THE SIXTH YEREVAN INTERNATIONAL CONFERENCE FOR YOUNG RESEARCHERS
"INTERNATIONAL HUMANITARIAN LAW: PROBLEMS AND PERSPECTIVES OF DEVELOPMENT"

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The collection is published in author's original. Views expressed in the articles reflect only the opinions of the authors and not necessarily the opinion of the organizers of the Conference.


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Foreword

The Russian-Armenian (Slavonic) University in partnership with the Delegation of the International Committee of the Red Cross (ICRC) in Armenia, International and Comparative Law Center and “Civil Society Institute” NGO is organizing the 7th International Conference for Young Researchers “150 years of Codified IHL: Moving Forward, Looking Back”, in Yerevan, Armenia, dedicated to the 150th anniversary of adoption of the First Geneva Convention. The Conference is aimed at creating a sustainable platform for young researchers to discuss the challenges of modern armed conflicts from the perspectives of the International Humanitarian Law, International Human Rights Law and International Criminal Law.

First Conference took place in April 2007 and since then became one of the most significant events held in Armenia in the sphere of International Law and particularly International Humanitarian Law.

The first six editions of the Conference hosted young researchers from almost all the CIS countries, as well as from Brazil, Czech Republic, Estonia, Georgia, Hungary, India, Iran, Israel, Netherlands, Poland, Switzerland and United Kingdom. During the events broad topics such as Status of Private Military Companies and Private Security Companies under International Humanitarian Law, The Status of Non-Privileged Categories of Persons Participating in Armed Conflicts (Unlawful Combatants, Mercenaries, Terrorists, Pirates), Status of Participants of Modern Armed Conflicts, War Crimes and Their Contemporary Interpretation, Implementation of IHL Norms and War Crimes and Crimes against Humanity Repression, Interaction between International Humanitarian Law and International Human Rights Law were debated. All the topics presented during the previous editions of the Conference, as well as the current one, were and will be published in a special volume. A survey conducted among former participants, revealed that more than 80 % of former participants intend to return to the Conference. The stated confirms once again that the objective of the Conference, which was creation of a solid forum for young researchers involved in the International Humanitarian Law, International Human Rights Law and International Criminal Law, has been achieved. The forum is recognized and continues to enlarge the scope of the topics discussed and countries participating.

Organizing Committee of the Conference
October 21, 2014, Yerevan, the Republic of Armenia
The Resolution of the Sixth Yerevan International Conference for Young Researchers “International Humanitarian Law: Problems and Perspectives of Development”

Yerevan, December 11, 2013

The participants of the Sixth Yerevan International Conference for Young Researchers “International Humanitarian Law: Problems and Perspectives of Development,” (Yerevan Conference) which took place on 9-11 December 2013, organized by the Russian-Armenian (Slavonic) University and the International Committee of the Red Cross, with the support of the International and Comparative Law Center and Protection of Rights without borders NGO,

Reaffirming the commitment to the resolutions adopted at the previous Yerevan Conferences,

Having discussed the contemporary problems of public international law development,

Celebrating the International Human Rights Day, the 65th Anniversaries of the Universal Declaration of Human Rights and of the Convention on the Prevention and Punishment of the Crime of Genocide, while promoting full enjoyment of all human rights and fundamental freedoms,

Being deeply concerned that armed conflicts continue to cause enormous suffering, including violations of international humanitarian law (IHL), such as murder, forced disappearance, the taking of hostages, torture, cruel or inhumane treatment, rape and other forms of sexual violence, and that such suffering affects entire populations, especially women, children and other vulnerable groups in various parts of the world,

Stressing that greater compliance with IHL is an indispensable prerequisite for improving the situation of victims of armed conflict and reaffirming the obligation of all States and all parties to armed conflict to respect and ensure respect for IHL in all circumstances,

Stressing on the importance of the implementation of IHL and international human rights law (IHRL) at the national level, as well as to disseminate knowledge of IHL and IHRL among civilians and military personnel,

Considering that accountability for violations of IHL and IHRL in general must be recognized as an indispensable component of peace and eventual reconciliation,

Acknowledging that IHL and IHRL are complementary and mutually reinforcing,

Being alarmed by the harmful effect that the conduct of hostilities may have on the environment and natural resources, and may therefore threaten the well-being, health or even survival of the population,

The participants of the Sixth Yerevan International Conference for Young Researchers:

1. Reaffirm the need to promote and ensure respect for the principles and rules of international law;

2. Emphasize that States parties to the Geneva Conventions of 1949 have undertaken to respect and ensure respect for these Conventions in all circumstances;
3. **Underline** the importance of work conducted by the International Committee of the Red Cross within the framework of Resolution 1, adopted by consensus in 2011, at the 31st International Conference of the Red Cross and Red Crescent aimed at strengthening the protection of victims in the armed conflicts;

4. **Stress** the importance of combating impunity in order to prevent violations of IHL and IHRL perpetrated against civilians in armed conflicts, and **urge** States, in accordance with their international obligations, to bring perpetrators of such crimes to justice;

5. **Confirm** that any derogation from obligations relating to human rights must remain strictly within the limits provided for by international law and that certain rights can never be derogated from;

6. **Recall** that in order to prevent the serious harm done to the natural environment during numerous armed conflicts, which only adds to the vulnerability of those affected by the fighting, the legal framework on the protection of the natural environment needs to be reinforced and strengthened;

7. **Consider** the crucial importance to foster an environment conducive to respect for the life and dignity of persons affected by armed conflict and other situations of violence, through promotion of IHL and humanitarian principles in formal and non-formal education settings, including supporting research and debates on issues related to IHL development;

8. **Decide** to continue research and discussion of the issues of contemporary IHL development in the framework of the next, 7th Yerevan Conference for young researchers.
Accomplishment of Justice, Accountability and Deterrence of International Atrocities - Fundamental Aspects of International Criminal Tribunals

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INTRODUCTION
The main objectives of international criminal justice are providing justice for the victims and international community as a whole by punishing the principal perpetrators and deterring future atrocities. ‘The purpose of a trial is to render justice, and nothing else…. Hence, to the question that is commonly asked about the Eichmann trial: What good does it do? There is but one possible answer: It will do justi 1. The task of dealing with perpetrators following mass atrocity and conflict is at the very heart of questions about transitional justice and rebuilding the state following mass violence.

This article starting with the short historical overview of the birth of criminal justice mechanisms then addresses to the primary role of international criminal tribunals in punishing and deterring 2 international crimes and atrocities.

The establishment of the ad hoc international tribunals in Rwanda and Yugoslavia (hereinafter: ‘ICTR’ and ‘ICTY’) following crimes of genocide was seen as a way of linking this with ‘a system of accountability and the maintenance of international peace and security.’ 3 Third part of the article will analyze tribunals as mechanisms for promoting and enhancing justice and peace in post-conflict regions.

There was great hope that both the ICTY and ICTR would hold those accountable for mass crimes, however, it can be argued that in reality the application of international law and the use of international tribunals as mechanisms of justice is a complex one that depends on political and social factors. Finally the paper will concentrate on political challenges and other factors that both the ICTY and ICTR have been faced with and factors that have hampered efforts to effectively prosecute perpetrators and contribute to reconciliation.

Birth of International Criminal Justice Mechanisms
The gross human rights violations committed in the past in the former Yugoslavia, Rwanda, the Democratic Republic of the Congo, Sudan and other places around the world have drawn attention to the responsibility of States and of the United Nations (hereinafter “UN”) in protecting vulnerable populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.

For decades, international law lacked sufficient mechanisms to hold individuals accountable for the most serious international crimes. Naturally, like any other crimes, punishment for grave breaches of the Geneva Conventions or for violations of the Genocide Convention or the customary law of war crimes and crimes against humanity depended primarily on national courts. The problem is that national courts were least willing or able to act because of widespread or systematic violence or because of involvement of agents of the State in the commission of crimes. If you look at the past to the best known historical events of that kind-Nazi Germany, Rwanda, the former Yugoslavia, the governments themselves or their agents were involved in the commission of those crimes. And so the failures of national courts in these contexts protected perpetrators with impunity. To prevent impunity in those situations, it is necessary to enforce international justice when national systems are unwilling or unable to act. The first actions taken by the international community were to create ad hoc tribunals in such situations. The first tribunals were those of Nuremberg and Tokyo after World War II. Then, more recently, the United Nations set up tribunals for Rwanda and the former Yugoslavia. These tribunals were extremely important. They were pioneers. They showed that international justice could work, but they all possessed several limitations – territorial and temporal.

The role of Punishment and Bringing Those Most Responsible for Mass Atrocity Crimes to Justice

The main and direct function of these international judicial bodies is trying persons responsible for gross human rights and serious humanitarian law violations. In this manner the ICTY, the ICTR and individualize guilt for gross human rights violation which creates a basis for inter-ethnic reconciliation. According to the principle of individual criminal responsibility, as recognized in the 1950 study of the International Law Commission, any person who commits an act which constitutes a crime under international law is responsible and liable to be punished. A corollary to this principle is the irrelevance of official capacity, recognized in the statutes of the ICTY, ICTR. Although selective, the prosecution of those who bear the greatest responsibility by these criminal courts and tribunals serves to imprint in the collective memory the fact that there is no impunity for serious crimes.

The role of deterrence

The deterrence rationale assumes not only that international criminal tribunals provide retribution for victims of war crimes and atrocities by punishing perpetrators, but that the very pursuit of justice can also prevent future atrocities. As one of the leading advocates for

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6 Respectively in Article 7(2) of the ICTY Statute, Article 6(2) of the ICTR Statute, and Article 27(1) of the ICC Statute. This last article reads: “This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”
International criminal tribunals explains, “[t]he pursuit of justice and accountability fulfills fundamental human needs and expresses key values necessary for the prevention and deterrence of future conflicts.”7 The millions of victims of humanitarian atrocities provide “grim testament to the failure of the international community to . . . prevent aggression and enforce international humanitarian law.”8

Indeed, former ICTY judge Antonio Cassese suggests that the failed efforts to punish the perpetrators of the Armenian genocide “gave a nod and a wink to Adolf Hitler and others to pursue the Holocaust some twenty years later.”9

This broad notion that justice will deter future atrocities (or that failing to provide justice will encourage future ones) is reflected in the preamble to the statute creating the International Criminal Court (hereinafter: “ICC”) - “[d]etermined to put an end to impunity for the perpetrators . . . and thus to contribute to the prevention of [serious international] crimes.”10

Elaborations of the relationship between International Criminal Tribunals justice and deterrence take two forms. First, some advocates have suggested that International Criminal Tribunals are uniquely positioned to prevent atrocities in the long term by fostering conditions for the emergence of a political culture where such atrocities are no longer acceptable. As Payam Akhavan, a former legal advisor to the ICTY has explained, International Criminal Tribunal prosecutions can establish “unconscious inhibitions against crime” or a “condition of habitual lawfulness” 11 in a society where such atrocities were previously accepted. Second, and more commonly, tribunal supporters have argued that criminal tribunals will have immediate deterrence effects as long as they are designed properly and provided adequate authority and resources. Deterrence of atrocities will occur when criminal tribunals can achieve the same frequency and consistency in the prosecution of international crimes as domestic legal systems achieve in the prosecution of domestic crimes. Deterrence thus requires further support for tribunals and superior institutional design.

Professor Meron’s formulation is indicative of this view: “Instead of despairing over the prospects of deterrence, the international community should enhance the probability of punishment by encouraging prosecutions before the national courts, especially of third states, by making ad hoc Tribunals effective, and by establishing a vigorous, standing international criminal court.”12

Promoting and Strengthening the Rule of Law in Post-Conflict Societies

In order to prevent a culture of impunity and support the return of the rule of law, the ICTY and the ICTR were framed not only as tribunals in which perpetrators would be prosecuted but also as a key component of United Nations peacekeeping operations and reconciliation. Thus there was an expectation that both tribunals would promote and enhance justice and peace as Michael Humphrey explains:

‘These international legal interventions then are designed not only to make perpetrators accountable but also to promote peace by restoring the rule of law, justice and individual rights after mass atrocity.’

It has been said that to respond to mass atrocity with legal prosecutions is to embrace the rule of law. The activity of the ad hoc tribunals is important for promoting and strengthening the rule of law at both the international level and the domestic level. By establishing the two ad hoc tribunals, the UN sought to advance a number of objectives, among which are bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law, and contributing to the restoration of peace. The support of the ad hoc tribunals for the rule of law at the domestic level consists of trainings for legal professionals, exchange of best practices and experience, and numerous public outreach activities. Engaging in these much-needed activities has taken some time and has been part of a learning curve on the part of these main international judicial institutions.

Promoting and strengthening the rule of law in post-conflict societies is an uphill battle, especially in countries where protracted conflict has eroded State institutions, especially the judiciary. Moreover, in several instances, State cooperation with the ICTY, ICTR has not been as forthcoming and timely as wished, and sometimes has been outright hostile. Lack of cooperation has caused unnecessary delays and considerable difficulties for the work of these international judicial bodies. As stated above, the transfer of expertise to the domestic judiciary and its training to deal with such cases has been more of an afterthought, rather than part and parcel of the mission of the ad hoc tribunals from their inception.

Political and social challenges to Justice and Peace

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Only providing justice in the form of holding perpetrators accountable, however, is not going to lift the post-conflict society from poverty and other problems. Peace and stability can only prevail if the population perceives that politically-charged issues, such as ethnic discrimination, unequal distribution of wealth and social services, abuse of power, denial of the right to property or citizenship, and territorial disputes between States, can be addressed in a legitimate and fair manner. For a transitional justice process to succeed in bringing a society together in order to build a peaceful and prosperous future, it needs to be accompanied by measures aimed at achieving economic and social justice. While the rule of law at the national and international levels remains essential for sustained economic growth, sustainable development and investments, and the eradication of poverty and hunger, creating the necessary conditions for economic development, and an inclusive society requires considerable investments in the economic field, a long-term commitment on the part of the international community of States, and close cooperation across the board.

Addressing state crime and issues of justice following conflict are ‘inevitably, contentious and riddled with dilemmas.’ They depend on political and social factors that impact on how effective justice can be in meeting collective and individual grievances. The expectations and impact of the International Criminal Tribunals in the former Yugoslavia and Rwanda have been hampered by the realities of working within highly politically charged situations. From the onset both tribunals were marred by the fact that they were held outside of the states in which the atrocities took place.

The Tribunal for the former Yugoslavia is held in the Hague in the Netherlands whilst the Tribunal in Rwanda is held in Arusha, Tanzania, with the reasons for holding the tribunals outside of Rwanda and the former Yugoslavia being that both conflicts had left the judicial systems corrupt, understaffed and dysfunctional and holding the prosecution of perpetrators outside the states would prevent the view that ‘victors justice’ would be employed.

Whilst the attempt by the tribunals to present the view that the trials would be fair and based on the rule of law, the government of Rwanda led by President Paul Kagame, the former leader of the Rwandan Patriotic Front (RPF) has refused to cooperate with the ICTR as they believe that reconciliation could not occur unless the tribunal was held in Rwanda.

