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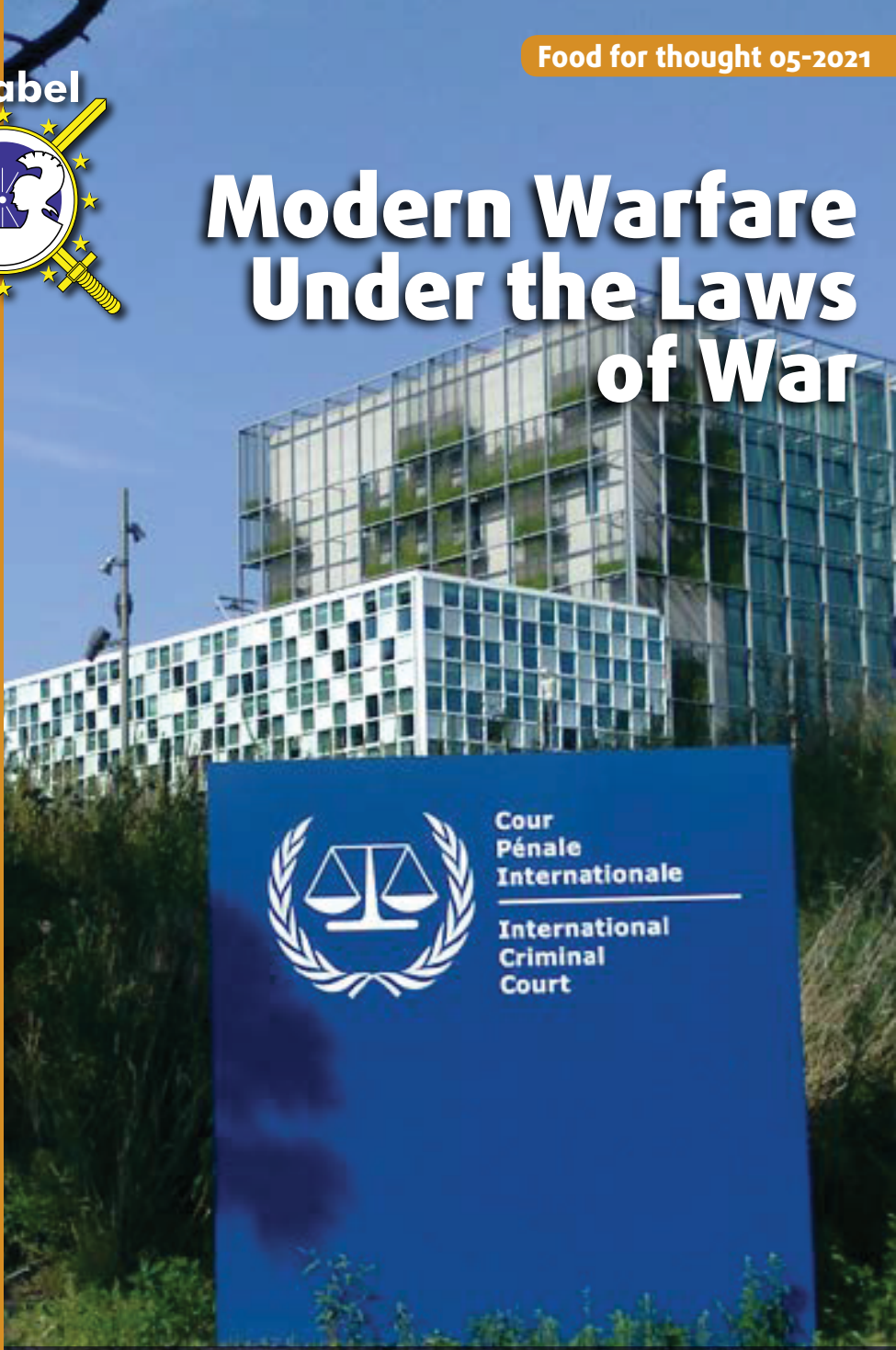
Modern Warfare Under the Laws of War



AN EXPERTISE FORUM CONTRIBUTING TO EUROPEAN ARMIES INTEROPERABILITY SINCE 1953

FINABEL
European Army Interoperability Center

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This paper was drawn up by Christian Di Menna, Candela Fernández Gil-Delgado, Leandro Mendes Pereira and Aris Vasilliou under the supervision and guidance of Mr Mario Blokken, Director of the Permanent Secretariat.

This Food for Thought paper is a document that gives an initial reflection on the theme. The content is not reflecting the positions of the member states but consists of elements that can initiate and feed the discussions and analyses in the domain of the theme. All our studies are available on www.finabel.org

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LIST OF ACRONYMS

UN Charter Charter of the United Nations

ECtHR European Court of Human Rights

IAC International Armed Conflict

ICCPR International Covenant on Civil and Political Rights

ICRC International Committee of the Red Cross

ICESCR International Covenant on Economic, Social and Cultural Rights

IHL International Humanitarian Law

EU European Union

LOAC Laws of Armed Conflict

NIAC Non-International Armed Conflict

NSAs Non-State Actors

PoWs Prisoners of War

US United States

INTRODUCTION

From the dawn of civilisation to today, warfare has brought great destruction and terrible human suffering, affecting combatants and civilians, who frequently bear the brunt of war. Families have been torn apart, and entire generations have been damaged, dislocated, and dispirited by loss, violence, and abuse. Although armed conflict has been romanticised in heroic stories of liberation and revolution, those who have experienced the reality of war are often terribly troubled and traumatised. Melzer notes "for as much as war is exclusively human, it is also inherently inhumane".[1]

There is nothing inevitable about the agony and desperation of victims of war; the international community has the ability and means to prevent this. A large corpus of International Humanitarian Law (IHL) has evolved to mitigate human suffering at war. In a world where conflict often spills across national borders, and with novel and unconventional forms of violence, the importance and necessity of this body of law has, perhaps, never been so great. As the face and practice of modern warfare are dramatically transformed by technology, the urge to ensure the protec-

1. Nils Melzer, "International Humanitarian Law: a comprehensive introduction", ICRC, August 2016, p. 12.

tion of civilians becomes ever more pressing.
The article begins with the chapter by Leandro Pereira Mendes, who presents the main principles and a brief history of the development of IHL. In the next chapter, Aris Vasilliou discusses the conflict in Eastern Ukraine regarding potential war crimes committed there by the parties of the conflict. In chapter three, Candela Fernández Gil-Delgado looks closely at the Nagorno Karabakh conflict, focussing on one specific situation: the right of self-determination, self-defence and the use of force. In chapter four, Christian Di Menna discusses the challenges and possible solutions vis-à-vis compliance with the principles and rules of IHL in situations of contemporary armed conflicts.

