over to the ICC. Although MSF had not collaborated with the ICC they were equally expelled by the government, which did not distinguish between the different organisations and used the expulsion to object the indictment.⁴⁸⁸

The humanitarian space is increasingly targeted for political reasons. Humanitarian organisations are often associated with political, military or economic

480 Collinson & Elhawary, 2012, p. 5.

481 Hilhorst & Jansen, 2010, p. 1130.

482 Eckroth, 2010, pp. 92, 102.

483 Collinson & Elhawary, 2012, p. 6.

484 Mackintosh, 2010, p. 387.

485 Idem, p. 384.

486 Collinson & Elhawary, 2012, p. 8.

487 Hilhorst & Jansen, 2010, p. 1134.

488 Mackintosh, 2010, p. 386; Médecins Sans Frontières, International Justice - pragmatism or principle? Dialogue 9, available at <http://www.msf.org.uk/dialogues.aspx> (consulted on 4 May 2012), p. 2.

interests of the western enemy.⁴⁸⁹ If humanitarian organisations are working alongside the military or UN forces they may be equated with them.⁴⁹⁰ Offenders often do not distinguish between humanitarian organisations and political organisations; rather, every foreigner is associated with the western led intervention and therefore a legitimate target.⁴⁹¹ Additionally, increased security measures taken by some humanitarian organisations strengthen the negative perception of humanitarians by the civilian population and belligerents.⁴⁹² Increasing insecurity has led to the fact that some organisations do not trust anymore in the acceptance by the belligerent parties and rather rely on protection or deterrence by armed guards, private military and security companies or UN forces.⁴⁹³

Interpretation and application of humanitarian principles vary from organisation to organisation and are often negotiated between the different actors.⁴⁹⁴ Access to conflict areas is negotiated between the humanitarian organisation and the host state which determines the conditions of the mission.⁴⁹⁵ When incidents occur humanitarian organisations react differently. The ICRC developed methods to prevent violations, it tries to take up contact with the government and armed groups and to inform them about their responsibilities under IHL and human rights.⁴⁹⁶ MSF relies on negotiations with the relevant political actors, armed groups and beneficiaries.⁴⁹⁷ On the other hand, organisations such as Amnesty International and Human Rights Watch are collecting facts and publicly denunciate the incidents in order to halt persistent violations.⁴⁹⁸ Many organisations reduce or withdrew international staff and replace them by national staff. Despite the fact that nationals are most of the victims of incidents they have better

489 Wasznik, 2011, pp. 25-26.

490 Eckroth, 2010, p. 94.

491 Carle & Chkam, 2006, pp. iii, 7; Collinson & Elhawary, 2012, p. 8.

492 Wasznik, 2011, pp. 25-26.

493 Carle & Chkam, 2006, pp. iv-v; Eckroth, 2010, p. 94.

494 Hilhorst & Jansen, 2010, p. 1112.

495 Mackintosh, 2010, p. 391.

496 Doswald-Beck, 2002, p. 3.

497 Médecins Sans Frontières, 2011, p. 138.

498 Doswald-Beck, 2002, p. 3.

knowledge of the situation and can move more freely than foreigners.⁴⁹⁹ The OCHA is coordinating the provision of relief and security to respond more flexibly to critical situations and to minimize the risk for humanitarian personnel.⁵⁰⁰ Some humanitarian organisations decide to partly or fully coordinate their security with the UN, while others, such as the ICRC or MSF prefer to remain fully independent from the UN system.⁵⁰¹

The humanitarian space is a complex concept where many different actors are involved. It includes actors like the ICRC dedicating itself strictly to the provisions of IHL, NGOs delivering aid based on humanitarian principles at their own discretion, and international organisations operating in line with internal principles. Thus it is likely that the lines between all different humanitarian actors become blurred. I have demonstrated that extensive international legal regulation on the protection of the humanitarian space exists. The boundaries of the humanitarian space are defined clearly. The recent rise of attacks is attributable to the fact that the humanitarian space has become a negative image. Different actors are working alongside different principles and motivations. Often they do not respect that the provision of humanitarian relief is based on the consent of the host state and must be humanitarian and impartial in character. Why should states and armed groups respect the special protection of the humanitarian space under international law if not even the humanitarian space does this?

Incidents against the humanitarian space can be perpetrated mainly by two offenders, either by the state or organs that are attributable to it or by non-state actors, such as individuals or armed groups. Sufficient protection against the state is provided by law. As long as humanitarian actors remain within the boundaries of the humanitarian space as defined by law and agreed by the host state it is less likely that they will be the object of an attack. Protection against non-state actors depends on the

499 Eckroth, 2010, p. 101.

500 *Idem*, p. 97.

501 *Idem*, pp. 103-104.

level of respect the humanitarian space enjoys.

The more humanitarian actors obey the fundamental principles and interpret them close to the provision of IHL, and the more they try to earn the trust of the civilian population, the less likely there will be an attack. To conclude, there is an urgent need to further adapt the international legal framework to the new challenges of contemporary armed conflicts. The humanitarian space needs a homogenous definition and humanitarian actors should devote themselves more to the international legal framework. Also, the question of responsibility of those engaged in the humanitarian space and in particular of the UN and associated personnel has to be clarified. In conclusion, to strengthen or reestablish the credibility of the humanitarian space would be for the benefit of all since its one and only purpose should be the provision of aid to civilians in need and the reduction of human suffering.

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