Furthermore Kagame and his government have been obstructing the tribunals attempt to try members of the RPF for crimes committed during the genocide, which has led to criticism that the ICTR has only focused on Hutu perpetrators whilst doing nothing to try members of the RPF for

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19 Ibid. at p. 19, par. 81.
the murder of some 45,000 people.\textsuperscript{22} Coupled with this is the fact that Kagame has been accused of using the specter of genocide to stamp out opponents and consolidate his power, ensuring that the tribunal has become overburdened with cases as any referral back to Rwanda would be ‘politically fraught.’\textsuperscript{23}

This reflects the delicate balance that tribunals face between addressing mass atrocities and promoting reconciliation and peace. Kagame’s government has been praised for encouraging reconciliation between Hutu and Tutsi’s and rebuilding Rwanda’s shattered economy thus pursuing trials of members of the RPF could be seen as destabilizing whilst any association with a government that may be subjected to prosecution could undermine the credibility of the ICTR.\textsuperscript{24} This may lead to the view that the ICTR’s work in Rwanda is incomplete, as insecurity in Rwanda has continued whilst the underlying economic and political inequalities between Hutu and Tutsi’s remain unaddressed.\textsuperscript{25}

The ICTY has faced many of the same problems, as the indicted of Radovan Karadzic and Ratko Mladic for crimes against humanity were marred by the refusal of NATO forces to arrest the two believing that this could be destabilizing for peace talks at Dayton.\textsuperscript{26} The refusal to arrest Karadzic and Mladic has been viewed by many as a failure of the international community and has significantly diminished the credibility and impact of ICTY in the former Yugoslavia.\textsuperscript{27}

The fact that it has taken fourteen years to arrest Karadzic and Mladic has avoided arrest for over a decade reflects the belief that the ICTY has been ineffective in bringing those responsible to justice. However it can be argued that this is an example of the failure of the international community as a whole to effectively set up a mechanism for enforcing indictments. Furthermore there have also been criticisms by Serbs that the court has focused solely on crimes committed by Serbia during the conflict a view, which has led to reactions to decisions handed down by The Hague ‘divided along ethnic lines’, adding to doubts that the ICTY could ever contribute to reconciliation.\textsuperscript{28}

As explained by Laurel Fletcher and Harvey Weinstein, Bosnian Serbs ‘alleged that the tribunal was politically biased against them, basing their view on misinformation that the ICTY had

\textsuperscript{22} Wadhams, N, ‘Rwanda Genocide Arrest: Justice but is it for all?’, Time Magazine, Wednesday October 7\textsuperscript{th}, 2009, http://www.time.com/time/world/article/0,8599,1929012,00.html (accessed 2 November 2010)
\textsuperscript{23} Ibid., p.1.
\textsuperscript{28} Ibid., p. 40.
indicted only Serbs.’ This misinformation of what the tribunals have in fact been doing has undermined the ability of the courts to make an impact on local populations and reflects the failure of tribunal outreach programs to inform the public, an issue that shall be explored later in this piece. Furthermore it can be argued that views such as those of Serbs who deny the Tribunals findings can be associated with genocide denial and reflect the minority of views in the former Yugoslavia.

Whilst both the ICTR and the ICTY have been hampered by political constraints, both tribunals have contributed significantly to justice and peace including ensuring that crimes do not go unpunished, establishing the truth within historical records and ensuring that victims’ rights are upheld. The tribunals’ contributions to international humanitarian law and acknowledgement that crimes committed in Srebrenica and Rwanda were genocide are significant for understandings of peace and justice both locally and internationally.

CONCLUDING REMARKS

The role and impact of ad hoc tribunals and hybrid courts in facilitating justice and peace is a complex one, depending on political, social and legal factors. Whilst the ICTY and ICTR have been instrumental in providing recognition that genocide and crimes against humanity have taken place and provided a forum for historical recording, it can be argued that they are limited in their capacity to facilitate peace as ethnic tensions can be exacerbated by misunderstandings of court decisions and can be ineffective in healing victim’s pain.

The international criminal justice system, alone, cannot solve all the myriad challenges facing a post-conflict society. Its main function is almost surgical: removing the main perpetrators of mass crimes from a post-conflict society and subjecting them to a criminal legal process. In the course of the last two decades, the possibilities and limitations of international criminal justice mechanisms have been tested to a significant extent. Despite their limitations and imperfections, international and hybrid criminal tribunals have changed the character of international justice and enhanced the global character of the rule of law. The activities of the ICTY, the ICTR have been crucial to entrenching accountability and the rule of law both internationally and domestically. That said, without the necessary accompanying economic and social justice reforms, transitional justice processes alone are not going to stabilize a post-conflict society. Supporting the civil society is also an important part of rebuilding conflict-torn societies, alongside strengthening the rule of law and consolidating democratic State authorities.

That said hybrid tribunals suggest that the rule of law is a pre-requisite for peace and can foster greater understanding and reconciliation when applied within the context of other transitional


justice mechanisms and strategies. Victims’ needs and dealing with the root causes of conflict are essential for ensuring that peace and justice can be achieved.

This reflects the fact that expectations that tribunals or hybrid tribunals can achieve substantial peace and reconciliation are premature and it has to be remembered that peace is not achieved over night. The ability of international tribunals to enhance the domestic capacity to prosecute war crimes is perhaps one of their greatest achievements. What needs to be remembered is that the primary role of a tribunal or hybrid tribunal is to ensure that justice is done in terms of accountability and that the law provides ‘a strong message to society that there is not anybody who committed a crime who can stay untouched, unpunished.’

The Role of the Special Court for Sierra Leone in Prevention and Punishment of War Crimes

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Now we have the belief that no matter who you are, no matter the wealth you have, the court will be above you.

Chief Kasanga II

Introduction

In 2013 the Special Court for Sierra Leone (SCSL) had the last judicial proceeding and 6 days ago it closed its doors because of the accomplishing its main goal. This hybrid Tribunal was supposed to bring to justice those who bear the greatest responsibility for atrocities committed during the country’s civil war of 1991-1999, in which many people were killed, mutilated and expelled from their homes. Under its mandate the SCSL did a great job. It considered 13 indictments that were issued in 2003 by the Prosecutor, however, three of them were withdrawn because of the deaths of the accused. The importance of this Tribunal cannot be overestimated. People across Sierra Leone and Liberia highly evaluate its role and state that the Special Court has successfully accomplished its mandate of prosecuting perpetrators, bringing justice and helping to restore the rule of law. And as it is the last year of SC’s functioning, it is important to analyze all the major achievements of this Tribunal and try to reveal some shortcomings that SCSL faced in order to avoid them in the future.

The reason why the Special Court for Sierra Leone appeared is behind the Lomé Peace Agreement that was signed by the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF) as a result of the civil war (1991-1999). In accordance with this agreement amnesty and immunity against judicial process were to be granted to combatants for atrocities committed during the conflict from March 1991 to July 1999. By the way, these amnesty provisions didn’t embrace such crimes as genocide, crimes against humanity, war crimes and other

1 Chief Kasanga II is a traditional chief in Makeni.
http://www.ijmonitor.org/category/charles-taylor/
serious violations of International Humanitarian Law. In defiance of this particular agreement the RUF leadership resumed their crimes against civilians and took UN peacekeepers hostage. After such incidents the President of Sierra Leone, Alhaji Ahmad Tejan Kabbah, had nothing to do but requested the Security Council of the United Nations to assist in setting up of a special court for Sierra Leone that may put an end to the impunity and contribute to national reconciliation as well as to the restoration and maintenance of peace. It led to the appearance of SCSL based on the Agreement that was concluded in 2002 between the United Nations and the Government of Sierra Leone⁵. The personal jurisdiction of the court included "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."⁶ It was the date of the signing of the Abidjan Peace Agreement, the first comprehensive agreement between the government of Sierra Leone and the Revolutionary United Front (RUF), the country’s main rebel group.

Subject matter jurisdiction included war crimes, crimes against humanity and certain crimes under national law (genocide, however, was excluded as there was little evidence of that crime).⁷ Interestingly, the nature of SCSL differs from that of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia. SCSL was a treaty-based sui generis court of mixed jurisdiction, i.e. a hybrid tribunal. The applicable law here was international and Sierra Leonean law, and the Tribunal itself consisted of international and Sierra Leonean judges, prosecutors and administrative support staff.

The SCSL was a court of many firsts: it was the first court to be established in the country where the crimes took place (after Nuremberg); the first hybrid court where international and national judges and personnel worked together; the first international tribunal to be funded solely on voluntary contributions from interested states; the first to indict a sitting African head of state, Charles Taylor; and the first to convict individuals for the recruitment and use of child soldiers, for the crime of forced marriage and for attacks against UN peacekeepers⁸.

Proceedings conducted by the SCSL

The first indictments were issued by the Prosecutor of the Special Court for Sierra Leone in March, 2003. They were against the leaders of all three major factions in the war - the Revolutionary United Front (Foday Sankoh and Issa Sesay), the Armed Forces Revolutionary Council (Johnny Paul Koroma), and the Civil Defense Forces (Sam Hinga Norman). Moreover, this set of indictments also included the indictment of Charles Taylor, although it was kept under seal until June 4, 2004. However, not all accused were punished, only 9 of them. Sam Bockarie and Foday Sankoh died before their trials began, while Chief Sam Hinga Norman died in the course of

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⁶ Statute of the Special Court for Sierra Leone, Art. 1, Para 1 (http://www.rscsl.org/documents.html).
⁷ Statute of the Special Court for Sierra Leone, Art. 2-5.
⁸ Exploring the legacy of the Special Court for Sierra Leone (http://scsl-legacy.ictj.org/about-project).
his trial. Charles Taylor was finally transferred into the custody of the Court in 2006. Eight accused – including two former leaders of the CDF, three former leaders of the RUF, and three former leaders of the AFRC were ultimately tried and convicted by the court in Freetown. They were sentenced to prison terms ranging from 15 to 52 years. They are currently serving their prison terms in Rwanda.

There is only one case left for the SCSL to decide: the case of Johny-Paul Koroma who is the former head of the AFRC. In January 2003 he disappeared after allegedly participating in a raid on an armory in Freetown and now nobody knows anything about his whereabouts. The prosecutor had hoped to make a final decision on the death of Koroma and withdraw the indictment, or submit a reduced, fact-specific indictment that would remain pending beyond the closure of the SCSL. However, recent exhumations based on witness testimony about the location of Koroma’s body have been unsuccessful, making it less likely that his death can be confirmed before the end of trials. Moreover, it is still unclear who would try Koroma, if he were found. The SCSL closed its doors and a national court would not manage to hear this case, simply because there would occur problems concerning the application of the 1999 general amnesty contained in the Lomé Peace Accord. The only way out of this situation is to have the case tried by the Residual SCSL, although we may be confronted here with some difficulties as well and, as a result, may not consider it as a panacea.

Is it all for peace?

The proceedings conducted by the SCSL have shown us that all the facts should be thoroughly scrutinized. The truth was revealed during the trial of former Liberian President, Charles Taylor who pretended to be a peacemaker. Charles Taylor was involved in the various peace negotiations between the Government of Sierra Leone and the RUF, and, as a result, tried to convince the Court that he had only good intention. At the same time he financed the activities of the RUF and AFRC and provided them with arms therefore the Chamber held that Taylor was undermining the peace process. The SCSL affirmed that no one should hide under the cloak of a “peacemaker” in order to seek exemption from prosecution for serious international crimes.

What about mid-level commanders?

If we look at the jurisdiction of this Court, we can find out another problem: only the most senior commanders or leaders of the various fighting forces were to be indicted. However, there are still many mid-level commanders who actively participated in, and ordered the commission of crimes but were not tried by the Court. Victims of rebel brutality would tell you that an ex-combatant ‘Colonel Savage’ was responsible for the deaths of hundreds of civilians, who were all

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9 Lessons from the Special Court for Sierra Leone in the Fight against Impunity, p. 3.
10 From the Taylor trial to a lasting legacy: putting the Special Court model to the test, p. 43-44//International Center for Transitional Justice and Thierry Cruvellier, 2009.
12 From the Taylor trial to a lasting legacy: putting the Special Court model to the test, p. 19-20//International Center for Transitional Justice and Thierry Cruvellier, 2009.
buried in a mass grave. Today, Colonel Savage freely moves across the country. This should be taken into account by the future tribunals because it is very difficult to realize, especially for victims, that the vast majority of offenders are set free.

Moreover, some potential indictees may be shielded for political reasons. For example, some have questioned why President Kabbah has not been indicted, given that he acted as Minister of Defense during the war while Hinga Norman was only Deputy Minister of Defense. Others have wondered why Blaise Compaore, president of Burkina Faso, was not indicted for his alleged links to the violence. This issue should also be reconsidered so that there won’t be any breach of equality before the law.

Landmark cases

The Special Court’s proceedings contributed to the development of the jurisprudence of international criminal justice a lot. It has clarified the difference between conscription and enlistment of child soldiers. In 2004 the Appeals Chamber held that the recruitment or use of children under the age of 15 was a crime under international law since 1996, and that defendants are subject to individual criminal responsibility for this offence during the entire period covered by the court’s jurisdiction. This ruling certainly helped to defend the rights of many children who became the victims of such recruitment during the civil war. The Appeals Chamber also held that heads of state immunity does not apply to the prosecution of international crimes, and unanimously rejected Charles Taylor’s preliminary motion challenging the legality of his indictment on the grounds that he was the President of Liberia at the time it was issued.

There were several complaints made by some of the accused, concerning the issue of amnesty granted under the Lomé Peace Agreement. However, the Appeals Chamber held that this amnesty could not bar the Court from prosecuting crimes of international nature before July 1999. It ruled that the amnesty granted in the Lome Peace Accord applied only to national criminal jurisdiction and not international crimes.

Also the SCSL made some special rulings concerning sexual violence. There were many judgments where the accused were convicted of rape, sexual slavery, and other forms of sexual violence, however, they all were when the accused physically perpetrated the rape or was present,

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13 Lessons from the Special Court for Sierra Leone in the Fight against Impunity, p. 5.
14 Special Court for Sierra Leone’s Annual Report focuses on legacy as mandate nears end (http://www.ijcenter.org/2012/10/11/special-court-for-sierra-leones-annual-report-focuses-on-legacy-as-mandate-nears-end/)
15 Lessons from the Special Court for Sierra Leone in the Fight against Impunity, p. 3.
16 Decision on challenge to jurisdiction: Lome Accord amnesty. (http://www.google.ru/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.trascrim.org%2F07%2520SCSL%2520-%2520%2520%2520%2520Kallon%2520Kamara%26ei=UsMmVJiUDOWuygPek4KIBQ&usg=AFQjCNED6q4mD-T15SplEc69KHGLCMlz7w&bvm=bv.76247554,d.bGQ&cad=rjt);
See also “Legality of amnesties in international humanitarian law. The Lome Amnesty Decision of the Special Court for Sierra Leone.” Simon M. Meisenberg.
ordering, or ignoring the crimes. The SCSL has changed this practice. According to Kelly Askin, “The conviction of Taylor recognizes that civilian or military leaders who are far from the battlefield but who support and encourage sexual violence, or make no attempt to prevent or punish it, can be held responsible for sex crimes”\(^\text{17}\).

The importance of the court’s location

The SCSL is situated in the country where the crimes were committed, it means that all the victims of the civil war could see justice done. It also gave all the principals of the Court unhindered access to the people. This contributed immensely to the success of Outreach and Public Affairs Unit in terms of disseminating timely and useful information to local and international audiences, thus enhancing the legitimacy of the process.

Remembering the needs of victims

While it is absolutely critical to bring perpetrators to justice, addressing the social and economic needs of victims is just as important. Since the verdict in the Taylor trial was handed down, there were received mixed messages from the victims in Sierra Leone. While some have expressed relief at Taylor’s conviction, others say the verdict means little to them as long as they continue to suffer.

The Sierra Leone experience has shown that efforts at combating impunity must be complimented by a meaningful and sustainable reparations program in order respond to the needs of those most affected by the conflict. These functions were conducted by the Truth and Reconciliation Commission (TRC)\(^\text{18}\) that was established as a result of the Lomé Peace Agreement. The TRC gave people the chance to say what they had experienced during the civil war. It investigated the full story of what happened\(^\text{19}\).