A BRIEF OUTLINE OF INTERNATIONAL HUMANITARIAN LAW

International Humanitarian Law (IHL), also known as the 'laws of war' or 'laws of armed conflict' (LOAC), is a branch of Public International Law restricting the means and methods of warfare to assure the protection and humane treatment of those who are not or are no longer, participating in hostilities. To put it differently, IHL consists of rules that set minimum requirements of humanity to be abided by in times of armed conflict.
Since this legal framework was specifically created to control scenarios of war, belligerents are not exempted from their humanitarian obligations by the chaotic and harsh nature of armed conflict. Thus, IHL must be respected in *all circumstances*.[2] This means that these rules are binding for all parties to a conflict, regardless of its causes, or its nature or origin.[3] For instance, a sovereign nation exercising its right to self-defence, established by Article 51 of the Charter of the United Nations (UN Charter), must obey IHL, as must a non-state armed group employing force in violation of both international and national law. All parties to hostilities must comply with IHL even if it is infringed by their opponents.[4]
The laws of armed conflict are deeply-rooted in an equilibrium of military necessity versus humanity.[5] While it perceives that it may be necessary to adopt severe measures – and thus cause harm and destruction – to overpower an opponent in wartime, IHL does not give belligerents unlimited discretionary power based on their military necessities. Humanity does not only restrain the means and methods of warfare. It also requires the humane treatment of those who have succumbed to enemy forces. This delicate equilibrium finds more specific expression in a range of pivotal principles.
Perhaps the most fundamental principle of IHL is the principle of distinction. This draws on the understanding that "the only legitimate object which states should endeavour

2. 1949 Geneva Conventions I-IV, Common Article 1; Customary IHL, Rule 139.
3. Protocol Additional to the Geneva Conventions of 12 August 1949. Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Preamble, para. 5.
4. 1949 Geneva Conventions 1-4, Common Article 1; Customary IHL, Rule 140.
5. Nils Melzer, "International Humanitarian Law: a comprehensive introduction", ICRC, August 2016, p. 17.

to accomplish during war is to weaken the military forces of the enemy".[6] It makes clear that "[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations."[7] In this sense, the belligerents must always distinguish between the civilian population and combatants, and between civilian objects and military objectives, and shall direct their operations only against military objectives.[8]

It can be argued that the principle of distinction also entails "constant care to spare the civilian population, civilians and civilian objects" during wartime.[9] This means an attacker should do everything feasible to prevent attacking civilians, their objects, and those subjects to special protection ("precautions in attack").[10] This obligation also applies to those being attacked. They must take the "necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers result-

International Committee of the Red Cross, Geneva, Torbjorn Toby Jorgensen, April 15, 2019 (Source: https://commons.wikimedia.org/wiki/File:International_Committee_of_the_Red_Cross_Geneva_(46907115041).jpg)

Headquarters of the ICRC in Geneva

6. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (St. Petersburg Declaration), Preamble.
7. Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 51 (1); Customary IHL, Rule 1.
8. Ibid, Art. 48; Customary IHL, Rules 1 and 7.
9. Ibid, Art. 57 (1); Customary IHL, Rule 15.
10. Ibid.

ing from military operations" ("precautions against the effects of attack").[11] However, when this is impossible, parties must consider the principle of proportionality. According to Article 51 (5) (b) of the Additional Protocol I, it is considered as indiscriminate any "attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[12]

The principle of unnecessary suffering is also extremely important to IHL. The St. Petersburg Declaration recognises that it is contrary to the laws of humanity to employ "arms which uselessly aggravate the suffering of disabled men or render their death inevitable".[13] Therefore, it is "prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering".[14] In addition, human treatment is central to this international body of law. As stated by Common Article 3 to the Geneva Conventions, individuals who are not participating in the hostilities anymore "shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria."[15] This rule symbolises "a customary minimum yardstick for protection that is binding in any armed conflict".[16]

It should be noted that IHL expressly allows belligerents to adopt "measures of control and security". They, however, must not affect the entitlement to humane treatment and fundamental rights of the persons concerned.[17] Those are absolute rights that must be respected even when it is justifiable to adopt measures of constraint.

The development of IHL

The traditional narrative of IHL begins by identifying that the laws of war are as old as war itself. Constraints on warfare have existed across all civilisations and religions. They are demonstrated among others by the Chinese *Wei Liaozi* and codes of honour and chivalry.[18] These ancient means of regulating the conduct of war, however, have become wholly inadequate to cope with the improvements in technology brought on by the Industrial Revolution.[19] The combination of modern industrialised weaponry and conscripted mass armies helped make armed conflict more sophisticated and deadly. Unfortunately, technological advances were not equally distributed throughout the military; medical services, for example, were unable to deal with the horror, suffering, and destruction inherent to warfare in the nineteenth century.[20] Consequently, tens of thousands of injured, sick, and moribund combatants were left to die on the battlefields. Against this background, several initiatives were conceived, both in Europe and in America, to mitigate the suffering of

11. Ibid, Art. 58 (c); Customary IHL, Rule 22.
12. Ibid, Art. 51 (5)(b).
13. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (St. Petersburg Declaration), Preamble.
14. Protocol Additional to the Geneva Conventions of 12 August 1949. Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 35 (2).
15. Common Article 3 to the Geneva Conventions of 1949.
16. Nils Melzer, "International Humanitarian Law: a comprehensive introduction", ICRC, August 2016, p. 20.
17. Geneva Convention IV, Art. 27.
18. Page Wilson, "The myth of international humanitarian law", International Affairs 93:3, 2017, p. 565.
19. Nils Melzer, "International Humanitarian Law: a comprehensive introduction", ICRC, August 2016, p. 34.
20. Ibid.

soldiers and civilians during war, ultimately driving the systematic codification of what today is known as IHL.

In North America, the move toward codification of humanitarian rules was triggered by the barbarities of the United States Civil War. This motivated the US government to adopt the Lieber Code.[21] Although this was not an international treaty but rather a domestic instrument, it led to the "development and codification of modern IHL well beyond the borders of the [U.S.]".[22] In Europe, Henry Dunant, a Swiss businessman, was another pioneer of this process of codification of IHL. After witnessing the carnage of the Battle of Solferino (1859), Dunant was appalled by the dearth of assistance and protection for the wounded left on the battlefield. Returning to Geneva, he wrote *Un Souvenir de Solferino,* in which he proposed measures to alleviate the suffering of war victims. Dunant's book was a huge success throughout Europe, and his suggestions led to the foundation of the International Committee of the Red Cross (ICRC) in 1863, as well as to the adoption of the first Geneva Convention for the Amelioration of the Conditions of the Wounded in Armies in the Field in 1864.

From the adoption of these first legal instruments, IHL has extended its treaty body in conjunction with developments in armed conflicts to become "one of the most codified branches of international law".[23] In 1906, the original Geneva Convention was expanded to further ameliorate the conditions of the wounded or sick in armies in the field and, in 1907, the Hague Regulations with respect to the Laws and Customs of War on Land laid down the general rules vis-à-vis combatant privileges, treatment of prisoners of war (POWs), and the relationship between belligerents and the inhabitants of occupied territories. In the course of the Great War (1914-1918), however, these treaties revealed several deficiencies and a lack of precision, which allowed great human suffering. Such omissions were overcome by the adoption of the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare in 1925 and, in 1929, a distinct Geneva Convention relative to the Treatment of Prisoners of War.[24]

The atrocities committed against both combatants and civilians during the Spanish Civil War (1936-1939) and World War II (1939-1945) provided compelling evidence of the need to adjust IHL once again to the ever-changing character of war. As a result, the 1949 Diplomatic Conference decided to make a fresh start and four new Geneva Conventions were drawn up: 1) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;[25] 2) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;[26] 3) the Convention relative to the Treatment of Prisoners of War;[27] and 4) the Convention relative to the Protection of Civilian

21. The Lieber Code was also known as the Instructions for the Government of Armies of the United States in the Field.
22. Nils Melzer, "International Humanitarian Law: a comprehensive introduction", ICRC, August 2016, p. 35.
23. Ibid.
24. Mohammad Saidul Islam, "The historical evolution of International Humanitarian Law (IHL) from Earliest Societies to Modern Age", Beijing Law Review 9, 2018, p. 299.
25. Hereinafter 'First Geneva Convention'.
26. Hereinafter 'Second Geneva Convention'.
27. Hereinafter 'Third Geneva Convention'.

Persons in Time of War.[28] These conventions remain in force and have become the most ratified treaties with 196 state parties.[29]

In the second half of the twentieth century, the global system that had been brewing for decades finally took shape. As a consequence of the creation of the United Nations, the process of decolonisation, and the consolidation of the so-called Cold War, new forms of armed conflict had arisen. War was no longer a prerogative of sovereign states; confrontations occurring between governmental armed forces and the forces of organised armed groups or between such groups became ordinary. Moreover, the delicate balance of terror gave rise to a military stalemate between the two international hegemons, which in turn instigated the upsurge of non-international proxy wars, in which the superpowers offered military and financial support to one side or the other.

