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From The Perspective of Human Rights Law

Edited by
Nóra BÉRES



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From the Perspective of Human Rights Law

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The *Raison d’Être* of a Book: An Introduction to “International Criminal Law, Humanitarian Law and Refugee Law from the Perspective of Human Rights Law”

Nóra BÉRES

ABSTRACT

This chapter is meant to be an introduction to the volume of “International Criminal Law, Humanitarian Law and Refugee Law from the Perspective of Human Rights Law”, a piece of the textbook series designed for students of the Human Rights and Rule of Law LL.M. programme co-organised by the Central European Academy (Budapest, Hungary) and the Faculty of Law, University of Miskolc (Miskolc, Hungary). The paper briefly explains the interaction between international criminal law, humanitarian law, refugee law and human rights law, then determines the scope and aim of the book, dedicates the book to its target audience, explains why the book is unique among general international public law textbooks, and overviews a detailed structure of the book, including chapters on the history of international criminal law, on international crimes, on the International Criminal Tribunal for the Former Yugoslavia and on the International Criminal Tribunal for Rwanda, on the International Criminal Court, on the history of humanitarian law, on the principles of humanitarian law, on the 1949 Geneva Conventions and their Additional Protocols I-III, on the distinction and scope of migration law and refugee law in general terms, on the 1951 Convention Relating to the Status of Refugees, on the principle of non-refoulement, and on the special Central and Eastern European features of these fields. Finally, this chapter adds an acknowledgement as a closure of the editor’s introductory thoughts.

KEYWORDS

international criminal law, international human rights law, international humanitarian law, international public law, international refugee law

1. International Criminal Law, Humanitarian Law, Refugee Law and Human Rights Law: How Are They Connected?

International criminal law, humanitarian law and refugee law are separate branches of international public law, however, they have developed with regard to one another and they interact in several ways, especially in respect of armed conflicts. Likewise, international criminal law, humanitarian law and refugee law are complementary bodies of law that cannot achieve their ultimate aims without taking into due

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consideration human rights: the latter works as a net that permeates the entire functioning of other branches. As Gillard notes, international humanitarian law, refugee law and human rights law share a common goal, i.e. the protection of the lives, health and dignity of persons.¹ Concurrently, international criminal law, from the angle of restorative justice, acknowledges the harm caused by the breach of human rights norms concerning the lives, health and dignity of persons and provides justice and reparations for victims.

According to the United Nations Office of the High Commissioner for Human Rights, ‘human rights are rights we have simply because we exist as human beings – they are not granted by any State’.² This definition reflects a strong natural law approach which is additionally underscored by the principles applicable to them: universality, inalienability, indivisibility, interdependence and the prohibition of discrimination. Human rights are inherent to us all, regardless of our nationality, sex, national or ethnic origin, colour, religion, language, or any other status. In this vein, international criminal law, humanitarian law and refugee law are supplementary bodies of law affirming the enforcement of human rights including the abovementioned principles.

International criminal law and human rights law³ are both related to the recognition of the legal subjectivity of individuals under international law in the 20th century. In light of the famous theory of Georges Scelle,⁴ legal subjectivity of individuals manifests in two ways in international public law. On the one hand, individuals may appear as direct subjects of human rights, and they may enjoy the benefits and protection emerging from this status (“active side”). On the other hand, individuals may also appear as direct subjects of international criminal law, i.e. they are responsible for committing international crimes: the crime of genocide, crimes against humanity, war crimes and the crime of aggression (“passive side”).⁵ As said, grave breaches of human rights norms may result in the commitment of international crimes, and international criminal law may contribute to the proper enforcement of human rights. For instance, victims’ participation in proceedings before the International Criminal Court and reparations paid to victims demonstrate a sheer example for the close interplay between international criminal law and human rights in contemporary judicial practice.⁶ The influence of human rights on international criminal justice has also been proven by the quite recent judgement of the case of Dominic Ongwen⁷ before the International Criminal Court where the court made

1 Gillard, 2005.

2 Office of the United Nations High Commissioner for Human Rights (OHCHR), 2025.

3 Clapham, 2016, pp. 11–33.

4 Cassese, 1990, pp. 210–231.

5 Kovács, 2016, pp. 365–366.

6 Pellet, 2025, pp. 297–316; Kovács, 2020, pp. 181–194.

7 *The Prosecutor v. Dominic Ongwen*, Trial Judgement, 04 February 2021; *The Prosecutor v. Dominic Ongwen*, Judgement on the appeal of Mr Ongwen against the decision of the Trial Chamber IX of 4 February 2021 entitled “Trial Judgement”, 15 December 2022.

multiple references to the case law of international human rights bodies as well as to major human rights instruments, e.g. to the European Court of Human Rights, to the Inter-American Court of Human Rights, to the Universal Declaration of Human Rights or to the International Covenant on Civil and Political Rights.