Conclusion

The establishment of the Special Court for Sierra Leone has a great impact on the fight against impunity at local and international levels, but additional efforts should be made to close the impunity gap for mid-level commanders who were not tried by the Court. It would be perfect if the Residual SCSL prosecuted these criminals. However, it would be still too difficult to find some evidence of their participation in committing all the atrocities.

The Special Court for Sierra Leone was designed with a number of advantages over international courts that preceded it, including its in-country presence, the incorporation of national as well as international staff, a reasonably secure environment, and good state cooperation. Moreover, it is very important that the tribunal’s trials were public so that all people who live in Sierra Leone could see the justice done.

Summing up, the Special Court for Sierra Leone remains one of the most important attempts to reshape international justice. There are many valuable lessons to be culled from its experience that will be of direct relevance for future efforts that draw upon the Special Court model.

\(^\text{17}\) Lessons from the Special Court for Sierra Leone in the Fight against Impunity, p. 4.


\(^\text{19}\) Sierra Leone’s TRC and Special Court: a citizen’s handbook, p. 2// P. James-Allen, Sheku B. S. Lahai, Jamie O’Connell, 2003
Bloodless Wounds? Protecting Rights of Combatants Who Suffer from Mental Problems acquired during armed conflicts

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Thinking about wars and missions we can see frightened, denuded of possessions and the closest people civilian population and the physical suffering and also sacrifice, blood, sweat, death and wounds blindly carrying out orders to the soldiers. Nobody wonders what those people feel inside. What is their psyche like, and at the same time giving vent to the images they saw, and life in long-term stress and difficult (to stand) conditions. Perhaps inadvertent superficiality assessment, or small knowledge of psychology and psychiatry contributed to this very precise and imprecise definition of the international conventions that created the concepts of sick and wounded. It is also not clarified whether the trauma can be connected to the set acquired by a soldier during a mission diseases.

According to the dictionary of the English language a patient is a person, afflicted with the disease and just not properly functioning.\(^1\) The disease is a deviation from full health body. It consists of function disorder or damage to the body structure. According to the World Health Organization (WHO) approved by the International Health Conference in 1946, health is a state of complete well-being ("welfare"), physical, mental and social well-being and not merely the absence of disease or infirmity.\(^2\) Wounded is the one who suffered the wound. During the combat operations soldier is deficient, does not have a full combat capability mostly directed to the points of medical or military hospitals. Slightly wounded soldiers combat actions can lead to a limited extent.

The meaning of art. 8 point I. of the Additional Protocol to the Geneva Conventions of 12th August 1949, concerning the Protection of Victims of International Armed Conflicts "wounded and sick" means persons, whether military or civilian who because of injury, illness or other infirmity or interfere with the physical or mental health need or medical assistance to refrain from any act of hostility.\(^3\) In same Geneva Conventions, these terms are not defined, then, we speak of the existing concepts. Article 13 of the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, marks only the scope of circles or group of persons to which the regulations are related. These include members of the armed forces of the parties in conflict, members of the regular armed forces, members of crews, ships or Population non-occupied territory, which on the approach of the enemy take up arms in order to resist

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\(^1\) [www.oxforddictionaries.com](http://www.oxforddictionaries.com/definition/english/patient)  
\(^2\) [www.who.int](http://www.who.int/hia/evidence/doh/en/)  
\(^3\) Article 8 point I. of the Additional Protocol to the Geneva Conventions of 12th August 1949.
spontaneously. It seems, therefore, that the scope of application remain the only person involved in the war, the mission directly, engaging in activities in place. However, it turns the attention to the art. 9 I the Additional Protocol in conjunction of art. 1 point 2 of this document, which expand the scope to veterans, soldiers, for whom the mission is over. To the extent that it is acceptable that these articles also apply to veterans disputes arise in relation to classify diseases and revolve around the question of whether or not the term "trauma" is part of a range of diseases. In other words, whether the trauma can qualify as an illness, a person with whom the patient manifests as defined in the Convention and the Protocol. Using a broad interpretation, it seems that mental illness can be found in the application of the Geneva Conventions, and the soldier, who is recognized to have mental health problems should be treated as a sick person. This assessment is clear from today's understanding of the term "trauma" and "disease" and the fact that the "trauma" is an element of "diseases" of modern medicine, which is indisputable. Trauma is seen as a trauma in the mind of man, which binds to the abnormal functioning of the body.

Although acceptance as outlined concept of "trauma" and "disease" and understanding for people suffering from mental illness, the soldiers left to fend for themselves, often feel forgotten, useless, deprived of support, which are their duties. Help, which is offered to them, is often provided only during the mission, mental illness invisible at first glance, are underestimated. It is obvious that noticing a growing mental illness during the mission can be considered as disease in the light of the Convention, the soldier can rely on assistance from the state. Unfortunately, mental illness is often characterized by delayed disclosure, and the symptoms may be visible even after half a year since the end of the front.

To be able to define the concept of trauma and traumatic events and properly diagnose a disease which the entity acquired during the war, we need to extract used classifications of mental disorders in the world.

For the DSM-III traumatic event is a stressor, which can be distinguished, at the same time causing everybody 'average' man symptoms of distress. This means that every traumatic event is an event that can trigger a trauma in even the average person. However, in the DSM-IV, there has been a clarification of the criteria. A person who has experienced trauma need to experience, witness or be confronted with the actual death or a threat to life and this event had to induce in him a feeling of fear or a sense of helplessness.

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4 Article 13 of the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949
5 Article 9 and 1.2 of the Additional Protocol to the Geneva Conventions of 12th August 1949
6 [www.oxforddictionaries.com](http://www.oxforddictionaries.com/definition/english/trauma)
8 N. Breslau, Epidemiologic Studies of Trauma, Posttraumatic Stress Disorder, and Other Psychiatric Disorders, The Canadian Journal of Psychiatry, 2002
According to the World Health Organization (ICD-10 system), traumatic event exposure is exceptionally threatening or catastrophic stressor short- or long-term.\(^9\)

As you might notice having to deal with the various classification systems encounter with differently understood the concept of a traumatic event, which raises doubts when trying to diagnose a specific disease patients. DSM-IV Manual (Diagnostic and Statistical Manual of Mental Disorders), whose revision was made in 2000 by the American Psychological Association personally find it more current, because in the rest of the work I will be basing on taxonomy.

According to the DSM-IV for PTSD diagnosis there were established two categories: acute stress disorder (ASD) and posttraumatic stress disorder (PTSD).\(^10\) With acute stress disorder we are dealing during or immediately after the trauma. It is the body's response to an exceptionally strong stressor or traumatic event that may be associated with such injuries, death or threat of physical integrity of self and others connected with the reaction of the people in the form of fear, helplessness. Then, during or immediately after the event the person has a feeling of numbness, emotional indifference, narrowing the field of consciousness, derealization, depersonalization, dissociative amnesia.\(^11\) To diagnose ASD there need to occur min. 3 above states. Such individuals often exhibit poor concentration, tend to have nightmares, thoughts, flashbacks, in which again they are experiencing these traumatic events, but at the same time avoid stimuli that evoke memories. The danger to others may constitute persons which are observed to have states of irritability, agitation, aggression, and impulsive and risky behavior. An important factor that affects the development and course of acute post-traumatic disorders is to support the family and society, the type of personality or pre-existing disorders caused by other stressors. That is why, it is so important not to minimize problem and prompt diagnosis and also professional help. Symptoms are formed during or immediately after a traumatic event and persist min. 2 days. More importantly, it should take up to four weeks. If, at this time the symptoms persist you should consider a diagnosis of PTSD.\(^12\) From this it follows that to 4 weeks after the cessation of stress you should not put a diagnosis of PTSD because of the possibility of ASD, whose symptoms are extremely close to it, and the main factor is the time that differs them.

It also seems that due to the "softer" and less of PTSD course of the disease, the soldiers at its suffering are less danger to the environment, and even help that would offer them is limited because of ASD in its "assumption" should give way to the max. 4 weeks.\(^13\)

PTSD is a disease recognized by both the classification adopted by me (DSM-IV), as well as by the World Health Organization (ICD-10 scheme\(^14\)).

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\(^11\) NYU Langone Medical Center For combat veterans suffering from post-traumatic stress disorder, 'fear circuitry' in the brain never rests, 2013

\(^12\) N. Breslau, Epidemiologic Studies of Trauma, Posttraumatic Stress Disorder, and Other Psychiatric Disorders, The Canadian Journal of Psychiatry, 2002

\(^13\) B. Nowak, Stres bojowy. Przyczyny, oznaki, zapobieganie, MON, Warszawa, 2010
As previously mentioned, when it comes to the nature of traumatic events and symptoms of PTSD is similar to ASD, it is even said that the state of chronic stress, resulting in the persistence of the symptoms of this second. One of the frequently occurring examples, an event that might render the acquisition of this disease is just the armed struggle (as much as 38% of men). Therefore, from the point of view of the impact on the environment, to further consequence for the life of the sick soldier seems to be more important than the ASD. Due to the time between stress and the disclosure of the symptoms and the time at which they are kept stand out three subgroups. Acute PTSD, whose symptoms appear up to 3 months, chronic PTSD, with symptoms are lasting more than three months, and PTSD with delayed onset, the symptoms appear after about 6 months after the stressor (although the DSM-IV does not specify when the symptoms should occur to be able to diagnose PTSD). Symptoms are usually close to ASD but more intense, for example, a patient may experience sudden outbursts of panic, anger, aggression, but you always have to remember that every person cope with difficult events individually and for him- his behavior may be different from those listed above. It is, however, dependent on personality traits, past experiences, enabling environment.\footnote{Klasyfikacja zaburzeń psychicznych i zaburzeń zachowania w ICD-10. Kraków-Warszawa: Uniwersytecie Wydawnictwo Medyczne „Vesalius”, 1998, s. 96-97}

Subtype of PTSD is called. Complex PTSD. It is a kind of modification of the basic form, which is the foundation of a certain frequency of the stressors. It provides an experience more than one traumatic event, unfolding in a long time. The symptoms may be similar or more intense compared to "normal" PTSD.\footnote{Z. Juczyński, N. Ogińska-Bulik, Pomiar zaburzeń po stresie traumatycznym — polska wersja Zrewidowanej Skali Wpływu Zdarzeń, Via Medica, vol. 1, 2009}

Another recognized by both classifications (although differently in being classified) disease is persistent personality change after catastrophic. The change must be "clear and consistent pattern of change in individual perceptions, attitudes and thinking in relation to the environment and each other as a result of stress in the sizes of disaster”\footnote{R. A. Bryant, The complexity of complex PTSD, The American Journal of Psychiatry, vol. 167, 2010}

One of its symptoms is a persistent sense of threat which often results in irritability and aggression, binds to the abuse of alcohol or other. From the analysis presented above and the symptoms of psychotic disorders, the present study shows that the connecting part of them (symptom) are often difficult to prevail and control their reflexes and emotions which in turn leads to the use of aggressive, temper tantrums, excessive irritability and hyperactivity.

On the other hand, traumatic events provoke and plausible grounds frequent consumption of alcohol and psychotropic drugs, which ultimately can lead to addiction.\footnote{Xian H, Chantarujikaong SI, Scherrer JF, Eisen SA, Lyons MJ, Goldberg J, and others. Genetic and environmental influences on posttraumatic stress disorder, alcohol and drug dependence in twin pairs. Drug Alcohol Depend 2000;61:95–102}

I acknowledge that the soldier, who, as a result of the stressor purchased one of the above diseases in the light of the Geneva Conventions and I Additional Protocol is deemed to be patient.
Article 8 of the Protocol does not clarify the time of onset. Reference is made just about "wounded and sick" which mean persons who have both military and civilian, who, because of injury, illness or other infirmity or interfere with the physical or mental health or in need of medical assistance. It is possible that the legislature had in mind only people who are directly located on the site of the war, and not after their completion. However, using a broad interpretation would expand the functional scope also to the people who have suffered trauma (physical, mental), acquired the disease when acting in war, and whose symptoms manifested themselves later or in need of medical assistance at later time. In fact, there should not be made a distinction and "discriminate against" diseases only because of the time factor. Although, it is possible to diagnose the disease only after a certain time, not answering its attribute of disease and suffering are treatment options.

The Polish state in the art. 3 of the Act of veterans activities outside the country, defines a veteran of the victim as a person who took part on the basis of a referral in activities outside the country, suffered bodily injury as a result of the accident remains in connection with these actions or illness contracted while performing tasks or duties outside the country in respect of which awarded himself compensation benefits. The decision to grant the injured veteran status includes, among others. Information about the percentage of bodily harm as a result of the accident remains in connection with the activities outside the country or illness contracted while performing tasks or duties in framework of the activities outside the country in respect of which compensation benefits were awarded. In addition, necessary to establish the existence of the disease protocol is damaged or decision finding an occupational disease and the judgment of the medical commission of the relationship of the resulting disease event during which the disease "created". In accordance with Art. 23, the veteran is entitled to medical and psychological care regardless of time of onset of the first symptoms. It is important that the disease was acquired during the war. How then, should the state react when the first symptoms appear several months after completing the mission? Should the state intervene, continue to support and heal its sick citizen? It seems that there should be given not only to the strictly legal aspect, but also on the welfare of the victim, or simply a sense of reciprocity and compensation unpleasant experience. In addition, the effects of which carry on the psychological problems, often provided untreated, characterized by the intensification of aggressive action, excessive nervousness and excitability, sometimes it even leads to suicide. Patients may constitute a source of danger to himself and others that are directly linked to the issue of criminal and civil liability (tort) sick soldier.

It is not difficult to imagine a situation when the patient under the hard influence of the stimulus caused by a stressor commit a crime, such as doing harm to his loved ones. So what if the sick soldier will be re-sent to the front during the war and commit murder of a civilian or make other crime?

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18Article 3 of the Polish act of veterans activities outside the country (Ustawa z dnia 19 sierpnia 2011r. O weteranach działan poza granicami państwa), Dz. U. Nr 205, poz. 1203, 2011
19Article 23 of the Polish act of veterans activities outside the country (Ustawa z dnia 19 sierpnia 2011r. O weteranach działan poza granicami państwa), Dz. U. Nr 205, poz. 1203, 2011
In accordance with article 51 of an Additional Protocol\textsuperscript{20} The civilian population is protected and it is unacceptable to carry out its attacks, intimidation, violence and threats. Article 85 of this document criminalize such acts. In addition, they are treated as so, severe violations or war crimes.\textsuperscript{21} On the basis of the extradition treaties Polish citizen should be subjected to the jurisdiction of Polish orchards. Similarly, in the other side, extradition is not allowed when it concerns a Polish citizen, and therefore in any situation where the entity who violated the rule contained in art. 51 of the Protocol is soldier of Polish citizenship will apply the Criminal Code. Polish Penal Code of 1997 art. 31 in conjunction with art. From art. 123 CC criminal responsibility off of that "because of mental illness [...] could not act in time to recognize its importance or of guiding his conduct."\textsuperscript{22} Mental illness disables the blame where it is impossible to assign blame does not commit an offense.

A similar adjustment includes art. 31, paragraph 1, letter a of the Rome Statute of the International Criminal Court\textsuperscript{23}, which excludes criminal responsibility for a person suffering from a mental illness, among others, for all considered acts of war crimes listed in art. 8 of this document.

Who is, therefore, taking the responsibility for business sick soldier? So far, the International Law Commission has not developed any regulations that would regulate the issue of the responsibility on an international level. However, it may result from a specific state law, such as art.417 Polish Civil Code\textsuperscript{24} which states that the State bears the responsibility for a damage caused by unlawful action functional nature in the performance of his duties. Responsibility may also result from general principles of law, contract law and international treaties of international law.