Until today, the only provision of IHL applicable to non-international armed conflicts (NIAC) had been Common Article 3 of the 1949 Geneva Conventions, which basically claims that persons taking no active part in the hostilities must be treated humanely. To deal with this legal gap, IHL had to adapt again to the challenges imposed by modern warfare. Hence, in 1977, the international community adopted two protocols additional to the Geneva Conventions, further developing the treaty body of the law of armed conflict. Additional Protocol I, covers the protection of victims of international armed conflicts (IAC) and "contains the first systematic codification of IHL governing the conduct of hostilities".[30] It also equated conflicts in which people are fighting against colonial domination, alien occupation, and racist regimes to international armed conflicts, therefore extending the same rights and privileges enjoyed by state's combatants to members of insurgent forces. Additional Protocol II, in contrast, concerns the protection of victims of non-international armed conflicts, complementing the basic principles laid down in Common Article 3. In 2005, a third protocol was adopted, adding the "red crystal" to the list of emblems used to identify neutral humanitarian aid workers. Concurrently, the desire to stop unnecessary pain or suffering, and to reduce incidental loss of life and injury to civilians, has brought about a wide range of international conventions and protocols banning or regulating the development, storage, or use of several armaments, such as chemical,[31] bacteriological,[32] incendiary,[33] and blinding laser weapons,[34] as well as landmines and cluster munitions.[35] Moreover, it is important to bear in mind that, now, states are under the obligation to assess whether the employment of new weapons, means or methods of warfare is in agreement with the rules and principles of international law.[36] International tribunals have also contributed to the development of both cus-

28. Hereinafter 'Fourth Geneva Convention'.
29. According to Article 14 of the 1969 Vienna Convention on the Law of Treaties, ratification is the expression of state's consent to be bound by a treaty.
30. Nils Melzer, "International Humanitarian Law: a comprehensive introduction", ICRC, August 2016, p. 36.
31. Convention on the Prohibition of the Development, Production and Stockpiling of Chemical Weapons and on their Destruction, a.k.a. Chemical Weapons Convention.
32. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) Weapons and on their Destruction, a.k.a. Biological Weapons Convention.
33. Protocol (III) on Prohibitions or Restrictions on the Use of Incendiary Weapons to the Convention on Certain Conventional Weapons.
34. Protocol (IV) on Blinding Laser Weapons to the Convention on Certain Conventional Weapons.
35. Convention on the Prohibition of the Development, Production and Stockpiling of Anti-Personnel Mines and on their Destruction, a.k.a. AP Mine Ban Convention; Convention on Cluster Munitions.
36. Art. 36 of the Additional Protocol I to the Geneva Conventions.

tomary and treaty rules of IHL through their clarification and harmonious interpretation.[37] After more than a century of modifications, enhancements, and codifications, these once imprecise and erratic practices have become a robust, universally binding legal framework, which regulates warfare and provides humanitarian protection to civilians and combatants of all kinds. Despite its relative maturity, IHL has faced a variety of fresh challenges caused by the technological advancements of the twenty-first century.

CONFLICT IN EASTERN UKRAINE AND THE POTENTIAL BREACHES OF THE GENEVA CONVENTIONS

Since 2014, the eastern part of Ukraine, encompassing the Luhansk and Donetsk Oblasts and collectively known as the Donbass, has been engulfed in armed conflict. This conflict stems from a wider set of issues, namely, in whose orbit Ukraine will place itself in the international sphere. Combat has been violent, but this has decreased in scale due to foreign interventions to limit the use of heavy weaponry. However, breaches of the convention are to be found, and the conflict remains active. The fighting largely takes place around civilian centres of population, resulting in substantial civilian damages. Therefore, the question arising in relation to this conflict is whether the parties have violated IHL, more specifically the Geneva Conventions, and if so, which provisions have been violated. Thus, attention will be paid to the development of the conflict, its status under international law, and finally, the provisions of international law applicable to this conflict and the alleged violations.

The Donbass Conflict

Since 1793 and the partition of Poland, the bulk of Ukraine has been under continuous, direct Russian control up until the fall of the Soviet Union in 1991. However, successive pro-Russian governments have dominated Ukrainian internal affairs, with an interlude in 2004 marked by the Orange Revolution. However, this was replaced by a pro-Russian government. In 2010 the signing of the Kharkiv Pact extended the Russian lease of a naval base in Sevastopol on the Crimean Peninsula and provided Ukraine with discounted gas imports.[38]

The genesis of the current conflict stems from the signing, and later abandoning, of the European Union-Ukraine Association Agreement in November 2013 by the Kiev government of the day.[39] This agreement was replaced by the signing of a Ukraine-Russia trade agreement to ensure that Kiev stayed within the Russian economic zone. This was immediately followed by a violent protest, known as the Maidan protest. This toppled

37. For instance, the International Criminal Court, the International Court of Justice, the ad hoc Tribunals for the former Yugoslavia, Rwanda, and Sierra Leone.
38. Astrov, "The Great Power (Mis)Management: The Russian-Georgian War and Its Implications for Global Political Order". (London: Routledge, 2016)
39. BBC News. "Ukraine Crisis: Timeline," November 13, 2014. Available at: https://www.bbc.com/news/world-middle-east-26248275

the pro-Russian government and replaced it with a pro-EU government. Russia, the overlord of Ukraine during the Soviet era and Ukraine's main trading partner felt its grip slipping and moved to protect its interests.[40] These were found in the Sevastopol naval base, and further, in asserting its influence over the predominantly Russian populated areas of eastern Ukraine, namely, in the Luhansk and Donetsk Oblasts.[41] Furthermore, Russia sought to destabilise Ukraine to ensure the country could not be governed effectively, which would check the expansion of Western influence, a Russian ambition since the end of the Cold War.

In April 2014, the occupation of government buildings by Russian separatists began in the Luhansk and Donetsk Oblasts.[42] This occupation, and subsequent attempts to re-establish control, saw the region descend into open war, pitting western backed Kiev central government forces against the Luhansk and Donetsk based separatist forces backed by Moscow. Even though the bulk of the fighting took place between June 2014 and February 2015, this period was marked by the signing of the Minsk agreement, yet, fighting sporadically erupts along the line of contact to this day.[43]

Car ICRC, Yozh, February 23, 2015 (Source: https://commons.wikimedia.org/wiki/File:Car_ICRC.jpg)

Car of the International Committee of the Red Crescent in Ukraine 2015.

The Donbass case and its categorisation as an armed conflict under international law

It must be noted before any analysis that Ukraine and Russia are both party to the Geneva Conventions and the Additional Protocols I and II.

In analysing whether or not there have been breaches of IHL, the conflict in question in the Donbass, must attain the threshold indicated in Article 2 of the Common Articles. The threshold for an IAC requires a dispute between states and an armed conflict. A dispute has aris-

40. Konończuk, Wojciech, and Wojciech Konończuk. n.d. "Russia's Real Aims in Crimea." Carnegie Endowment for International Peace. Accessed February 12, 2021. Available at: https://carnegieendowment.org/2014/03/13/russia-s-real-aims-in-crimea-pub-54914
41. Ibid.
42. BBC News. 2014. "Ukraine Crisis: Timeline," November 13, 2014. Available at: https://www.bbc.com/news/world-middle-east-26248275
43. Global Conflict Tracker. 2020. "Conflict in Ukraine." Global Conflict Tracker. 2020. Available at https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine

en between Ukraine and Russia, leading from the Euro Maidan protest to the annexation of Crimea by the Russians. The second rule of armed dispute is more difficult to establish as "officially no Russian soldiers" take part in the fighting in the Donbass.

A variety of reports have established the presence of Russian army personnel fighting in the Donbass. However, Moscow affirms that such persons are volunteers, a claim undermined by the behaviour of Russian authorities towards Russian casualties, which tends to show a regulative regime for Russians fighting in the Donbass.[44] Furthermore, if Article 2 is not satisfied, an alternative route could be found in the doctrine of overall control test found in the *Tadic* case. It states that, to establish the participation of another state in a non-international armed conflict, it must be established that the state in question went beyond the financing and equipping of armed groups, and that it also was involved in the participation of the planning and supervision of the military operations. Reports have indicated the extensive Russian involvement in the set up and directing of the separatist movements.[45] It should be noted that such a conflict represents what can be characterised as a "hybrid conflict". These are conflicts that are both international and non-international armed conflicts. Yet, due to the extensive involvement of the Russian state in the conflict, it could be classified as an international one.

However, if failure to establish an international armed conflict arises, the possibility to fall back on the concept of non-international armed conflict could be useful. This can easily be ascertained as the minimum level of intensity required has been achieved as well as the criteria of minimum organisation. Thus, the narrow requirements of Additional Protocol II would easily be fulfilled and would trigger the application of IHL.

The war crimes in eastern Ukraine and the application of Geneva Conventions: laws relative to the treatment of prisoners and the protection of civilians in the Donbass case.

For the Conventions to apply, Article 2 of the Common Articles states that there must either be a declared war or any armed conflict even if the state of war is not recognised by the belligerent. Hence, in terms of triggering the Conventions, a *de facto* state of war must exist. Thus, a wide variety of violent interactions between states can activate the application of the Conventions. Finally, when analysing whether or not the Conventions are triggered, the analysis must centre around, whether there is a dispute between states, and whether there is an armed conflict.[46]

In cases of non-international armed conflict (NIAC), in the territory of one of the parties, each party shall be bound to apply minimum standards found in Article 3 of the Common Articles. An internal conflict would not trigger the full body of the law of war, but rather a limited set of protections. Furthermore, Additional Protocol II of the Convention supplements the substantive provisions of Common Article 3. It does so by formalising the criteria for the application of the Convention to a non-international armed conflict. By laying down the conditions that dissident armed

44. International Partnership for Human Rights. "Fighting Impunity in Eastern Ukraine", 2015, Brussels.
45. Ibid.
46. Bill Brian J., "Law of War Deskbook". Charlottesville, Va, International and Operational Law Dept., The U.S. Army Judge Advocate General's Legal Center and School.

forces or other organised armed groups, they must be under responsible command and exercise control over part of a state to enable them to carry out sustained and concerted military operations for the conflict to be caught under international law. Hence, the scope of application of the Convention is effectively narrowed to groups capable of carrying out military operations rather than forms of dissent characterised by violence.

Once it has been established that an international armed conflict is occurring, persons to attain POWs status must satisfy certain criteria.[47] Such is found in Article 4 of the third Geneva Convention. The criteria are as follows; being commanded by a person responsible for their subordinates, having fixed distinctive insignia, carrying arms openly, and conducting their operations in accordance with the laws and customs of war. If such conditions are met, the combatant captured will be accorded POW status.[48] Such status carries protection from certain predicaments, such as the right to humane treatment, to not be subject to medical experiments; to be protected from violence, intimidation, insults and public curiosity; to receive medical care, and be immune to warlike acts.[49] Hence, POWs receive extensive protection under International Humanitarian Law.[50] However, such is only for international armed conflict.

For NIAC, the status of POWs is not extended to persons participating in combat. The servicemen captured would not enjoy the immunity of prosecution from acts of war, nor the extensive protection granted by the Third Geneva Convention. However, certain minimum protections are found that cannot be disregarded. These are to be found in Common Article 3, and Additional Protocol II. They protect from murder, torture, taking of hostages, humiliation, and degrading treatment, and the right to a fair trial. These minimum standards cannot be disregarded at any time. However, in non-international armed conflict, domestic law is the standard for dealing with captured personnel.[51]

In both cases, while the protection for POWs in international armed conflict is more extensive, there is a minimum level of protection accorded to combatants in internal conflict. These protections cannot be derogated from and are at the core of substantive protection of POWs in international conflicts.

One case regarding humiliation towards POWs is that of Lieutenant Savchenko of the Ukrainian Air Force.[52] Lt Savchenko was captured by the Luhansk People's Republic armed forces during active hostilities. At first, she was transferred to Russia and detained as an undocumented refugee; then, she was detained in a civilian detention centre where she was charged with killing two Russian journalists.

As explained previously, the conflict in the Donbass could be categorised either as a NIAC or IAC. The legality of Savchenko's detention depends on the nature of the conflict in which she was "captured" or "fell into

47. Supra no 46
48. Ibid.
49. Puls Keith E., Editor. Law of War Handbook. Charlottesville, Va, International and Operational Law Department, The Judge Advocate General's Legal Center and School, U.S. Army.
50. Rodley, N. S.& Pollard, M."The treatment of prisoners under international law.", 2011, Oxford University Press.
51. Cullen, Anthony, and University Of Cambridge. "The Concept of Non-International Armed Conflict in International Humanitarian Law", 2010, Cambridge, Cambridge University Press.
52. Nuzov, Quintin "The Case of Russia's Detention of Ukrainian Military Pilot Savchenko under IHL". Available at: https://www.ejiltalk.org/the-case-of-russias-detention-of-ukrainian-military-pilot-savchenko-under-ihl/

Russian hands". If we consider the conflict as an IAC, then Savchenko's internment would be permitted by Article 21 of the III Geneva Convention, as she was detained as an undocumented refugee. While she would have a presumption of POW status under Article 45 of Additional Protocol I, Russia interned Savchenko under Article 105 of the Russian Criminal Code. During an IAC, this would only be possible if Russia were in charge of a court with jurisdiction over members of the armed forces, as provided in Article 102 of the III Geneva Convention. In this case, there is a civilian court and prosecuting a POW in a civilian court is a violation of IHL and Article 5 of the European Court of Human Rights (ECtHR).

On the other hand, if this was an NIAC, as Russia is dealing with the conflict, authors such as Horowitz argue that IHL has no provision for authorising internment.[53] In general, IHL explicitly prohibits the transfer of civilians. However, Savchenko was detained by a state not a party to the conflict. The regulation falls within the scope of Article 105 of the Russian Criminal Code, which provides for the prosecution of persons suspected of crimes against Russian citizens abroad. However, if there was clear evidence confirming the death of the Russian journalists, the transfer would be legitimate in this particular case. Savchenko's case is not unique, there is evidence of unlawful detentions carried out by both separatist and government forces in Ukraine.[54] However, as mentioned before, this does not constitute a crime under non-international armed conflict law.[55]

Furthermore, evidence of execution of Ukrainian servicemen has been documented.[56] To a lesser extent, murders have been committed by pro-Kiev forces.[57] Such murders constitute violations of the Common Article 3, Article 50 of Geneva I, Article 51 of the II Geneva Convention, Article 130 of the III Geneva Convention, and Article 147 of the IV Geneva Convention. Therefore, these constitute war crimes in both international and non-international armed conflicts. In addition, acts such as torture by both pro- and anti-government forces against both civilians and combatants have been documented.[58] Anti-Kiev forces have also been documented engaging in humiliating treatment, such as the parading of prisoners.[59]

Thus, all of the above constitute war crimes under both regimes of international law as they violate the minimum requirements for the protection of persons. Therefore, while it is a crime if the conflict is ascertained to be an international one, it would not be one if it was an internal one.