\textsuperscript{20} Article 51 of the Additional Protocol to the Geneva Conventions of 12th August 1949
\textsuperscript{21} Article 85 of the Additional Protocol to the Geneva Conventions of 12th August 1949
\textsuperscript{22} Article 31, article 123 of Polish Penal Code (Ustawa z dnia 6 czerwca 1997r.- Kodeks karny), Dz.U. 1997 nr 88 poz. 553, 1997
\textsuperscript{23} Article 31, paragraph 1, letter a of the Rome Statute of the International Criminal Court, 2010
\textsuperscript{24} Article 417 of Polish Civil Code (Ustawa z dnia 23 kwietnia 1964r.- Kodeks cywilny), Dz.U. 1964 nr 16 poz. 93
The International Criminal Court yesterday and tomorrow. Nowadays problems and future perspectives.

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Introduction
Geneva Conventions and rules applicable to international and non-international armed conflicts are the very base for International Humanitarian Law but they are still just part of it. International Criminal Law is an important branch, sometimes omitted or depreciated. Nevertheless, it is crucial if the international community wants to square up with Second World War’s crimes and those who committed it.

The history of mankind is full of global wars and minor territorial conflicts. The very first step on a way of developing international criminal jurisdiction was the end of the Second World War. Then, the first international criminal tribunal was established – the Nuremberg Military Tribunal and, later, the International Military Tribunal for the Far East. The first one was proceeding for almost a year, between November 20th, 1945 and October 1st, 1946. It sentenced twelve German criminals for death penalty, three people for life imprisonment and two people for twenty and fifteen years in prison. The another Tribunal was held to try the leaders of the Empire of Japan for three types of war crimes. "Class A" crimes were for those who participated in a conspiracy to start and wage war (crimes against peace); "class B" crimes were for those who committed "conventional" atrocities (war crimes); "class C" crimes were for those who committed crimes against humanity. Several Polish sources from 20th century reports that the idea of establishing first Permanent International Criminal Court appeared soon after First World War – over a hundred years ago. One may find it obvious that the idea was recalled after Second World War but the initiative had to be put aside for several decades because of international tensions called “the Cold War”. International powers such as the United States of America and the Soviet Union were unable to make a compromise. It was the main reason why international community had to wait so long for an institution with universal jurisdiction.

Historical overview
Further step on the way for establishing international criminal institution was erection of two International Criminal Tribunals with local scope. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, commonly referred to as the International Criminal

1 The Avalon Project: Documents in Law, History and Diplomacy; The International Military Tribunal for Germany http://avalon.law.yale.edu/subject_menus/imt.asp [access: 17.10.2014].
Tribunal for the former Yugoslavia or ICTY was created in 1993 by Resolution No. 827 of the United Nations Security Council. Its main goal was to prosecute people responsible for crimes committed during wars in former Yugoslavia. The maximum sentence the ICTY could impose was life imprisonment.

A year later another tribunal was established – The International Criminal Tribunal for Rwanda (ICTR). This Tribunal was meant to judge people responsible for the Rwandan Genocide and other serious violations of international law in Rwanda, mostly in 1994. Rwandan Genocide was a mass slaughter of ethnic Tutsi and politically moderate Hutu by government-directed gangs of Hutu extremists.

Creation of the International Criminal Court was not an easy task. It took two years to complete the project of the International Criminal Court – the works were led by the United Nations General Assembly. In the end, in 1998, the final voting was conducted and 120 states decided to enact the Rome Statute as the foundational and governing document of the International Criminal Court. The Rome Statute came into force on July 1st, 2002. On this date all requirements were met and the International Criminal Court came into being.

General information about the International Criminal Court

Before all, it is essential to gather all basic information about the International Criminal Court as a starting point. The International Criminal Court is a permanent institution and the base of its functioning is aforementioned Rome Statute – an international multilateral treaty. The premises of the International Criminal Court locate in the Hague (the Netherlands). Eighteen judges work in the International Criminal Court, they are nominated by the High Contracting Parties of the Rome Statute (also referred as the Rome Treaty). The International Criminal Court is not dependent on the United Nations organization and has international legal status. Only individuals may stand trial. The International Criminal Court’s jurisdiction is intended to be complementary to High Contracting Parties’ national courts. There are only several categories of crimes which may be prosecuted – material breaches of international law.

The International Criminal Court has four organs: the Presidency, the Office of the Prosecutor, the Judicial Division and the Registry.

The Presidency is responsible for the administration of the Court. It consists of the President and two Vice-Presidents. They can perform their duties for maximum three years and they may be elected only twice.

The Judicial Division comprises the eighteen judges and has three chambers: Pre-Trial Chamber, Trial Chamber, Appeals Chamber. Judges are elected for a nine-year term and must not be re-elected.

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The Office of the Prosecutor conducts prosecutions and, earlier, investigations. Article 42 of the Rome Statute provides that the Prosecutor should act independently – that means any member of his Office cannot seek help from any institution, organization, state or individual person.

The Registry was created for administrative issues and serving the Court. The Registry is headed by the Registrar who is elected for a five-year term.

The official seat of the International Criminal Court, like aforementioned, is the Hague in the Netherlands but the proceedings may be carried anywhere.

Jurisdiction of the International Criminal Court has three dimensions: territorial, personal and temporal. Territorial jurisdiction includes states’ territory, registered vessels and aircraft. The personal jurisdiction extends to all natural persons, regardless of where they are located or where the crimes were committed, as long as those individuals are nationals of either states that are party to the Rome Statute or states that have accepted the Court’s jurisdiction. Temporal jurisdiction means the time period over which the Court can exercise its power – usually it starts at a date when a state becomes Party to the Rome Statute.

Current situation

Firstly, it is recommended to refer to material breaches, namely, what does it exactly mean. The Rome Statute includes strict definitions of crimes being under the International Criminal Court’s jurisdiction in Article 5. There are: crimes of genocide (Article 6), crimes against humanity (Article 7), war crimes (Article 8) and crimes of aggression (Article 5 (2)). One should remember that in the international public law there is no definition of term ‘aggression’ and the Rome Statute refers to this issue; crimes of aggression will be able to be prosecuted by the Court after the definition of the term “aggression” is formulated, presented, approved and implemented. Experts say it is not possible before 2017 when the International Criminal Court’s jurisdiction may be activated after adopting Kampala amendments. Until this day the International Criminal Court remains unable to exercise its jurisdiction over the crime of aggression. Thus, when one deals with crimes’ unfitting definitions of the abovementioned three crimes the International Criminal Court has to refrain from any action since it has no competence to try people responsible for committing any kind of crime considered as the crime of aggression. Because of that, the International Criminal Court has no power regarding to aggression matters since one of the basis of its competence still has not come into force.

Another difficulty the International Criminal Court has to face is the issue of non-signing by several states of the Rome Statute or signing but not ratifying it yet. The most populous countries (for example People’s Republic of China, the Republic of India, the United States of America) still have not signed or ratified the Rome Treaty which means they are not bound by the International Criminal Court’s jurisdiction. It decreases the Court’s international meaning in standing criminals.

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5 Article 3 (3) of the Rome Statute.
7 High Contracting Parties agreed to define the term “aggression” and regime of exercising the ICC’s jurisdiction over that type of crime.
trial and its effectiveness as well. Other states that are important but not willing to do so are Israeli, Sudan, Belarus, Turkey. One cannot clearly state if it is necessary the Rome Statute to be signed by every country in the world (assuming it would be ever possible) and if the International Criminal Court would be automatically one hundred percent effective in such situation. It may be put into doubt. Nevertheless, the International Criminal Court cannot proceed properly if the most important countries, strongholds of democracy and human rights and another states are still not party to the Rome Treaty. There is a constant need for signing the Rome Statute and handing over national jurisdiction to the International Criminal Court under circumstances depicted in the Rome Statute.

The criticism the International Criminal Court is subject to, is based not only on the lack of possibility of effective proceeding in several countries. Despite the ICC the legal status, it possesses no army or any different ways to enforce its judgments, warrants and others\(^8\). It has to rely only on states’ good will and willingness to cooperate. One may see clearly the lack of enforcement measures stands as another obstacle on a way of effectiveness and proper fulfilling its obligations. It is not very hard to imagine what would happen if interested country was reluctant to perform its duties regarding trial and is not a party to the Rome Treaty. It seems to be a serious loophole.

Regarding legal status of the International Criminal Court it is essential to mention that the Court is only complimentary\(^9\) – it means that it may proceed if states are unable or unwilling to prosecute an individual. Therefore, if legitimate national investigations or proceedings have taken place or are ongoing, the Court will not initiate proceedings. Even if an investigation is closed without any criminal charges being filed or if an accused person is acquired by a national court, the Court will not prosecute an individual for the crime.

Another issue concerns restrictions of the United Nations Security Council. Under Article 16 of the Rome Statute, the Security Council is entitled to turn to the International Criminal Court with a motion for postponing or suspension of procedure for the term of twelve months. It is essential that the motion has to be approved and accepted by the International Criminal Court, regardless of any condition, situation or necessity. After these twelve months of suspension or adjournment another motion may be submitted. The procedure remains the same as well as conditions. It is clear that unanimous conduct of Permanent Members of the Security Council may effectively restrain the International Criminal Court from initiating or continuing procedure in particular case, even in every case.

Another problem concerns cases that the International Criminal Court is dealing with recently. The African Union came into clear conclusion that the Court is proceeding exclusively African states’ cases. It is undoubtedly truth but one should take into consideration the issue of actualization of the competence of the Court. The International Criminal Court may prosecute only those criminals whose crimes were committed after the Court received competence to judge such


\(^9\) Article 17 of the Rome Statute.
cases. It is important to remind that the abovementioned competence was established in 2002. Actually, official investigations take place in the following states: Democratic Republic of the Congo, Uganda, Sudan, Central African Republic, Kenya, Libya, Cote d'Ivoire, Mali. Preliminary examination is taking place for example in Afghanistan, Georgia and Iraq but still it is not an official investigation. According to the latest available official information from the Office of the Prosecutor, there are eight situations under investigation, nineteen cases concerning twenty seven persons, eight preliminary examinations on four different countries.

Further allegations refer to the way of financing the International Criminal Court. Critics’ point that the funds from states designated to support the Court are not sufficient to conduct an effective procedure, the bureaucracy is growing to unimaginable scope and simultaneously there are too many officers – the number of them does not meet the real needs of the International Criminal Court. Others pay much more attention to the scope of rights that remain to the defendant’s disposal – it is too wide and hinders the Court to proceed without delays. African politicians say about the International Criminal Court as a tool of Western imperialism and the Prosecutor is “rendering justice with double standards”. They accuse the Court of over-focusing on the African continent and turning a blind eye on what is happening in other regions in the same time.

One may be surprised on which initiative the proceedings in states commence. The starting motion was issued by the Security Council in only two out of eight states. Thus, six countries decided to start the proceedings by themselves. It may be considered as a sign of an adulthood of some kind of these states or growing respect to the International Criminal Court’s authority. This information is surely a strong argument in Court’s enthusiasts’ hands. It may be also turning point if states will give it chance for further activity.

Summary

Regardless of who is right, critics or Court’s enthusiasts, it has to be agreed that the International Criminal Court is not a flawless institution and it will never become one. The Court is newly established – ten years of activity is definitely not enough to finally assess whether it functions properly or not. One may see its advantages like willingness of several countries to hand over their national jurisdiction to the Court. There are obviously drawbacks, a lot of them were already mentioned.

Enthusiasts and critics should refrain from harsh assessment and complex allegations. The International Criminal Court has to learn how to proceed correctly, most effectively, how to engage states and receive their trust. Whether the Court operates so inappropriately that it needs thorough changes and amendments we will see only after the Court finishes several of cases it proceeds over now. Then it will be clear if the International Criminal Court indeed focuses only on African states, defendants have too much opportunities to protracting investigation or hindering procedures or if

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Court’s funding should be changed and if yes – how it should be like. Those, who will assess the International Criminal Court, need more time and a proper perspective, being objective and considering all advantages and drawbacks. There is still no time perspective and that is why the international community needs to wait. It is harder to foresee how long, two or twenty years. After that we will find out if the International Criminal Court is still needed or more effective are Tribunals erected ad hoc to judge particular cases.
Application of international human rights law in a situation of military occupation: Case study from the Occupied Palestinian Territories (OPT)

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Abstract
The legal regime regulating the daily life in OPT is complicated for any lawyer, let alone the local population for whom ability to navigate within the increasingly fragmented system of international law combined with military orders and outdated decrees left from periods of British, Ottoman and Jordanian rule has become a matter of survival. It is frequently presumed that complementarity in application of international humanitarian law (hereinafter referred to as IHL) and international human rights law (hereinafter referred to as IHRL) serves the interests of the most vulnerable population. This presumption, however, is problematic for the cases with obvious power asymmetries where the decision to refer to a particular area of law is made by those benefiting from the existing disproportion. In the case of OPT, it is Israel determining which rule to apply, and consequently it is Israelis political considerations that are finding their way into the legal analysis.

What is happening in reality could be described as manipulation of the international law by the governmental authorities “jumping” from IHL to IHRL depending on what area provides better grounds for justification of already determined policy. As the result the differences between IHRL and IHL standards or more specifically the way Israel is handling them lead towards new injustices and weakened protection of the occupied population in reality.

Research
The legal regime of the OPT and corresponding political situation was induced by the Oslo Accords signed by Palestinian leaders and the Israeli government leaving almost 70 percent of the West Bank territory under the control of the latter.

Richard Falk and Mohammed Abu-Nimer, although coming from the different backgrounds of legal science and conflict transformation, provide a remarkably similar assessment of the Oslo Accords and the role (or rather the absence of any role) played by international law during the entire process.

Any serious discussion of providing legal guarantees was deliberately avoided in these peace negotiations, at the insistence of Israel negotiators. As the result, the absence of the

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guaranties coupled with the asymmetrical character of relationships between the parties in this conflict only solidified Israel’s position, leaving Palestinians dependent on the willingness of the occupying state to fulfill its promises and comply with the requirements of international law.

The legal regime of OPT

The legal regime regulating daily life in the Occupied Palestinian Territories is complicated for any lawyer, let alone the local population for whom ability to navigate within the increasingly fragmented system of international law combined with military orders and outdated decrees left from periods of British, Ottoman and Jordanian rule has become a matter of survival. The relevant areas of law regulating daily lives of people within the Occupied Palestinian Territories include jus in bello (or international humanitarian law, hereinafter referred to as IHL), international human rights law (hereinafter referred to as IHRL) and local laws, that represents a combination of Ottoman law, British mandate and Jordanian law that were in force ante 1967 with Israeli military orders.

IHL

The main objective of the law of occupation as a part of IHL applicable in the present case is to force an occupying state to take care of the local population and prevent it from misappropriating the sovereignty belonging to people. IHL limit legislative powers of the occupier, outlaw displacement of existing communities and transfer of the nationals of the occupying state to the occupied territory, impose heavy restrictions on expropriation of private property, and prohibit any alterations in the local structures of governance and allocation of powers.\(^2\) Not surprisingly, since 1967 up until now, the executive branch of the Israeli government has been attempting to get rid of the limits imposed by the law of occupation. In January 2012, in response to the continuous requests of settlers to strengthen their positions in the Occupied Palestinian Territories the Prime Minister of Israel appointed a committee comprised of lawyers widely known for their support of the settlements to analyze the legality of the latter. In July 2012 the newly established body has issued its final report (the “Levy report”) reaffirming the legality of the settlements and inapplicability of IHL to the Occupied Palestinian Territories, basically concluding that if the occupation is prolonged, it is no longer an occupation.\(^3\)

Unfortunately for the Israeli government, the applicability of the law of occupation to the West Bank territories has been confirmed not only by the International Court of Justice,\(^4\) the General

\(^2\)Convention Respecting the Laws and Customs of War on Land and annexed Regulations Respecting the Laws and Customs of War on Land, the Hague, 18 October 1907, 36 Stat. 2277, articles: 43, 46, 52, 53; Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August, 1949, 75 UNTS 287, articles 49, 53, 54, 64.