Moreover, reports of indiscriminate attacks on civilians have been reported. Indiscriminate attacks on civilians and civilian objects stem from the fact that this conflict occurs in a densely populated region. The use of unguided weapons, such as rocket artillery, has led to a high civilian death toll.[60] Addi-

53. As an example, Horowitz, IHL Doesn't Regulate NIAC Internment - A drafting history perspective. Available at: http://opiniojuris.org/2015/02/09/guest-post-ihl-doesnt-regulate-niac-internment-drafting-history-perspective/
54. Supra no 44
55. R. Atadjanov, "War Crimes Committed during the Armed Conflict in Ukraine: What Should the ICC Focus On?", p. 385–407.
56. Supra no 44.
57. Ibid.
58. Human Rights Watch World Report 2016. Events of 2015. New York, Ny: Seven Stories Press.
59. Supra no 44
60. Human Rights Watch, "Ukraine: Unguided Rockets Killing Civilians." July 2014. Available at https://www.hrw.org/news/2014/07/24/ukraine-unguided-rockets-killing-civilians

tionally, reports have concluded that attacks are deliberately aimed, or show disregard, toward the civilian population.[61] In all instances where an attack took place against forces placed in dense urban areas, using unguided weapons, there is a failure of the proportionality test, which is a legal requirement when attacking such military objectives. Such attacks are indiscriminate toward the civilian population and constitute war crimes under both regimes of international law pursuant to Article 51(5)(a) of Additional Protocol I and Additional Protocol II Article 13. Finally, reports have demonstrated that there have been cases of several summary executions in rebel-controlled areas, of supporters of the Kiev government.[62] These have been conducted through the use of death squads operating in rebel-controlled territory.[63]

The protection of civilians for international armed conflict is found in the Geneva Convention IV and Protocol I. The definition of a civilian is found in Protocol I Article 50(1). This asserts that if one is not a lawful combatant, then one is a civilian. Furthermore, according to Article 51(3) Protocol I, a civilian loses status when partaking in a direct part in hostilities. Hence, civilians should abstain from hostile acts, otherwise, they would lose their status and protections.[64] The kind of protection that a civilian would enjoy in an international armed conflict are as follows, protection from murder and torture, pillage, and indiscriminate destruction of property, taking of hostages, collective punishment, prohibition of unlawful detention, and the passage of medical supplies must be allowed.[65]

In cases of NIAC, the relevant protection that a civilian would enjoy is to be found in the Common Article 3, and the definition of a civilian in these instances is enshrined in Article 4 of the Additional Protocol II. It is defined as someone who does not take part directly in hostilities. The protections enjoyed by civilians in such a case are found in common Article 3, and they set the minimum standards that they should enjoy, while Article 4 of the Additional Protocol II expands the principle.[66] The major protections enjoyed are as follows, prohibition of violence toward a civilian, murder or cruel treatment, hostage taking, and protection from attacks against object indispensable to civilian survival.[67]

Hence, the level of protection found for the civilian population in both international armed conflict and non-international armed conflict overlap to a certain extent. Namely, they overlap on the basic, fundamental, and non-revocable humanitarian protection, which is equated with traditional protection of POWs.[68] This covers both procedural and substantive human rights and humanitarian protection.[69] The overlap of protection of civilians is found in the prohibition of murder, prohibition of torture, cruel or inhuman treatment or outrage against personal dignity and taking of hostages. Then, the difference of regime relates to the fact that unlawful con-

61. Supra no 44
62. Human Rights Watch. "World report 2015: Events of 2014". New York, Ny, Seven Stories Press. 2015
63. Supra no 44
64. Supra no 49
65. Ibid.
66. Jean-Marie Henckaerts,et al, "Customary International Humanitarian Law", 2005, Cambridge, New York: Cambridge University Press.
67. Supra no 49
68. Emily Crawford, "The Treatment of Combatants and Insurgents under the Law of Armed Conflict". Oxford: Oxford University Press.
69. Ibid.

finement is not a problem regarding non-international armed conflict, while it would be for an international conflict.

Thus, while the regime that would govern this conflict is ambiguous, the overlap between both regimes of international law ensures that the liability for war crimes can be established. For the serious crimes of torture, murder, degrading treatment and indiscriminate attack on civilians, liability can be established in this conflict. Additionally, the exactions against surrendered belligerents, liability can also be established. The only category that would escape liability under the NIAC regime would be illegal imprisonment. Consequently, the great majority of war crimes in Ukraine could create state liability under international law.

In the Ukraine conflict, there is extensive documentation of war crimes committed by both parties to the conflict. Such war crimes have been perpetrated contrary to provisions that largely can be found in both regimes of IHL. As a result, it would be difficult for the parties of the conflict to escape liability regarding the crimes committed. This raises the question: Who will be liable? This answer will ultimately rest on the final classification of the conflict under international law, but there is no doubt that war crimes have been committed against civilians and surrendered soldiers.

IHL AS AREMAIN OF A LONG-LASTING WAR

One of the most recent violations of the principles of international law has been the Nagorno-Karabakh conflict, a region in Azerbaijan largely populated by ethnic Armenians. In this chapter, we will focus on how this situation, full of overlapping territorial claims by both Azerbaijan and Armenia, evolved and which breaches of international law were committed describing one specific situation: the rights of self-determination and self-defence that, unfortunately, led to the use of force.[70] Due to the complexity and length of this conflict, details such as the Minsk Group actions or the Russia and Turkey positions in supporting Armenia or Azerbaijan will not be considered.

Nagorno-Karabakh conflict

The Armenian-Azerbaijan international armed conflict began in 1988, three years before either Armenia or Azerbaijan gained independence from the Soviet Union.[71] According to the principle of *uti possidetis juris*, which serves to preserve the boundaries of colonies emerging as states, Azerbaijan preserved its territorial integrity.[72] Yet, Armenia claimed its ideas and rights, occupied several territories and changed the demographic structure of the occupied territories by transferring its own civilians into these new territories in contravention of the IV Geneva Convention, namely Article 49 paragraph 6

70. European Parliament, "Armenia and Azerbaijan on the brink of war", 2020. Available at https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/659267/EPRS_ATA(2020)659267_EN.pdf
71. Ali Askerov, "The Nagorno Karabakh Conflict- The Beginning of the Soviet End", February 2020.
72. Legal Information Institute, "Utis Possidetis Juris", Cornell Law School. Available at https://www.law.cornell.edu/wex/uti_possidetis_juris

by which "[t]he occupying power shall not deport and transfer of its own civilian population into the territory it occupies" leading to a gross violation of international law.[73]

In 1993, Armenian armed forces managed to occupy the Nagorno-Karabakh region, by then recognised by the international community as part of Azerbaijan.[74] In the process, they self-proclaimed the unrecognised Republic of Nagorno-Karabakh, also known as "Republic of Artsakh". In 1994, the international community put pressure to end the war leading Russia to a ceasefire between the two countries, providing two decades of relative stability.

Despite this, a great deal of violence occurred during the four-day war in April 2016, with both sides accusing each other of launching military actions. In the course of fighting, both parties used all weapons at their disposal (tanks, heavy artillery, rocket launchers, and to a limited extent: airpower) and engaged in acts such as the shelling of civilian targets, something expressly prohibited by the IV Geneva Convention.[75] The clashes ended on the 5th of April with a ceasefire.

In September 2020, conflict over Nagorno-Karabakh escalated once more, with Azerbaijan's military put on the offensive and claiming its right of self-defence. At the outbreak of this round of violence, new tensions had arisen between Armenia and Azerbaijan deriving from renewed hostilities and more intense fighting than in previous skirmishes.