\(^4\)Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004.
Assembly of the United Nations, and the Human Rights Council but also by its own Supreme Courts on numerous occasions.

Nevertheless the continuous application of the IHL is far from being unproblematic. It is generally more susceptible to the “interest of security” arguments that can potentially limit the rights of the Palestinians living in the West Bank.

IHRL

The second area of international law particularly relevant for cases of prolonged occupation is IHRL. Although initially drafted as the set of rules regulating the relationship between a state and its nationals in the absence of an armed conflict, human rights subsequently expanded its scope of application. Continued relevance of the norms of IHRL during the armed conflicts in general, and in the situation of prolonged occupation in particular, was confirmed by the International Court of Justice. The doctrine is also unequivocally supportive of application of human rights standards during the occupation.

The rationale behind expanding the scope of the human rights framework to include instances of occupation is very simple: to improve the protection of the local population. Given the absence of active hostilities, it would be to force the occupying authority to comply with a more rigid standard in terms of the use of force and the right to detain.

The best aspect about IHRL is that it does not take into consideration specifics of the regime requiring from the occupier to provide the peace-time standard of protection for the population. Paradoxically, the worst things about IHRL being applied to the situation of occupation come from exactly the same roots: it does not take into account specifics of the relationship between the de facto authority and the local population and it gives a wide range of duties to the occupier to comply with.

Interrelation between international humanitarian and international human rights law

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Although IHL and IHRL do not have exactly the same sphere of regulation, some of the issues they seek to address are indeed overlapping. It would not be a problem if these areas of law did not give rise to directly contradicting prescriptions.

There are lots of heated debates among legal scholars about whether a conflict of norms exists and how it should be resolved. Some lawyers openly confirmed that in deciding which rule to apply in the case of a normative conflict, political considerations have to be taken into account: “Giving priority to a special norm within the system of unclear norm relations in which a decision cannot rely on such relations, the decision actually relies on political or other considerations…” The problem is how to decide whose political considerations ought to be taken into account while determining the applicable norm.

Currently national and international courts, governments and international organizations are determining which rule to apply on a case-by-case basis. The prevailing approach is to apply IHL and IHRL simultaneously, in a way that helps them to complement and inform each other. It is presumed that the complementarity principle would be applied in a most beneficial way for the vulnerable population. This presumption is problematic for the cases with obvious power asymmetries where the decision is made by those benefiting from the existing disproportion. In the case of the West Bank, it is Israel determining which rule to apply, and consequently it is Israelis political considerations that are finding their way into the legal analysis.

Unfortunately, the politics appear to affect not only the way the law is interpreted by the executive branch but it has also found its way into the case-law. The Israeli courts have to function under constant political pressure, which certainly affects the rulings. As the result, the judges use all possible and impossible justifications in order to avoid ruling on politically controversial issues. In a number of cases it seems that courts explicitly accommodated the government of Israel or desperately struggled to find the balance between law and politics. While commenting on the Afu et al., v. Commander of IDF Forces in the Judea and Samaria et al., Chief Justice Shamgar “opined that … the Court should adopt the interpretation that is least restrictive of the state’s sovereignty.” For obvious reasons, courts did not endorse this conclusion at loud; nevertheless, judges have repeatedly acknowledged the constant expansion of authority the government of Israel vests its bodies with to be legal and legitimate. In the end according to Guy Harpaz Yuval Shany

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13 HCJ 9132/07, The Supreme Court sitting as High Court of Justice, Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defense, para. 12.
“The Court’s jurisprudence has thus adjusted to accommodate occupation more than occupation has adjusted to accommodate legal restraints”.

Selected cases of IHL and IHRL implementation

Administrative internment and following judicial proceedings

Despite the fact that there is no ongoing hostilities within the OPT, by the end of February of 2013 there were 169 people detained in Israeli facilities without any charges brought against them or any court proceedings confirming validity of their detention. In addition since 1967 the Palestinian residents of the West Bank have been tried by Israeli military courts that were repeatedly characterized by the international community as lacking the basic procedural guarantees implied by the rule of law principle. The proceedings of these quasi-judicial institutions in 99.74 percent of cases result in a guilty verdict.

Although one can argue that in the absence of ongoing hostilities it would be more reasonable to comply with the standards for deprivation of liberty and due process guarantees provided by IHRL, it is definitely not the choice of the Israeli government.

Creation of fire zones

While claiming to implement Article 52 of the Hague regulations (1907) Israel has been constantly creating fire zones that allegedly serve the purpose of military training. In the reality the creation of fire zones results in expulsion of Palestinian population from their settlements and preventing them from cultivating their agricultural lands. Furthermore the Israeli authorities tend to establish and close military zones every Friday during the time of demonstrations preventing Palestinians from taking part in political protests. As the result the powers vested with the occupying authorities under the IHL are serving the purpose of restricting Palestinians’ right that Israel has to ensure under IHRL.

Protection of the human rights within the OPT

For the purposes of IHRL, the distinction between the occupied and the occupying does not exist. Courts applying it do not have to take into account that the very presence of Israeli settlers on Palestinian territories is illegal. Human rights provisions grant them totally equal political, social and economic rights. As the result IHRL grants settlers land rights, rights for proper housing, protects settler access to water and cultural property. While utilizing these provisions the Israeli government allows the advancement of the settlements (otherwise illegal under IHL). Furthermore the security of the settlements and corresponding right to life of its residents is protected through

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16Harpaz and Shany, “The Israeli Supreme Court”, 516.
creating “security zones” separating them from Palestinian villages and coming at the expense of Palestinian public and private property.

Sadly, the Israeli human rights commentators tracking the development of court jurisprudence conclude that the recent practice of the Israeli courts have further eroded the preferential status of Palestinian population compared to its own decision in Jamayit Iscan v. the Commander of IDF\(^{20}\) by concluding in Abu Safiya v. The Minister of Defense granted under IHL arguing that even the rights of those Israeli citizens passing through the Occupied Palestinian Territories could be preferred to Palestinian rights.\(^{21}\)

Amendment of local legislation

IHL requires the occupying authorities to leave the local laws unchanged unless it is absolutely impossible.\(^{22}\) Originally this provision meant to prevent occupiers from legislating unless the local legislation legalized torture or genocide, essentially making it impossible to comply with international law. However, Israel has been interpreting this rule in a very broad way leading to adoption of innumerable military orders arbitrarily amending local laws. Israel is selective of the laws it applies, limiting it to provisions that advance its interests, rather than for effective protection of Palestinian interests. It is common for the Israeli government to use the responsibility for implementing human rights within the OPT as the rationale behind constant process of modification of the local legislation.

The most striking example of modification of local rules was created around the procedure of issuing building permits within the OPT. Arguing that Palestinian councils are incapable of securing human rights enforcement Israel has amended the local regulation vesting the power to issue legal permits with Israeli executive bodies proven to be unjustly discriminating against Palestinians.\(^{23}\) As the result only 6 percent of applications for building permits submitted on behalf of the Palestinians are approved.\(^{24}\) It is not that difficult to contrast demolition of 540 Palestinian-owned structures that have been allegedly built without a permit\(^{25}\) with an extremely limited practice of demolishing illegal buildings within the settlements and existing outposts. The latter despite being illegal even under the Israeli law are currently hosting 3,371 settlers.\(^{26}\)

**Conclusion**

\(^{20}\)HCJ 393/82 Jamayit Iscan Almalmun Althaunia Almahduda Almesaulia v. The Commander of IDF in the Judea and Samaria Area, 1983.

\(^{21}\)Harpaz and Shany, “The Israeli Supreme Court”.

\(^{22}\)Convention Respecting the Laws and Customs of War, article 43.


\(^{26}\)Palestine Monitor. Factbook 2012, p. 49.
The current state of international law regulating the occupation is partly induced by the absence of the strict hierarchy of rules within the international law. However it is also the result of an aspiration to create a flexible system that would benefit the interests of the occupied population.

In the present case the conflict between the IHL and IHRL provisions and the flexibility of the regime in general have been repeatedly used in order to advance the occupation and add to the permanence of its character. By manipulating the relevant norms without apparently violating any of them Israel has been expanding the settlements, practicing administrative internment, displacing Palestinian population, depriving them of their agricultural lands and eroding the preferential status of the occupied population. The Israeli courts while concluding that some of the concrete policies were illegal due to their disproportionate effects did not object to arbitrary expansion of the government authority letting the political considerations to shape their case-law.

It is vital to recognize that universally applicable rules created by the international legal community might cause unintended political consequences and impair efforts to protect the victims of armed conflicts on the ground. The case study from the OPT demonstrates that in the absence of impartial actors that would determine applicable provisions and resolve conflicts of rules the flexibility of the regime and an opportunity to opt for a more convenient norm serves the interests of the occupying power unless it is capable of acting in an unprejudiced way. Given the inherently asymmetrical character of power relationships between the occupier and the occupied providing the former with more responsibilities (inevitably leading to providing it with more powers over the occupied) requires guarantees of their fulfillment and concrete responsibility for the policy carried out in bad faith.
Forced Marriage as a New Crime Against Humanity In International Criminal Law

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Forced marriage is a crime against humanity first introduced by the Special Court for Sierra Leone (SCSL). In Sierra Leone, forced marriage occurred when girls and women were abducted and forced to serve as “wives” to combatants. It has been recently debated whether there is a need to recognize this new crime against humanity or it is just creating unnecessary duplicity in international criminal law. This Article examines whether forced marriage as it was defined by the Appeals Chamber of the SCSL is distinct from already existing crime of sexual slavery. It is argued that although forced conjugal association imposed on victims coupled with relationship of exclusivity is not always incorporated in crime of sexual slavery, it is the case in Sierra Leone and several other states where similar gender-based violence occurred (Uganda, Liberia, Rwanda and Democratic Republic of Congo). It is further argued that in some cases forced marriage is a separate crime and falls within the definition of “other inhumane acts” as crimes against humanity as it exists in customary international law. It is stated that forced conjugal association imposed on “bush wives” in case of Sierra Leone is not sufficient to constitute an “other inhumane act” under international criminal law. On the other hand, forced marriage in Khmer Rouge-ruled Cambodia satisfies definition of “other inhumane acts” as it is of gravity similar to any other crime against humanity. In the Cambodian context forced marriages were a part of state policy and both men and women were victimized. It is concluded that forced marriage should be recognized as a crime against humanity, but with a standard higher than the one introduced by the Appeals Chamber of the SCSL, including, inter alia, enforcement of both spouses.

Introduction

For the first time in history of international criminal justice Special Court for Sierra Leone’s (SCSL) Prosecutor raised a question whether a crime of forced marriage exists in international criminal law. This crime is one of the most notable examples of “gender-based” tendencies in international criminal justice1.

In 1991 was an outbreak of civil war in Sierra-Leone which lasted for more than ten years. This conflict was infamous for, inter alia, phenomenon which is now called “bush wives”. During the conflict young women and girls were abducted by rebels and forced to serve as “wives” to them2.

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This so-called forced marriage involved following practices. “Wives” were forced to enter into sexual relationships with their “husbands”. They were expected to cook, wash clothes, carry “husband’s” belongings and perform other household duties. Moreover, “wives” were also expected to bear children, to take care of them and raise them. If the “wife” was accused of infidelity, she was facing severe punishment, including death penalty. Victims were often subjected to physical, emotional, and sexual violence; some contracted sexually transmitted diseases.

Forced Marriage as Other Inhumane Acts

In SCSL and Extraordinary Chambers in the Courts of Cambodia (ECCC) charges of forced marriage were brought under category of other inhumane acts as crimes against humanity. Hence, it is, first and foremost, necessary to understand what behavior may constitute other inhumane acts as crimes against humanity.

Other inhumane acts are a residual category designed to punish acts or omissions not specifically listed as crimes against humanity, provided these acts or omissions meet, inter alia, the following requirements:

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;
2. Such act was of a character similar to any other act constitution crime against humanity.
3. Character is described as nature and the gravity of the act.

Apart from that, International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Court (ICC) in their jurisprudence came to conclusion that other inhumane acts are violations of basic human rights pertaining to human beings; such rights are codified in recognized international instruments, including the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966. Furthermore, as it was noted by ICTY in Stakic case, not all human rights laid down in recognized international instruments are protected by international criminal law.

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3 Ibid, para. 711.
4 Ibid, Concurring opinion of Justice Sebutinde, para. 15.
5 Ibid, para. 190.
6 Ibid.
8 Rome Statute Elements of Crimes, Article 7(1)(k); it should be noted that Statute of the Special Court for Sierra Leone (SCSL) use the same definition of other inhumane acts as in the Rome Statute.
9 Ibid, fn. 30.
Summing up, a number of crimes against humanity recognized in customary international law were first criminalized as other inhumane acts\textsuperscript{12}. So the question is – are there elements of forced marriage different from sexual slavery, and, not less importantly, would forced marriage constitute other inhumane act as a crime against humanity?

Did SCSL Define A New Crime Against Humanity?

SCSL Prosecutor first charged the accused with forced marriage in Brima case. In this case SCSL Trial Chamber came to conclusion that charges of forced marriage are fully subsumed by charges of sexual slavery. Trial Chamber further noticed that there is no such gap in international criminal law that would justify charging a person with other inhumane acts\textsuperscript{13}. Therefore, it was decided that there is no need to “invent a wheel” and charge both crimes in the case.

It should be noted that to commit a crime of sexual slavery the perpetrator needs to exercise any or all of the powers attaching to the right of ownership over one or more persons and to cause such person or persons to engage in one or more acts of a sexual nature\textsuperscript{14}. In Brima case the Trial Chamber was, first of all, convinced that Article 2(g) of the SCSL Statute exhaustively enumerates all crimes of sexual nature, therefore, only acts of predominantly non-sexual nature can qualify as other inhumane acts\textsuperscript{15}.

Secondly, the Chamber came to conclusion that the Prosecution failed to indicate any element which would not have been already included in sexual slavery. Since the accused are already charged with sexual slavery, there is no need for duplicity\textsuperscript{16}. In Chamber’s opinion, forced performance of conjugal duties is the mere example of enslavement as an element of sexual slavery\textsuperscript{17}. On the other hand, use of the term “wife” was considered by the Court as a mean of establishment of ownership over the victim and as a tool to suppress the victim\textsuperscript{18}. Interestingly, Defense, although claimed that there is no crime of forced marriage, did not insist on the fact that there are not elements not subsumed by sexual slavery. On the contrary, Defense merely stated that behavior in question is of insufficient gravity to be qualified as a crime against humanity\textsuperscript{19}.

Nevertheless, SCSL Appeals Chamber came to diametrically different conclusion. It noted that the Trial Chamber failed to analyze “non-sexual” elements of forced marriage\textsuperscript{20}. The Chamber, inter alia, concluded that:

\textsuperscript{13} Prosecutor v. Brima et al, No. SCSL-04-16-A, Trial Judgment (20 June 2007), para. 713 (hereinafter as – Brima Judgment).
\textsuperscript{14} Rome Statute Elements of Crimes, Article 7(1) (g)-2; SCSCL, Brima Judgment, para. 708.
\textsuperscript{15} Ibid, para. 697.
\textsuperscript{16} Ibid, para. 704.
\textsuperscript{17} Ibid, para. 705.
\textsuperscript{18} Ibid, para. 711.
\textsuperscript{19} Ibid, para. 702.
\textsuperscript{20} Brima Appeals Judgment, para. 181-182.
Firstly, other inhumane acts as crimes against humanity may include both crimes of sexual and gender-based nature. Moreover, Trial Chamber’s restrictive approach does not reflect a current state of customary international law\(^\text{21}\). In any event, forced marriage is a complex crime, which includes both sexual and non-sexual elements.

Secondly, in forced marriage the perpetrator aims to establish a forced conjugal association, not to exercise rights of ownership towards the victim\(^\text{22}\). This association implies that both “spouses” have mutual obligations\(^\text{23}\). In exchange to what the “wife” was expected to do, the “husband” had to provide food, clothes and protection, including protection from other men. That, in Appeal Chamber’s opinion, does not happen when the woman is used for merely sexual purposes\(^\text{24}\).

Thirdly, relationship of exclusivity between husband and wife is the second element of forced marriage\(^\text{25}\). “Wife” who did not properly fulfill her household obligations and (or) was unfaithful was subject to harsh punishment, including death penalty\(^\text{26}\). Use of the term “wife” psychologically traumatizes the victim, leads to rejection of the victim by society and makes reintegation of the victim extremely complicated\(^\text{27}\).

The Court underlined that arranged marriages are different from forced marriage in a sense that the first implies agreement of both sides in one form or another\(^\text{28}\). More than that, arranged marriages of underage girls violate their rights codified in Convention on the Elimination of All Forms of Discrimination against Women. At the same time forced marriage which takes place during the armed conflicts is a criminally punishable act\(^\text{29}\).

Appeals Chamber concluded that in Brima et al case forced marriage was of the gravity sufficient to qualify as other inhumane acts\(^\text{30}\). The Court took into account nature of perpetrators’ actions, atmosphere of violence in which the crimes were committed, and vulnerability of the victims, especially young girls.

However, it should be noted that Appeals Chamber failed to provide convincing enough evidence proving that forced marriage is substantially different from sexual slavery. Victims themselves did not consider their relationship marriage, there was no wedding ceremony,

\(^{21}\) Ibid, para. 184.
\(^{23}\) Brima Appeals Judgment, para. 190.
\(^{24}\) Ibid.
\(^{25}\) Ibid, para. 191.
\(^{26}\) Ibid.
\(^{27}\) Ibid, para. 193.
\(^{28}\) Ibid, para. 194.
\(^{29}\) Ibid.
\(^{30}\) Ibid, para. 200; see more at Michaela Fruli, Advancing International Criminal Law. The Special Court for Sierra Leone Recognizes Forced Marriage as a ‘New’ Crime against Humanity, JICJ 6 (2008), 1033-1042, p. 1036-1037.
including ceremony according to local customs\textsuperscript{31}. Apart from that, it would be fair to mention that victims’ reintegration problems arise rather due to loss virginity but not because of the use of one or another word. And loss of virginity equally appears as a consequence of sexual slavery (as well as pregnancy may appear as a consequence of sexual slavery).

**Further Developments: Taylor Case**

SCSL once again came back to the crime of forced marriage in Taylor case. Trial Chamber rightfully noted that factual circumstances surrounding sexual slavery often provide evidence of forced conjugal association between victim and perpetrator\textsuperscript{32}. In Trial Chamber’s opinion, forced marriage is a not a correct term to describe events which took place in Sierra Leone. Charged conduct included sexual slavery and forced labor in form of household work\textsuperscript{33}. The Chamber further stated that notion of marriage cannot be used to describe events which took place in Sierra Leone, and it is incorrect to call perpetrators husbands\textsuperscript{34}. Forced conjugal association is not marriage which is a mutual and sacred union but, rather, a conjugal form of sexual slavery\textsuperscript{35}. This union is a form of enslavement where perpetrator exercised all rights of ownership towards the “bush wife” and forced her into activities of both sexual and non-sexual character\textsuperscript{36}. Such activities, even if do not entirely fall within notion of sexual slavery, still constitute it\textsuperscript{37}.

Therefore, the Chamber came to conclusion that forced household labor is just a more detailed element of one of the types of sexual slavery\textsuperscript{38}. Forced conjugal association does not constitute a new crime just like gang rape does not stop being rape at the same time\textsuperscript{39}.

It is hard to disagree with SCSL’s conclusion in Taylor case. As it was constantly underlined in ICTY jurisprudence, other inhumane acts include only acts which violate basic human rights. Not all rights codified in universal human rights documents are protected by international criminal law. In Brima et al case Appeals Chamber failed to show violation of what rights constitutes a new crime against humanity. What additional, falling outside the scope of sexual slavery, rights were violated?

Gender-based discrimination? SCSL Appeals Chamber mentioned that arranged marriage may be a violation of girls’ rights, but forced marriage is a crime by its nature. Hence, the Chamber itself did not consider gender-based discrimination and violations of analogues rights of the gravity

\textsuperscript{31} See Brima Trial Judgment, para. 712; Michael P Scharf, Suzanne Mattler, Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone’s New Crime Against Humanity, 1:2 Case Research Paper Series in Legal Studies (2005), p. 17.

\textsuperscript{32} Prosecutor v. Taylor, No. SCSL-03-01-T, Trial Judgment (26 April 2012), para. 422 (hereinafter as – Taylor Judgment).

\textsuperscript{33} Ibid, para. 425.

\textsuperscript{34} Ibid, para. 426.

\textsuperscript{35} Ibid, para. 427.

\textsuperscript{36} Ibid.

\textsuperscript{37} Ibid, para. 228.

\textsuperscript{38} Ibid, para. 429.

sufficient to qualify as crimes against humanity. It is hard to imagine that, for instance, right to marry freely and to establish a family is the very fundamental right, violation of which “inflicts great suffering, or serious injury to body or to mental or physical health” of gravity similar to other crimes against humanity.

Apart from that, SCSL Appeals Chamber underestimated the meaning of marriage. It is a mutual and sacred union. This genuine meaning of marriage is the only thing which makes the whole concept special and distinctive from other institutions, and events which took place in Sierra Leone are anything but a sacred union of two people.

**Forced Marriage In Khmer Rouge-Ruled Cambodia**

It could be argued that events which took place in Khmer Rouge Cambodia are much more suitable when forced marriage definition is considered. Question whether certain acts committed by Khmer Rouge regime constitute crime of forced marriage was raised by victims representatives in the ECCC.

In Cambodia, forced marriage was a part of Khmer Rouge policy of total control of the population and was applied to women as well as to men. Forced marriages were used as tools to destroy a traditional family and ensure loyalty of the population. Sexual life and reproductive function of all population were under governmental control. Often marriage ceremonies were conducted collectively, when from 20 to 60 couples were registered at the same time.

In application on investigation of cases of forced marriage victims representatives described elements of this crime in Cambodian context. These elements are:

“(1) the perpetrator conferred a status of marriage, through words or conduct by force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against the victim, or by taking advantage of a coercive environment or such person’s incapacity to give genuine consent; (2) that the perpetrator caused such person to engage in conduct similar to that arising out of a marriage relationship, including prolonged association, acts of sexual nature, child bearing and the rendering of other conjugal duties; and (3) that the perpetrator caused the loss of virginity and disqualified the marriage to a freely chosen person and hindered the person from separation because he or she had to promise to stay together forever.”

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40 Rome Statute Elements of Crimes, Article 7(1)(k), para. 1.
Unfortunately, in Kang Kek Lew case forced marriage as a crime against humanity did not receive a proper attention. However, the Closing Order in the ECCC case No. 2 included, inter alia, forced marriage as a crime against humanity.\footnote{Ibid, para. 1443.}

It seems that Cambodian context, unlike “bush wife” phenomenon in Sierra Leone, is much more helpful in understanding potential nature of forced marriage as crime against humanity. In Cambodia, marriage was not one of the means of enslavement through forced conjugal association. Marriage itself was one of the values in danger. More than that, the whole integrity of a person as a human being was undermined. Therefore, in ECCC there was a violation of core fundamental human rights, which, no doubt, would constitute a crime against humanity.

Conclusion

There is a clear tendency of gender mainstreaming in international criminal justice. While it is a clearly positive trend, sometimes it may lead to inventing unnecessary “new” crimes. It may be said that criminalization of “bush wives” phenomenon as forced marriage is one of the rather negative aspects of the trend. This “new” crime committed in countries like Sierra Leone, Uganda or Congo, in reality is subsumed by already existing crime of sexual slavery. Using SCSL Trial Chamber’s words, it may be qualified as a distinct type of sexual slavery, the so-called conjugal sexual slavery. In any event, it should be repeated that only violations of fundamental human rights may constitute other inhumane acts as crimes against humanity. Therefore, elements of forced marriage which may have not been subsumed by sexual slavery are not of sufficient gravity to justify invention of the new crime against humanity.

On the other hand, this conclusion does not mean that the notion of forced marriage should be abandoned altogether. It is further argued that there is evidence of forced marriage which may be qualified as a crime against humanity in Khmer Rouge Cambodia. In Cambodia, both men and women were victimized and the concept of marriage itself was at stake.
Protection of the Natural Environment in Non-International Armed Conflicts: A Clash of Methodological Approaches

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I. Introduction

Due to technological developments modern wars have increased their (potential) harmful effects on the natural environment. International humanitarian law and international environmental law are, hence, closely related topics of growing concern to the international community. This paper focuses on the former which is the lex specialis of armed conflict.¹

General principles on the conduct of hostilities – such as the principles of distinction, military necessity and proportionality – undoubtedly apply to the protection of the natural environment in both international armed conflicts (hereinafter– IACs) and non-IACs.² Given that most armed conflicts nowadays are internal, the question is where and how we can find any specific rules of international humanitarian law on the protection of the natural environment in non-IACs. These rules are not expressly set forth in the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts³ (hereinafter – AP II). After the analysis of the two possible approaches to the solution of this problem, the present paper concludes that such protection should stem from the application of some other provisions of AP II, in particular, those regarding the protection of civilian population.

II. The Two Methodological Approaches

It has been submitted that “every international situation is capable of being determined as a matter of law,”⁴ even though there is not always a clear and specific rule readily applicable thereto. The two methodological approaches come into play in this regard, namely: (1) application of specific legal rules where they already exist and (2) application of legal rules derived, by the use of known legal techniques, from other legal rules or principles.⁵

1. Application of specific legal rules where they already exist

The first approach presupposes the adjustment of the relevant rules concerning IACs, mutatis mutandis, to non-IACs. Such specific rules are enshrined in the Protocol Additional to the Geneva

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⁵Ibid.
Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts6 (hereinafter – AP I) and the Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques.7 Article 35(3) of AP I prohibits the methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.8 Despite the fact that Australia proposed to extend the protection of the natural environment to non-IACs in AP II, this was rejected by some other delegations at the 1974 Diplomatic Conference in Geneva. Nevertheless, the International Committee of the Red Cross (hereinafter – the ICRC) believes that the same protection has already been given to both IACs and non-IACs by dint of customary international law.9

According to classical international law, an international custom comprises of the two elements: (i) a wide-spread and consistent general practice and (ii) a psychological element known as opinion juris sive necessitatis.10 The presence of the relevant provisions in various military manuals and national laws cited by the ICRC, i.e. some patterns of State practice, is undisputed, although it may still be insufficient.11 In any case, there is an unequivocal lack of opinio juris sive necessitatis. In the Nuclear Weapons Advisory Opinion, the International Court of Justice implicitly denied the customary character of rules on the protection of the natural environment enunciated in AP I describing them as “powerful constraints for all the States having subscribed to these provisions.”12 Thus, they do not constitute an international custom even in IACs, let alone non-IACs. The above-mentioned Advisory Opinion was rendered in 1996, i.e. one year after the ICRC had commenced the preparation of its comprehensive study on customary international humanitarian law. The inadequate demonstration of the necessary opinio juris sive necessitatis by the ICRC combined with the pronouncements of the International Court of Justice disprove that the framework of AP I for the protection of the natural environment can be applied to non-IACs by means of customary international law, at least to date. It might, at best, be regarded as an emerging custom.13

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8 This provision is complemented by Article 55(1) of AP I: “Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.”
12 Legality of the Threat or Use of Nuclear Weapons, op. cit., at 242, para. 31.
Furthermore, Articles 35(3) and 55(1) set the high threshold for their application: damage must concurrently be widespread, long-term and severe. Therefore, from a utilitarian point of view, it would not be judicious to refer to this provision. The Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques, having the lower threshold, does not, however, apply to non-IACs, the only exception being a hostile use of an environmental modification technique during a non-IAC, “where the weapon is wielded intentionally against a domestic foe but causes cross-border environmental damage to another State Party.”

2. Application of legal rules derived, by the use of known legal techniques, from other legal rules or principles

According to the second methodological approach, rules on the indirect protection of the natural environment may be deduced from other rules applicable to the situation of non-IACs. In particular, Article 14 of AP II stipulates, “Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless for that purpose, objects indispensable to the survival of the civilian population.” It follows from this provision that there must always be a nexus between the prohibition of starvation and the protection of objects indispensable to the survival of civilian population, because the second sentence clarifies the first one. Objects are considered to be ‘indispensable to the survival of the civilian population’ if they are “of basic importance for the population from the point of view of providing the means of existence.” In general terms, environment itself can purport such a ‘means of existence’, as it “represents the living space, the quality of life and the very health of human beings, including generations unborn.” On the other hand, if natural environment as a whole was defined in such a way, this would be a very broad reading of the legal concepts in question and an undisguised deviation from the original link to ‘starvation of civilians’. At the same time, vagueness of the word ‘indispensable’ enables the parties to a non-IAC to construe it in an utterly flexible manner which can be either an advantage or a disadvantage of the above-mentioned Article depending on the subjectivity of an interpreter in a given situation.

Article 14 further provides with the non-exhaustive list of objects indispensable to the survival of civilian population: food-stuffs, crops, livestock, drinking water installations and supplies and irrigations works. In this context, it is claimed that the express reference to the objects such as food-

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18Legality of the Threat or Use of Nuclear Weapons, op. cit., at 241, para. 29.
stuffs and drinking water installations means that certain natural resources (e.g. lakes, rivers, fish and, arguably, forests) fall within the ambit of the provision too.\textsuperscript{19} Indeed, the preamble of AP II recalls the Martens Clause and stresses the need to ensure the better protection for victims of non-IACs which may affirm the principal purposes of this international treaty.

The flaws of the second approach result from the fragmentary scope of regulation: only certain environmental components are protected. Taking into account that peace environmental treaties continue operation, wholly or partly, during armed conflict,\textsuperscript{20} they might become useful in filling the gaps in legal protection.

III. Conclusion

The paper has compared the two methodological approaches to establish the jus in bello framework for the specific protection of the natural environment in non-IACs. It has been refuted that relevant legal rules of AP I are applicable to non-IACs: the ICRC study on customary international humanitarian law merely distorts the truth and shows the de lege ferenda status of such rules. What appears to be more efficient is indirect application of legal rules derived from other rules of the law of non-IAC, particularly, those regarding the protection of civilian population in Article 14 of AP II.