Nagorno-Karabakh conflict, CuriousGolden, December 19, 2020 (Source: https://commons.wikimedia.org/wiki/File:Nagorno-Karabakh_conflict.png)

Geographic depiction of the Nagorno-Karabakh Conflict (December 2020)

73. Parliamentary Assembly, "Illegal settlement of Armenians in the occupied territories of Azerbaijan by Armenia as a gross violation of the principles of international law", June 2006. Available at https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11341&lang=EN

74. BBC, "Armenia-Azerbaijan: "Why did Nagorno-Karabakh spark a conflict?", November 12, 2020, Available at https://www.bbc.com/news/world-europe-54324772

75. Aleksandra Jarosiewicz and Maciej Falkowski, "The four-day war in Nagorno-Karabakh", April 6, 2016. Available at https://www.osw.waw.pl/en/publikacje/analyses/2016-04-06/four-day-war-nagorno-karabakh

International organisations, such as Amnesty International reported that "[b]oth Armenian and Azerbaijani military forces carried out disproportionate and indiscriminate attacks prohibited under IHL."[76] Fighting ended on November 10, again with the Russian intervention, leading to a negotiated truce.[77] This not only led to the termination of fighting, but it also changed the existing territorial *status quo*, with Azerbaijan regaining control of all seven surrounding districts and parts of Nagorno-Karabakh.[78]

Application of international law to the conflict

During the years of combat, military occupation, civilian deaths, and humiliation of POWs, the principles of IHL, Human Rights Law, the Geneva Conventions and their Additional Protocols have been violated.

Since the outbreak of hostilities, a clash between the principles of territorial integrity and self-determination has existed in the Caucasus.[79] The first principle, enshrined in Article 2 paragraph 4 of the UN Charter declares "the prohibition of the use of force", which encompasses the inviolability of the territory of the state, including territories under the effective control and possession of a state.[80] Additionally, the right of self-determination is considered as one of the core principles by virtue of its status of *erga omnes*.[81] This outlines the duty of states to respect and promote this right and the obligation to refrain from any forcible action which deprives people of such right. In particular, the use of force to prevent people from exercising their right of self-determination is regarded as illegal; this has been consistently condemned by the international community, see the *East Timor case* - Portugal v. Australia or the cases of declaration of independence of Kosovo, Abkhazia and South Ossetia.[82] Referring to the Armenia-Azerbaijan conflict, further questions come into play when questioning the territorial integrity according to the peoples' right to self-determination[83] and whether such self-determination is lawful according to IHL. These issues are to be answered in the following paragraphs.

Right of self-determination, self-defence and use of force. What is legitimate?

Armenia has occupied Azerbaijani territory for more than thirty years. According to Article 42 of the 1907 Hague Convention, "a territory is considered occupied when it is actually placed under the authority of the hostile army."[84] However, the IV Geneva Convention and its Additional Protocol are the most re-

76. Amnesty International, "Civilian casualties from unlawful strikes in the Armenian - Azerbaijini conflict over Nagorno-Karabakh", January 14, 2021. Available at https://www.amnesty.org/download/Documents/EUR5535022021ENGLISH.PDF
77. RadioFreeEurope RadioLiberty, "HRW: Azerbaijan Mistreats Armenian Prisoners of War", December 3, 2020. Available at https://www.rferl.org/a/hrw-azerbaijan-mistreats-armenian-prisoners-of-war/30981697.html
78. Annyssa Bellal, "Military occupation of Azerbaijan by Armenia", June 3, 2019. Available at https://www.rulac.org/browse/conflicts/military-occupation-of-azerbaijan-by-armenia
79. Carol Migdalovitz, "Armenia-Azerbaijan Conflict", 2003, Congressional Research Service. Available at https://www.everycrsreport.com/files/20030709_IB92109_040563c72e8a315fcf3834fbf6e8952da3e0040b.pdf
80. Princeton University, "Territory integrity". Available at https://pesd.princeton.edu/node/686
81. Diakonia International Humanitarian Centre, "International Law and Self-Determination". Available at https://www.diakonia.se/en/IHL/The-Law/International-Law1/IL--Self-Determination/. It says that the principle "was adopted by the United Nations General Assembly in 1970, by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and by the International Covenant on Civil and Political Rights (ICCPR)".
82. Vesna Crnić-Grotić, "The right to self-determination - the Kosovo case before the International Court of Justice", 2011, Faculty of Law. It states: "the ICJ advisory opinion on Kosovo did nothing to clarify the situation – it solely concluded that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently, the adoption of that declaration did not violate any applicable rule of international law. It did not, however, decide about the legal consequences of the declaration or whether or not Kosovo has achieved statehood, or about the validity or legal effects of the recognition of Kosovo".
83. Aytekin Kaan Kurt, "The Karabakh Armistice: Between the Principle of Territorial Integrity and Peoples' Right to Self-Determination", December 2020. Available at http://cilj.co.uk/2020/12/17/the-karabakh-armistice-between-the-principle-of-territorial-integrity-and-peoples-right-to-self-determination/
84. Nigar Mustafayeva, "Whether the Change in the Status of the Nagorno-Karabakh Armed Conflict from Non-international to International Meant for the Status of Protected Persons Affected by That Change?", December 1, 2012. Available at https://www.duo.uio.no/bitstream/handle/10852/35643/DUOxPILxthesis.pdf?sequence=1&isAllowed=y

cent codifications of international law on occupation. These treaties reflect a shift encompassing occupation situations outside traditional belligerent occupation and applying "new rules to international armed conflicts" to shield civilians from harm.[85] Article 4 of the IV Geneva Convention safeguards the preservation of the occupied government's authority over the occupied territory, stating that "the territory's legal status will remain unaffected by occupation". Besides, the occupied state's sovereignty is further protected by Articles 47 and 49 of the IV Geneva Convention, for which civilians, under the control of the occupied territory, "shall not be deprived, in any case, or any manner whatsoever, of the benefits of the present Convention by any change introduced". It also states that "[i]individual or mass forcible transfers [...] from occupied territory to the territory of the Occupying Power [...] are prohibited, regardless of their motive", ensuring in Article 6, that this is to be continued even after fighting has ceased.

However, the current conflict situation is far from a *simple* occupation. Armenia's *de facto* occupation of the territory for the last three decades and Azerbaijan's violent response do not comply with modern international occupation law. This is because there are no codified international laws allowing for a clear understanding of the occupation of territory. Thus, the Nagorno-Karabakh occupation is plagued by questions of whether the international law of occupation even applies,[86] whether the right to Armenian self-determination is applicable,[87] or if the use of Azerbaijani's self-defence invoking the use of force happens to be legitimate.

Concerning the last two rights, scholars such as Kaan Kurtul pose the questions of whether there is really a conflict with territorial integrity in the case of Nagorno-Karabakh. While authors such as Ruys and Rodríguez cross-examine the question of "[i]f we assume that the region [...] is unlawfully occupied by Armenia, can Azerbaijan claim self-defence to lawfully recover it, even though the current territorial *status quo* in the region has existed for a quarter of a century?"[88]

As a matter of the right of self-determination, Armenia claims the international community has common agreement that Armenia must withdraw its troops and seek a peaceful agreement. However, the question grows in complexity due to the overlapping territorial claims. If examined closely, the right of self-determination has been recognised by the International Court of Justice (ICJ) as an obligation *erga omnes* and an essential principle of contemporary international law. The sanctity of this right is also explicitly recognised under Article 1 (4) of the Additional Protocol I, wherein the struggles of people "fighting against colonial domination and alien occupation and racist regimes in the exercise of their right of self-determination…" are recognised as an IAC. This is supplemented by Article 96 (3) of Additional Protocol I, whereby an authority representing a people may unilaterally declare their intention to be bound by the Geneva Conventions and Additional Protocol I. With the Additional Protocol I, the right