With respect to the first part of the paper I would like to introduce some ruminations about IHL and IHRL in the context of general international law. The term “human rights law” comprises within itself all fundamental freedoms as well as all basic social, economic and cultural rights that are recognized to every individual irrespective of nationality. The term “humanitarian law” is today used in a broad sense. It encompasses all the rules relating to the protection of victims of armed conflicts, rules relating to the conduct of warfare, and rules on the rights and duties of the armed forces towards the other party in time of armed conflicts. Hence IHL covers the so-called ‘Geneva Law’, referring to the protection of victims of armed conflicts, and ‘Hague Law’, which, in its turn, refers to the regulations of the means and methods of warfare. Certainly, IHL and HRL are two distinct bodies of law, but at the same time they are complementary branches, insofar they are both concerned with the protection of the life, health and dignity of every individual, and what is even more is that they both overlap in practice. This kind of situation is, especially, well displayed, as for example, in time of occupation or non-international armed conflicts where human rights law complements the protection provided by humanitarian law.  

Nevertheless, it would be notable to mention one of the pivotal stages of the evaluation of the relationship of these two branches of law. As it is known, at first IHL was called ‘law of war’, and it was essentially understood as military law. And I dare say that the state of affairs were so till the ‘birth’ of the Geneva Conventions of 1949 year. Why were (and are) these Conventions so crucial? Because with the advent of the Geneva Conventions many things changed and, in particular, in the framework of the relationship of humanitarian and human rights law. And it was up to these Conventions that had to operate in a subversive manner in order to change this profoundly rooted conception and afterwards to make out of a body of military law a body humanitarian law. Inasmuch as it is conspicuous that the ties between a military conception and human rights are less intense than the ties between a humanitarian conception and human rights.

Besides, in addition to all the aforesaid, we should understand one more thing as well, where what refers is the application of IHL and IHRL. IHL applies in armed conflict (be it international or non-international), whilst human rights law applies in all times, in peace and in war. And in this respect I would like to speak a little about the so-called concept of ‘Habeas Corpus in Extremis’.

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International human rights law allows a State to suspend a number of human rights if it faces a situation of emergency. IHL cannot be suspended because it is already, by its very nature, conceived for emergency situations. But even in here we do have an exception, where what refers is Article 5 to the Fourth Geneva Convention. The wording of Article 5 is ‘Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favor of such individual person, be prejudicial to the security of such State’. Though, going ahead, the Article also mentions that in any event such an individual must be treated humanely. However, even from the standpoint of human rights law there are certain fundamental rights that must be respected in all circumstances and therefore cannot be suspended or waived by a State. These include the right to life, the right to freedom of thought, conscience and religion, the prohibition of torture and inhuman punishment or treatment, and so forth.

At last, I will introduce the precise interaction between IHL and IHRL with the help of 2 approaches.

The ‘Subsidiary Application’ approach

Human Rights Law is of universal and general application. Humanitarian Law is more specialized, which denotes that it applies to situations of armed conflict. Thus, IHL does not apply, for instance, in situations of internal disturbances, such as riots or sporadic acts of violence, or even terrorist attacks. Conversely, IHRL will also be applicable to such situations. In these cases, IHRL displays much the same function as common Article 3 of Geneva Conventions does within the framework of IHL: so what human rights law does is that it formulates a subsidiary rule, filling the gap of protection left open by humanitarian law. Thus, we may say that IHRL borders on all parts of IHL and, moreover, assures a humanitarian standard in all the cases where IHL does not apply. However it has to be recalled that IHL may also apply by way of special agreements where ex lege (as a matter of law) it would not automatically apply. Such special agreements are envisioned in Article 6 Geneva Conventions (1-3) and Article 7 Geneva Conventions (4). And here is what these Articles say about special agreements: ‘the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of the wounded and sick, of members of the medical personnel or of chaplains, as defined by the present Convention, nor restrict the rights which it confers upon them’… Thus, the protections of prisoners of war may be extended to the benefit of some captives in a non-international armed conflict, as it was done in the Spanish Civil War (1936-39).

What refers to the subsidiary application of IHRL when IHL does not apply then such examples can be found in cases of public emergency not amounting to an armed conflict, as for instance, the Greek case (1967-69), after the coup d’état by a military junta.

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2 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 5
The ‘Renvoi’ approach

This approach or technique is mostly used by IHL to make indirect reference- which is sometimes a matter of interpretation- to IHRL. Thus, for example, when IHL guarantees a ‘fair trial’, IHRL, by its very experience, may define more precisely the requirements of such a trial. This technique can also be reversed and go from IHRL to IHL. For example, the ‘right to life, which is enshrined in Article 6 ICCPR (1966), continues to apply in times of armed conflict. But its precise content in this situation will be influenced by the war. It is because in this very situation IHL constitutes a lex specialis which should be considered in order to understand what constitutes an ‘arbitrary deprivation of life’. But it is very important to understand that it is not so much a matter of putting one source in the place of another- which is, by the way, the traditional meaning of the lex specialis rule- but it is rather to complement these two branches of law with one another in such a manner so as to have a proper interpretation.3

Final Remarks

The interaction or relationship of IHL and IHRL has undergone colossal changes, and especially since 1945. From a situation of segregation as well as reciprocal disinterest, there has in due course been a move towards a progressive interpenetration, if not merger. But one should never imagine these two areas as a fusion. Because it is rather to work and figure out the questions in the framework of these two bodies which can lead to satisfactory and even innovative solutions.

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3 Human Rights and Humanitarian Law, Robert Kolb, Max Planck Encyclopedia of Public International Law [MPEPIL]
Protection of Children’s Rights during Armed Conflicts

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We worry about what a child will become tomorrow,
yet we forget that he is someone today.
Stacia Tauscher (17th century author)

Isn’t it a common practice, when parents say to their children: “Leave the room for a while, adults will talk”? In peacetime we do almost everything we can to guard them from our problems. Meanwhile they probably suffer the most from armed conflicts. Thereby, protection of children’s rights during armed conflicts becomes one of the primary tasks of belligerents, neutral countries, the International Committee of the Red Cross and any other humanitarian organization.

Under Article 1 of the UN Convention on the Rights of the Child, a child means: ‘every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.’

Children are deeply affected by armed conflict, but perhaps none more so than those who are the victims of genocide, crimes against humanity, and war crimes, collectively referred to as international crimes or sometimes simply war crimes. Until recently, international crimes against children have gone largely unpunished and perpetrators of such crimes have not been held accountable, despite the fact that States have the responsibility to exercise criminal jurisdiction over those responsible for international crimes.

Customary Rule #135 of International Humanitarian Law stipulates that “Children affected by armed conflict are entitled to special respect and protection.” This rule is applicable in both international and non-international armed conflicts. Special provisions concerning children can be found in the Geneva Convention relative to the protection of civilian persons in time of war (also known as the Fourth Geneva Convention) of 1949 and Protocols Additional of 1977; the United Nations Convention on the Rights of the Child of 1989 and Optional Protocol on the involvement of children in armed conflict of 2000; the African Charter on the Rights and Welfare of the Child of

1http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx
2The office of the UN Special Representative for Children and Armed Conflict. Working Paper Nº 3 ‘Children and Justice During and in the Aftermath of Armed Conflict’, September 2011, p.11
4See, e.g., Articles 14, 17, 23, 24, 38, 50, 82, etc.
5See, Articles 70, 77, 78 of Protocol Additional I and Articles 4 and 6 of Protocol Additional II
A child internally displaced by armed conflict or forced to leave home and community behind is, probably, the most vulnerable. Not only do they fear for their lives when they flee for safety, but often face discrimination as their families search for means of survival. They are at high risk of recruitment as soldiers and are frequently sexually assaulted or otherwise abused by unscrupulous adults, sometimes even by the aid workers or peacekeepers sent to protect them. They are exploited for personal or material gain: forced to become prostitutes; trafficked as sex workers or forced laborers; enslaved in diamond or golden mines. They languish without education or adequate food or clean water in IDP camps or become invisible people in huge cities desperate with hunger and a decent place to sleep. Sometimes in the chaos of war and fight, displaced children become separated from their families and, unable to indicate where they come from, end up alone on the streets vulnerable to the worst forms of abuse or placed in orphanages that are barren of resources and often, it seems, hope. These children are in desperate need of protection and assistance, which should come primarily from national authorities but is also needed from the international community. Thus, we can highlight the following problems concerning the children’s rights during armed conflicts which are reflected in the international treaties and documents mentioned above: murder and wound, separation from families, recruiting, lack of food and water, sex violation, use of child labor and trafficking, impossibility or quasi impossibility of getting education.

The right to life and the prohibition of killing and maiming civilians are principles enshrined in humanitarian law, human rights treaties, and jurisprudence. With Security Council resolution 1882 (2009), the Council defined patterns of killing and maiming of children in contravention of international law as a trigger for the Secretary-General’s annual list of shame. The humanitarian principles of distinction and proportionality require fighters to distinguish between combatants and civilians, and they prohibit civilian damage beyond the scope of military advantage. In the Nicaragua case the International Court of Justice stated that the principle of distinction between civilian and military targets is one of the “cardinal principles of international humanitarian law."

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and one of the “intransgressible principles of international customary law”\(^8\). However, in current warfare, this principle is eroding among armed forces and groups because of the changing nature of conflict. Children are often killed and injured in the course of military operations, including in cross-fire, aerial bombardment and shelling. Another worrisome trend is the rise in suicide attacks, and the use of children to carry them out, that lead to the death or serious injuries of children. Although thousands of children are injured and killed during military operations, many are also victims of landmines and unexploded ordnance\(^9\). In order not to be unfounded I would like to remind you that in Iraq in the past few months, children have been killed or injured by attacks targeting civilians. Schools, as well as recreational areas where children gather to play, have been targeted. One of the recent examples is the attack that took place on the 6\(^{th}\) October 2013 in an elementary school in a village of Mosul Province. A suicide bomber detonated a truck filled with explosives on the school playground, killing more than ten children and injuring dozens more\(^10\).

“Child soldiers” are generally a major concern of the community of states as well as of mankind. In modern armed conflicts – as Wells says – the recruitment and use of child soldiers is often a rule rather than an exception\(^11\). It is estimated that about 300 000 “child soldiers” are suffering currently, used as fighters, spies, porters, servants, and sexual slaves for armed forces and groups, but reliable data is not available. As Happold explains, “the number of child soldiers cannot be accurately estimated, there are undoubtedly tens, if not hundreds of thousands worldwide.”\(^12\) Dr Wagner in his paper declares that “it would be much easier to deal with the problems from a legal point of view if we all knew what a “child” in international customary law is and if there were binding rules of international customary law for international and non-international armed conflicts existing and applicable, that “children must not be recruited into armed forces or armed groups” and that “children must not be allowed to take part in hostilities,” as it was asserted in the study on customary international humanitarian law recently undertaken by researchers of the ICRC”. The Special Court for Sierra Leone in Prosecutor v Samuel Hinga Norman decided that there was in 1996 already customary international penal law existing upon the prohibition on the abduction and forced recruitment of children below 15 years of age in non-international armed conflicts though\(^13\). It is reported that children had been recruited in more than 85 countries and had fought in approximately 36 conflicts across the globe, especially in Africa and Asia. According to official information given by the United Nations in 2010 “child soldiers” were utilized in Afghanistan, D.R. Congo, Iraq, Yemen, Columbia, Myanmar, Nepal, Philippines, Somalia, Sri Lanka, Sudan/South-Sudan, Chad, Uganda and Central African Republic\(^14\).

\(^8\)Ibid, p. 5
\(^12\)Ibid
\(^13\)Ibid
\(^14\)Ibid, p. 6
The term “child soldier” mixes two incompatible elements, childhood and military. “Childhood” as a synonym of innocence, vulnerability and dependency of parents doesn’t fit into a context of duty, mission, collateral damage, casualties, bloodshed and braveness if necessary. On an informal level a definition of “child soldiers” was presented by the “Cape Town Principles” of the Working Group on the Convention on the Rights of the Child and UNICEF of 1997, in which the term “child soldier” means “any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to child who is carrying or has carried arms.\textsuperscript{15}

The criminal cases considered by the Special Court for Sierra Leone and the International Criminal Court are evidence of the intolerance the international community has for those that recruit and use children in armed conflicts. The first indictment ever issued by the International Criminal Court was in 2006 against Thomas Lubanga Dyilo, a Congolese warlord for allegedly conscripting children into his militia during Congo’s civil war. The Special Court for Sierra Leone charged former president of Liberia, Charles Taylor, with, amongst other crimes, recruiting child-soldiers. An international arrest warrant has been issued for Joseph Kony and other leaders of the Lord’s Resistance Army based in Uganda for war crimes including the forcible recruitment and use of children in hostilities. In 2007, the Special Court for Sierra Leone handed down the first-ever convictions by an international tribunal for the recruitment and use of child-soldiers, sentencing Alex Tamba Brima and two other militia leaders to terms of imprisonment of no less than 45 years each\textsuperscript{16}.

Rape and other forms of sexual violence against children are human rights violations, and may amount to grave breaches of international humanitarian law. If committed as part of a widespread or systematic attack against a civilian population, sexual violence can constitute war crimes and crimes against humanity under the Rome Statute of the International Criminal Court. Under Security Council resolution 1882 (2009), the Council designated sexual violence committed against children as a critical priority and called on parties to armed conflict to prepare and implement action plans to address the violation. Sexual violence is also a trigger for the Secretary-General’s list of shame of parties to conflict committing grave violations against children in armed conflict. Children who experience sexual violence suffer from long-term psychological trauma, health consequences including transmitted infections such as HIV/AIDS and early pregnancies. Their reintegration is even a greater challenge as communities often stigmatize girls who have been associated with armed groups and are suspected of having been raped. Young mothers of babies born of rape often stay with the armed group because of the family ties and dependency that have evolved over time and to avoid social stigma in the communities at home. These girls and their

\textsuperscript{15}Ibid, p.7
children are particularly vulnerable to all forms of exploitation including prostitution and trafficking and need special protection. Boys are also victims of sexual violence in conflict. For example, in Afghanistan the practice of Baccha Baazi (dancing boys), remains a widespread phenomenon. It is a form of sexual slavery and child prostitution in which boys are sold to wealthy or powerful men, including military and political leaders for entertainment and sexual activities. Another aspect that tends to be underestimated is the trauma boys face as witnesses or perpetrators of sexual violence. They may be forced to commit rapes either directly by their commander or indirectly through peer pressure\(^\text{17}\). Rape and other acts of sexual violence against civilians have been prosecuted in the ad-hoc criminal tribunals established to punish the perpetrators of major crimes in several conflicts. In Rwanda – Akayesu (1998) in which the court established that “acts of sexual violence can be prosecuted as constituent elements of a genocidal campaign”, Musema (2000). And the former Yugoslavia – Furundžija (1998), Kunarac (2000) in which the three accused were convicted and jailed for rape, torture and enslavement – the first time in history an international tribunal convicted individuals solely on charges of sexual violence against women and girls. Most recently, the Special Court for Sierra Leone established that “forced marriage” is also an offence under international criminal law when it found three militia leaders guilty of crimes against humanity for forcing girls into marriage\(^\text{18}\).

Abducting children against their will and the will of their adult guardians, either temporarily or permanently, is illegal under international law. It may constitute a grave breach of the Geneva Conventions and amount to a crime against humanity and a war crime\(^\text{19}\). In times of conflict, children are abducted from their homes, schools and refugee camps. Child abduction often leads to other violations against children such as forced labor, sexual slavery and recruitment. Many children also get trafficked across borders. Parties to conflict have used this practice in systematic campaigns of intimidation and reprisal against civilian populations\(^\text{20}\).