85. Carolyn Morway, "Armenia and Azerbaijan's Struggle with Occupation in Nagorno-Karabakh", December 31, 2018. Brooklyn Journal of International Law, Vol 44, Issue 1.
86. Carolyn Morway, "Armenia and Azerbaijan's Struggle with Occupation in Nagorno-Karabakh", December 31, 2018. Brooklyn Journal of International Law, Vol 44, Issue 1.
87. Ani Harutyunyan, "War Crimes Under International Law Committed By Azerbaijani Forces In The Course Of Their Military Operation Against Artsakh (Nagorno Karabakh) And Armenia", November 07, 2020. Available at https://peacedialogue.am/en/2020/11/07/war_crimes_en/
88. Tom Ruys and Felipe Rodríguez Silvestre, "The Nagorno-Karabakh Conflict and the Exercise of "Self-Defence" to Recover Occupied Land", November 10, 2020. Available at https://www.justsecurity.org/73310/the-nagorno-karabakh-conflict-and-the-exercise-of-self-defense-to-recover-occupied-land/

to self-determination seems firmly grounded within the IHL regime. However, this is not entirely the case as there is potential of such conflicts occurring between Non-State Actors (NSAs) and Non-State Parties of Additional Protocol I, such as the case of Nagorno-Karabakh, where Armenia is party to it whilst Azerbaijan is not.[89]

Therefore, the right of people to self-determination exists for people under colonial and alien domination who are not living under the legal form of a state, which at first sight would not be the case of Armenia. Thus, it can be argued that Armenia is violating the territorial integrity of Azerbaijan and the principles of the United Nations by sending armed forces into Nagorno-Karabakh. Responding to this, Armenia claims self-defence, but this lacks solid grounds since they also shell and attack Azerbaijan's troops and keep the territory under military control. In any case, such use of force is prohibited unless Armenia's use of force is authorised by the UN Security Council, according to UN Charter Article 2 (4). Armenia's invasion of this part of Azerbaijan territory, therefore, constitutes a violation of the prohibition of the use of inter-state force in the UN Charter, Article 2 (4) in relation to Article 2 (3), which states that the conflicts between states shall be settled peacefully.

In few words, Armenia has ultimately become the guarantor for exercising the right to self-determination of the people of Artsakh. Such has led to the claim of self-defence and the consequent use of force by the Azeri's to counter the military occupation.

In this sense, the right to self-defence is recognised in Article 51 of the UN Charter as well as customary international law by which "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security". Hence, the use of force invoked seems lawful when considering the resolutions of the Security Council. However, since it did not comply with UN Security Council resolutions, Azerbaijan failed on its side, leading to escalated tensions as Azerbaijan pushed to resolve the conflict by force. This has resulted in a complete breakdown of the UN Security Council resolutions and international law.

Note also, the use of force in self-defence is only lawful where it is a response to an armed attack which is ongoing, and is necessary, and where the use of force is proportionate. Therefore, we must consider both the immediacy of the response in self-defence and the notion that the use of force is a last resort. Since prolonged occupation arising out of force constitutes a continuing attack, any requirement relating to immediacy is met, and the question then turns to the last resort element of necessity.[90]

Neither of these have led to an end of the conflict, and today the question remains unresolved. Once again, the lawfulness of actions carried out by both countries have their explanations in international treaties and legal mechanisms. What is certain is that self-determination and self-defence rights, closely followed by the use of force operating in both

89. Shayan Ahmed "The Inapplicability of the Geneva Conventions to Self-Determination Movements", November 25, 2019, Cambridge International Journal Law. Available at: http://cilj.co.uk/2019/11/25/the-inapplicability-of-the-geneva-conventions-to-self-determination-movements/

90. Dapo Akande &Antonios Tzanakopoulos, "Use of Force in Self-Defence to Recover Occupied Territory: When Is It Permissible?", November, 18 2012. Available at: https://www.ejiltalk.org/use-of-force-in-self-defence-to-recover-occupied-territory-when-is-it-permissible/

countries, are not ensuring the protection of civilians.

This protection of human rights is at the centre of discussions when considering violations of international law. The targeting of civilians by both countries and the recent degradation and humiliation of POWs by Azeri forces have breached the principles of IHL, namely, the Geneva Conventions. As explained through the Donbass Conflict, the Armenian-Azerbaijan can be categorised as IAC, thus the same provisions should apply to this conflict.

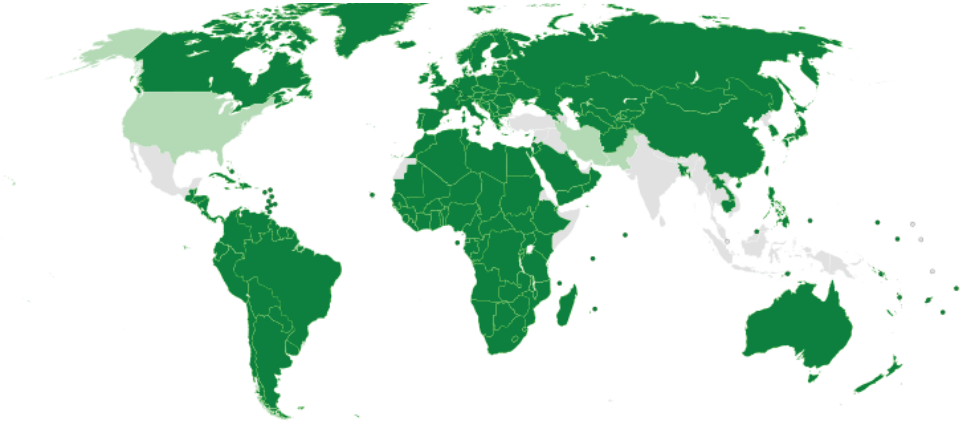
NEW WARFARE AND COMPLIANCE WITH IHL. CHALLENGES AND SOLUTIONS

In the post-World War II period, warfare has changed immensely due to the evolution of technology, weapons, and states' political status. This poses questions regarding the application of International Humanitarian Law and whether the rules of war remain effective. We must now discuss the challenges of IHL with Non-State Actors (NSA) and the new concepts of war that have emerged in recent decades. We must analyse the evolution of warfare and how, with new weapons, there are various consequences relating to the principles of IHL. Finally, we must analyse possible solutions to be able to implement IHL.

International humanitarian law in the future

In the twenty-first century, the conditions of armed conflicts dramatically changed and consequently, so did the application of the IHL. One of the main problems facing IHL is the perception of State and Non-State Actors to preserve their objectives since there is often a lack of compliance in any form.[91] Another factor regarding the implementation of IHL is the evolution of military technology. The continuing development of new weapons poses many challenges for the implementation of IHL, the consequences of which are mainly reflected in the difficulty of respecting the principles of distinction (explained in chapter I), proportionality, and precaution.[92] These principles are enshrined in Articles 51 and 57 of the Additional Protocol I, to constantly protect civilians and civilian objects from military strikes. Linked to this principle, we find the principle of proportionality that prohibits attacks that may cause incidental and excessive damage compared to the military advantage. In addition, the precautionary principle requires selecting the means and methods of warfare to minimise civilian losses and send a warning before the attack. These principles are not easily applicable to new weapons such as drones or cyberwarfare, which could cause incidental harm to civilians, as they make no distinction between combatants and civilians

91. Kelley, Morgan, "Challenges to Compliance with International Humanitarian Law in the Context of Contemporary Warfare" (2013). Independent Study Project (ISP) Collection. 1618.
92. Doswald-Beck, Louise, "Implementation of International Humanitarian Law in Future Wars", International Law Studies.