Schools and hospitals must be zones of peace, where children are granted protection even in times of conflict. Yet, there is an increasing trend of schools and hospitals being attacked with detrimental effects on children. Apart from the direct and physical damage to schools and hospitals, conflict can result in the forced closure or the disrupted functioning of these institutions. Children, teachers, doctors and nurses are also subject to threats by parties to conflict if suspected, for example, to support the other party to the conflict. Also of great concern is the use of schools for military purposes, as recruitment grounds and polling stations. Some armed groups are opposed to secular and girls’ education, or to girls being treated by male medical personnel and subsequently hamper access to these services. A general climate of insecurity as a result of conflict also prevents children, teachers and medical personnel from attending school or seeking medical assistance.


\(^{18}\) The office of the UN Special Representative for Children and Armed Conflict. Working Paper N° 1 ‘The Six Grave Violations against Children during Armed Conflict: the Legal Foundation’, October 2009, p.10

\(^{19}\) Ibid, p. 11

Parents, for example, may find it too risky to send their children to school in a volatile security situation, or children may be denied timely access to hospitals because of checkpoints and roadblocks. Under international humanitarian law, both schools and hospitals are protected civilian objects, and therefore benefit from the humanitarian principles of distinction and proportionality. Direct physical attacks and the closure of these institutions as a result of direct threats have since 2011 been added as triggers for the Secretary-General’s annual list of shame. One of the most notorious and recent examples is the attempt to assassinate Malala Yousafzai, a Pakistani girl, for her activism for right to education in the Swat Valley, where the Taliban had at times banned girls from attending a school21.

Humanitarian access is crucial in situations of armed conflict where civilians including children are in desperate need of assistance. Denial of humanitarian access entails blocking the free passage or timely delivery of humanitarian assistance to persons in need as well as the deliberate attacks against humanitarian workers. It is estimated that in today’s conflicts around the globe, 80 millions of children are denied humanitarian assistance. Access can be denied or hampered by parties to conflict for security or political reasons. In many parts of the world, humanitarian assistance is sometimes interrupted because of ongoing fighting22. Denial of humanitarian access to civilians including children and attacks against humanitarian workers assisting children are prohibited under the 4th Geneva Convention and its Additional Protocols and may amount to a crime against humanity and a war crime. Moreover, it is a principle in customary international law. The denial of humanitarian access attracts criminal accountability, even in times of war. For example, the SCSL declared it a war crime and in 2009 handed down the first ever convictions from an international tribunal to three militia leaders for targeting humanitarian workers and peacekeepers with direct attacks. The ICTY established that depriving inmates of food and other vital services in detention centers constitutes the basis for the charges of war crimes and crimes against humanity. The Rome Statute underscores that intentional attacks against a peacekeeping or humanitarian assistance mission acting in accordance with the UN Charter constitute a war crime. Furthermore, under the Statute’s definitions, using starvation as a method of warfare or willfully impeding relief supplies may amount to a war crime or even genocide23.

Unfortunately, children’s rights are still subject to different violations during armed conflicts despite the fact that they are protected by numerous acts mentioned above. Therefore, I would like to address to the leaders of the parties to armed conflicts (both current and future). Please, before getting involved in armed conflict, say to the children in order not to make them suffer: “Leave the room for a while, adults will talk”.

21See, e.g., http://www.globaleducationfirst.org/malaladay.html
Inter arma silent leges? Question of basic human rights during armed conflicts.

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Introduction

Human rights – according to the website of the Office of the High Commissioner for Human Rights - are “rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status”¹. The belief that every human being is entitled to some specific rights had been being only a philosophical idea for a very long time, but finally came to the legal status in the XX century. Heinous atrocities of the events, that happened in the first half of that century – especially II World War – resulted in adopting Universal Declaration of Human Rights – which, although has non-binding character – played huge role in the popularization of human rights. Ultimate acknowledgement that human rights should be part of law happened in 1966, when International Covenants of Human Rights were adopted (they entered into force ten years later, in 1976). Since that there is no doubt that human rights are part of international law and that every human being is entitled to those rights.

However, it is no secret that in many countries all over the world human rights are being broken. This is the case especially during the armed conflicts. To demand that all human rights – for example, right to life of enemy’s soldiers – should be protected in exactly the same way as during the time of peace would be unrealistic and would not bring any profits. Therefore, applicability of human rights during the armed conflict is a complicated issue that I would like to discuss from few approaches. First analyses relation between international human rights law and international humanitarian law. Second explains what are non-derogable and absolute human rights. Third approach presents practical observance of human rights during armed conflicts.

2. Relations between IHL and IHRL

International humanitarian law and international human rights law are two separate branches of international law. As Ilia Siatitsa and Maia Titberidze wrote, “international human rights law (HRL) and international humanitarian law (IHL) share the same fundamental principles, aiming to protect human beings”² – yet, traditionally, separation between them was perceived very sharply and any connections between them were denied. Such a views led to opinion, that while international humanitarian law – known also as an international law of armed conflict or even as a

law of war – is applicable during time of war, international human rights law is applicable only during time of peace, not when war happens. However, this has changed and now it is common opinion to recognize applicability of international human rights law also during armed conflicts.

One of reasons of this was “internationalization” of human rights, previously perceived as an internal matter of states. Forecast of that future interactions may be seen already in the 1907 Hague Convention, that refers to the “interests of humanity”. Additionally, so-called “Martens clause” may be regarded as referring to the fundamental human rights\(^3\). There are, however, much more direct indications in that issue. Line between international humanitarian law – that traditionally regulated the conduct in inter-state wars – and international human rights law – which regulated internal protection of individuals from state – was blurred with the adoption of Geneva Conventions and its Common Article 3, referring to non-international armed conflicts and guarantying some basic human rights to be respected in such conflicts – thus, regulating the treatment of state’s own citizens in a international humanitarian law treaty.

Adoption of the 1977 Additional Protocol I to the Geneva Convention posed even bigger mark. Article 72, covering the field of applications, reads: “The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict”\(^4\). Thus, it is clearly seen, that state-parties to that Protocol deem human rights as applicable during the armed conflict – otherwise, there would be no mention about provisions that are additional to the “rules relating to the protection of fundamental human rights” during an armed conflict. Such a position was also confirmed by International Court of Justice in 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: “The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency”.

It must be stated, that aforementioned opinion is not shared by literally all modern states. The most known example of state maintaining “separation” doctrine is Israel, which in the “Israeli Wall Case” denied that treaties dealing with human rights should apply in the situation of armed conflict\(^5\). However, as it was already stated, predominant opinion is contrary to that minority view. It is now widely accepted that human rights apply not only during the peace, but also during the armed conflicts.


\(^4\) 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, https://www.icrc.org/applic/ihl/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9f8ee1a77f0dc125641e0052b079 , access: 13.10.2014.

3. Absolute and non-derogable human rights

Since it was ascertained that human rights law is applicable during armed conflicts, it is necessary to discuss scope of that application. Without any doubts, during armed conflicts observing some of human rights may be highly straitened. Moreover, it cannot be ignored, that armed conflicts by their nature are based on hurting – and possibly killing – enemy’s soldiers; any attempt to change that fact would be unrealistic. Because of that, most human rights treaties contain so-called “derogation clauses”, which allow states to suspend some of the treaty rights under very specific conditions.

However, firstly the explanation about differences between “absolute” and “non-derogable” human rights must be made, since those two terms have similar meaning and are sometimes confused. Absolute human rights is less popular term, but still has some importance. It refers to the rights, that cannot be suspended or limited for any reason; it is said that “no circumstance justifies a qualification or limitation of absolute rights. Absolute rights cannot be suspended or restricted, even during a declared state of emergency”\(^6\). In turn, non-derogable human rights are those, which “cannot be suspended even in a state of emergency” – but some of them may be limited. Derogation, as Rachel Bell from Human Rights Law Centre in Melbourne, Australia, writes, „allow states to suspend part of their legal obligations, and thus restrict some rights, under certain circumstances”. Any derogation must be “for a limited period of time, proportionate to the emergency and non-discriminatory”\(^7\).

Some non-derogable rights are absolute, while the others are non-absolute; all absolute rights are also non-derogable. Example may be presented with the right to freedom of religion, guaranteed in International Covenant on Civil and Political Rights. According to the article 4(2), this is one of non-derogable rights; at the same time, according to the article 18(3), limitations that are “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others” are permissible\(^8\) - so it is not an absolute right.

Both absolute and non-derogable human rights are based on specific treaties and scope of those two groups may vary according to the treaty. Basing on International Covenant on Civil and Political Rights, Rachel Bell presented following list of absolute human rights: the right to be free from torture and other cruel, inhuman or degrading treatment or punishment (article 7), the right to be free from slavery and servitude (Articles 8(1) and (2) ), the prohibition of genocide (Article 6(3)), the prohibition of prolonged arbitrary detention (elements of Article 9(1)),

\(^6\) Absolute rights,  

\(^7\) R. Bell, Absolute and non-derogable rights in international law,  

\(^8\) Absolute rights,  
the prohibition of imprisonment for on the ground of inability to fulfill a contractual obligation (Article 11), the prohibition on the retrospective operation of criminal law (article 15), the right of everyone to recognition everywhere as a person before the law (article 16) and the right to freedom from systematic racial discrimination (elements of articles 2(1) and 26)⁹. Those are rights that may not be subject to any limitations or any restrictions, under any circumstances, in any time, at any place. That is very basic core of rights, that human beings have, and even during the armed conflict cannot be deprived of.

The list of non-derogable human rights includes following rights: the right to life, freedom from medical or scientific experimentation without concern, freedom from thought, conscience and religion, the right of all persons deprived of their liberty to be treated with humanity and for the inherent dignity of the human person, some elements of the rights of persons belonging to ethnic, religious or linguistic minorities, the prohibition against taking hostages, abductions or unacknowledged detention, the prohibition on propaganda for war and advocacy of national, racial or religious hatred that constituted incitement to discrimination, hostility or violence and the prohibition against re-introduction of the death penalty if it has been abolished.

One remark is worth mentioning. Right to life is a right that is non-derogable under European Convention on Human Rights, with “except in respect of deaths resulting from lawful acts of war”. Therefore, killing enemy’s combatant usually will not pose a violation of that Convention (unless, of course, it was not “lawful” act of war – for example execution of captured soldiers). From that perspective, it may be noted that protection standards may be different to different group of people – generally, we can divide them into combatants and non-combatants. How strongly human rights protect a specific person depends on to which group he or she belongs. Combatants are entitled to take part in hostilities; they cannot be prosecuted under criminal law for, for example, shooting to another combatants (with aforementioned exceptions), but they also can be shot by them. Shooting to – and killing – fighting enemy combatant might not be forbidden, while shooting to defenseless civilians certainly is a war crime. Moreover, civilians get additional protection under Geneva Convention IV.

The fact that some rights are non-derogable does not mean that states may absolutely freely deride the other – “derogable” - rights. Article 4(1) sets the conditions that must be met. It defines a „state of emergency”, which may justifies the restriction of most of human rights granted by this treaty – it is described as “public emergency which threatens the life of a nation” - as written on United Nations’ website, „the emergency must be actual, affect the whole population and the threat must be to the very existence of the nation. The declaration of emergency must also be a last resort and a temporary measure”¹¹.

¹⁰ Ibid.
Of course, war is the most obvious example of situation that may „threat to the very existence of the nations”, but it’s not the only case, and single fact of being in war does not automatically implies existence of such a threat – it was corroborated by Human Rights Committee, which stated that “not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation”\(^\text{12}\)\. Therefore, conclusion must be made, that human rights do apply during the armed conflicts, and some of them (but not all) may be limited only under very specific circumstances – while others may not be limited or suspended regardless of situation.

Two other treaties that are worth to mention are: European Convention on Human Rights and American Convention on Human Rights. In both of them provisions similar to those put in the International Covenant on Civil and Political Rights may be found. Regarding to the first one, derogation of rights guaranteed by this treaty is possible „in time of war or other public emergency threatening the life of the nation any High Contracting Party (...) to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”\(^\text{13}\)\.

The American Convention on Human Rights, known also as Pact of San Jose, also consists derogation clause, which is encompassed in article 27, „Suspension of Guarantees”. Conditions are quite similar: derogation is possible „in time of war, public danger, or other emergency that threatens the independence or security of a State Party”, extent of measures that are taken and the period of time are strictly required by the exigencies of the situation, those measures „are not inconsistent with its other obligations under international law” and – what is not included to the European Convention - do not involve discrimination on the ground of race, color, sex, language, religion, or social origin\(^\text{14}\)\.

It is also necessary to mention Geneva Conventions. Since most of modern armed conflicts are non-international, the significant importance must be ascribed to the Second Additional Protocol, relating to the protection of victims of such a conflicts. Very good statement was made by Dr. Jakob Kellenberger, former ICRC president: „The Second Additional Protocol represents a step forward in the protection of victims of civil wars. This is especially apparent in its detailed enumeration of fundamental guarantees for all persons who do not or no longer take a direct part in hostilities, of the rights of persons whose liberty has been restricted, and of judicial guarantees. It should be noted that the Protocol’s judicial guarantees provisions, in particular, surpass the protection afforded by human rights law, in as much as the specific judicial guarantees provided for under humanitarian law are non-derogable”\(^\text{15}\)\. It should be also emphasized, that the Second Additional Protocol has no derogation clause. Of course, Geneva Conventions are without any doubts the core

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of the international humanitarian law, but their de facto role in the protection of human rights during armed conflicts is undoubtedly extremely substantial.

4. Observance of human rights during the armed conflicts in practice

Theoretically, treaty provisions that relate to human rights in armed conflicts look properly – basic human rights are guaranteed, unjustified or exaggerated limitations are not allowed. However, reality unfortunately is not that good and various violations are committed in numerous modern armed conflicts.

Arguably the most heinous example of violating human rights during an ongoing armed conflict is Syrian Civil War. Atrocities that are committed there are obvious to everyone. Death toll rose to more than 190 000\(^{16}\), while 9 million people became displaced\(^ {17}\). The interesting observation is that Syrian Arab Republic is party of International Covenant on Civil and Political Rights\(^ {18}\) - yet, forces of the official government commit countless crimes that are very contrary to the provisions of that treaty\(^ {19}\). Security Council of United Nations discussed the problem of Syrian Civil War several times and adopted few resolutions\(^ {20}\), yet, it failed to restrain atrocities.

List of examples may also include following conflicts: Russo-Georgian War in 2008, in which, according to reports, both sides violated human rights\(^ {21}\) (both Russia and Georgia are parties to International Covenant on Civil and Political Rights and European Convention on Human Rights); during South Sudanese civil war ethnic cleanings against civilians happened\(^ {22}\); enormous human rights violations were also committed by ISIS in recent conflict in Iraq\(^ {23}\). It must be noted, that those are only chosen examples, and list of armed conflicts in which human rights are violated is much longer.

5. Conclusions

In modern world human rights are guaranteed by many treaties, of both universal and regional scope of application. They are important part of constitutions of most of the states. Theoretically, their observance is guaranteed and secured. As it was presented, it is recognized now that they apply not only in a peacetime, but during armed conflicts as well – moreover, those rights and rules of international humanitarian law should co-operate and complement each other, safeguarding even stronger protection. However, it is not difficult to find many examples showing

\(^{16}\) Syrian civil war death toll rises to more than 191,300, according to UN, http://www.theguardian.com/world/2014/aug/22/syria-civil-war-death-toll-191300-un , access 13.10.2014.
that this is not exactly the truth. There are no strong enough mechanisms that would transfer those paper arrangements into a real life. Producing treaties like ICCPR and ECHR without any doubts was important step toward proper protection of human rights, but it is not enough. In the future, further development of “responsibility to protect” doctrine might help, but there is long way before it will have substantial impact. Currently, human rights are during armed conflicts are protected on paper, but quite often not in practice.