Geneva Conventions Protocol II Signatories, Jesuiseduardo, April 10, 2019 (Source: https://commons.wikimedia.org/wiki/File:Geneva_Conventions_Protocol_II_Signatories.svg)

A map showing the states parties and signatories of Protocol II of the Geneva Conventions applicable to NIACs

thus, complicating the application of IHL under these new circumstances.[93] [94] [95] This new generation of weapons leads to four complex situations: (i) the impossibility to discriminate between military and civilian targets; (ii) the difficulty to identify the operators of the weapon; (iii) the lack of responsibility of the machines for their actions; and (iv) the difficulty to recognise two different members of the different armed forces. However, there are no IHL provisions forbidding such warfare yet.[96]

Another concern regarding new warfare from the perspective of the LOAC is the disclosure of cyber-attacks and the difficulty of attributing responsibility to identify the person who committed the attack.[97] IHL demands to know who the perpetrator of the attacker is. This poses a challenge to successful implementation of the law[98] since there are no specific provisions concerning cyber warfare in IHL. As affirmed by Saidul Islam, "cyber-attacks are encouraged" which creates a serious problem when implementing the laws of war.[99] On the contrary, automated weapons are not (yet) permitted under IHL due to the indiscriminate nature of these weapons.

Automated weapons and cyberwar are "new war" stemming from a failure of the state, this creates the disintegration of institutional order. Government armies tend to transform to organised armed groups which are difficult to distinguish from non-state actors.[100] These groups, however, usually do not conform with Article 1 of the Additional Protocol II.[101] Although organised armed groups

93. Mohammad Saidul Islam, Contemporary technological development, and challenges to the International Humanitarian Law, IIUC Studies, 13, 2016.
94. Ibid.
95. Supra note 97
96. Tariq Bin Sarwar, "Challenges for Implementing International Humanitarian Law in the contemporary Landscape", 2017.
97. See Food For Thought, "Understanding cybercrime: challenges and threats".
98. Supra note 94
99. Supra note 96
100. Nicolas Lamp, "Conceptions of war and paradigms of compliance: the "new war"challenge to international humanitarian law", Journal of Conflict & Security Law, 2011, Vol. 16 No. 2, p. 225–262.
101. Additional Protocol II (1977) Article 1: "organised armed groups which, under responsible command, exercise such control over a part of [a High Contracting Party's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol"

are not recognised as combatants, IHL does not criminalise participation even if they are prosecuted when they fall into the hands of a state. Members of the armed groups are liable for prosecution; they have no right to kill or destroy military targets, and they do not enjoy POWs status.

The "new war" concept does not seek to destroy the enemy, but it follows a political and economic logic. The "new war" takes the place of the "old war", where state armed forces are replaced by other organised armed groups, which differ completely in the aim of the military victory. Thus, the conception of IHL is completely different if compared to the original objective.

What solutions for IHL?

The complexity of armed conflicts in the twentieth and twenty-first centuries is evident. After World War II, the conduct of warfare changed significantly. The 31st Conference of the Red Cross and Red Crescent outlines several characteristics of this evolution. First, conflict has a low-intensity character where a weakened state has left space in which armed groups operate illegal activities such as trafficking, violence, extortion and more.[102] Second, the presence of extraterritorial military intervention is a new form of foreign military participation.[103] Third, the impact of new technologies has major implications for the future of IHL.[104] Fourth, there is less distinction between ideological and non-ideological confrontation and the non-state armed groups arising from organised criminal activity.[105] Fifth and last, the evolution of technology, globalisation, and the proliferation of internal conflicts contribute to the complexity of the international system. The IHL was not created to operate in these mentioned conditions and it is important to recognise that it is also essential to refrain from generalising it in IHL.[106]

Scholars see two different ways to ensure compliance with existing humanitarian law by non-state actors: the development of new laws or through the modification of current laws.[107] The adaptation of the existing legal frameworks to non-state actors could create a way to modernise international law. However, the international system is slow and ineffective because of the difficulty of reaching consensus. One development in this sense comes from lawyers in interpreting the existing laws and applying them as best as possible to the present situation.[108] Backstrom and Henderson suggest that lawyers, engineers, computer science experts and operators should collaborate in case of review of Article 36 Additional Protocol, I related to the protection of the victims of an IAC.[109] This suggests that it is not necessary to be multidisciplinary, but it is necessary to have "a technical understanding of the reliability and accuracy of the weapons" and "how it will be operationally em-

102. International Committee of the Red Cross, "International Humanitarian Law and the challenges of contemporary armed conflicts," 2011, Geneva.
103. ICRC, "International Humanitarian Law and Challenges"
104. Morgan Kelley, "Challenges to Compliance with International Humanitarian Law in the Context of Contemporary Warfare" 2013. Independent Study Project.
105. Ibid.
106. Supra note 85
107. Program on Humanitarian Policy, "Transnationality, War and Law," ii
108. Interview conducted with Dr. Marco Sassòli, Chair of the Board of Geneva Call and Professor of International Law at the University of Geneva, on Tuesday April 30, 2013, Geneva.
109. A. Backstrom and I. Henderson, "New capabilities in warfare: an overview of contemporary technological developments and the associated legal and engineering issues in Article 36 weapons reviews"

ployed"[110] meaning that participants should have a sufficient understanding of the field to facilitate the interaction between the professions. Boulanin and Verbruggen suggest a deeper recommendation starting from the ICRC guide to weapons reviews. The first step is the best practice on the reviews of Article 36 of Additional Protocol I, where the review process needs to start as soon as possible during the study of the new weapon. Thus, all professionals involved in this process would need technical training on technology and international law.

Finally, there is the test and evaluation step in which we can assess possible risks. If possible, a computer simulation is recommended to reduce the cost of the procedure.[111] The authors also suggest rigorous research be linked to new weapons, and proposing questions depending on the type of weapons. The questions are the same for the analysis within our chapter concerning the application of the principles of distinction, proportionality and precaution and the verification of the compliance with international humanitarian law.[112]

CONCLUSION

From the origin of international law until today, there have been countless victims of armed conflict. Whilst the first legal codes were written as early as 1700BC, the so-called laws of war only began to take shape and solidify in the aftermath of the Battle of Solferino. The brutality of modern weapons, the cruelty of the battlefield and the death of thousands of innocent people, inspired actions to reduce the pain of war by punishing the warring States.

International law, codified in several legal instruments such as the Geneva Conventions and its Additional Protocols, the Hague Protocol, and International Humanitarian Law, provided a means to differentiate between those who took part in the hostilities who did not. Furthermore, that even those who took part in the violence must be treated humanely. The morals and ethics to which man is conditioned must be embodied in laws that chastise all acts leading to violence. The conflicts discussed within the paper are those where the enforcement of IHL remains a complex task where many grey areas exist regarding how international law and legislation principles must be applied. Such grey areas offer a permissive environment for the violation of human rights. Thus, international humanitarian law continues to evolve, and countries continue to unite to prevent wars. They do this by addressing the laws governing armed conflicts and demanding courts to make justice for their reasons.

However, laws will continue to change, just as Hammurabi first inscribed his code into

110. Ibid. Kathleen Lawand, 'Reviewing the legality of new weapons, means and methods of warfare', in International Review of the Red Cross, Vol. 88, No. 864, December 2006, pp. 925–930; ICRC, A Guide to the Legal Review of New, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977, pp. 17–18.
111. Boulanin, Verbruggen "Dealing with the challenges posed by emerging technologies" Article 36 Reviews, Sipri 2017
112. Supra note 93

Babylonian clay. New forms of warfare and new technology are developing in leaps and bounds. Physical wars will perhaps give way to virtual ones, and battlefields will progressively become devoid of life and possibly humanity. In contrast, the digital dimension will likely become the Achilles heel of society. If we look at the changes in national armies, it is clear that armed forces will have to adapt to new realities. Naturally, the law will need to keep pace. The development of new weapons and equipment will replace what has been known up to now. However, this change will be progressive and will require the efforts of the international community to remain united and to continue to rely on legal instruments.

(Source: https://commons.wikimedia.org/wiki/File:V.P.-HIST-00981-65.jpg)

Prisoners of the Greco-Turkish war being repatriated under the auspices of the International Committee of the Red Cross (ICRC) in 1922, Unknown author, December 31, 1922

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