Although international humanitarian law and human rights law are complementary areas of international public law and serve common goals, according to the International Committee of the Red Cross, there are significant differences between them which are, most importantly, their origins, their scope of application, and the bodies that implement them. First of all, human rights law is more recent than international humanitarian law: whilst the latter has ancient origins and was codified mostly in the 19th century thanks to the devoted work of Henry Dunant, the founding father of the International Committee of the Red Cross, major human rights codifications took place in the 20th century after the end of World War II starting with the adoption of the Universal Declaration of Human Rights in 1948 by the United Nations General Assembly. Almost another twenty years had passed when the first universal covenants on human rights (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) were adopted in 1966 creating binding legal obligations for their States Parties. As for their temporal scope of application, international humanitarian law is *lex specialis* compared to human rights law (*lex generalis*), since the former only applies in armed conflicts, whereas the latter applies at all times irrespective of armed conflicts. Although human rights instruments may permit derogations from their norms in time of public emergency including armed conflicts, some human rights, e.g. the right to life, the prohibition of torture, the prohibition of slavery or *nullum crimen sine lege*, shall never be put aside. Additionally, international humanitarian law has well-established extraterritorial applicability, while the geographical application of human rights norms has more controversies in academic debates. Their relationship as *lex specialis* and *lex generalis* can also be detected when it comes to their personal scope of application. International humanitarian law protects those who do not or no longer take part in hostilities, like civilians and *hors de combat* (the wounded, the sick, the shipwrecked and the prisoners of war), however, human rights law applies to all persons within the jurisdiction of a state. Additionally, international humanitarian law has basically a “horizontal applicability” meaning that it binds all parties of an armed conflict including states and non-state actors, while human rights law applies “vertically” at the first place to the relationship between a state and persons under that state’s jurisdiction. Finally, international humanitarian law and human rights law have some common substantive rules, e.g. the prohibition of torture or inhuman or degrading treatment or punishment. International humanitarian law rules some special areas that falls outside the substantive scope of human rights law, for example the provisions on combatants, prisoners of war, protected emblems or specific weapons.⁸

8 International Committee of the Red Cross, 2015.

Compared to human rights law, international refugee law is also a supplementary body of law: a tool used by those fleeing from persecution in their home state, needing protection abroad, and as a consequence, those who cross international borders. Unlike the natural law approach describing human rights law, refugee status is dependent on positive legal criteria established under the 1951 Convention Relating to the Status of Refugees. As a consequence, international refugee law does not apply to everyone, only to asylum seekers and refugees, nevertheless, human rights law applies to asylum seekers and refugees as well. Another link between these branches of law is that grave breaches of human rights norms may trigger the application of refugee law. In addition to persecution, which drives refugees to flee, there must always be a well-founded fear of serious violations of human rights norms.⁹

2. About This Book

This edited volume primarily serves as a textbook for the Human Rights and Rule of Law LL.M. programme that has been co-organised by the Central European Academy (Budapest, Hungary) and the Faculty of Law, University of Miskolc (Miskolc, Hungary), since the autumn semester of 2024. As its title – International Criminal Law, Humanitarian Law and Refugee Law from the Perspective of Human Rights Law – seeks to clearly demonstrate, the book focuses on those branches of international public law that are closely related to human rights law, and assists readers in getting a comprehensive overview on supplementary but significant segments of international public law that might also come into play when it comes to discussing and solving human rights problems.

Therefore, this book primarily serves educational purposes in the first place to navigate Human Rights and Rule of Law LL.M. students (I) in understanding the key definitions and fundamental functioning of international human rights law's border areas; (II) in synthesising their previously acquired knowledge on human rights; (III) in introducing supplementary definitions that are of special significance when facing human rights issues; and all in all, (IV) in giving a whole landscape on these inter-related segments of international public law, in addition to (V) granting considerable and complex knowledge on human rights. Thus, the ultimate aim of this book is to provide the readers with a thorough analysis on certain branches of international public law that have a strong relationship with international human rights law: international criminal law, international humanitarian law and international refugee law. When studying these branches, one needs to make a clear-cut distinction and define the precise scope of these fields in order to comprehend their common role: how to protect individuals and their human dignity with the toolbox of international public law?

9 Chetail, 2014, pp. 19–72; Béres, 2024a, pp. 31–49; Béres, 2024b, pp. 83–119.

Throughout the pages of this book, an overview is offered on the history of international criminal law, on international crimes, on the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, on the International Criminal Court, on the history of humanitarian law, on the principles of humanitarian law (the principle of humanity, the principle of military necessity, the principle of distinction and the principle of proportionality), on the 1949 Geneva Conventions and their Additional Protocols I-III, on the distinction between migration law and refugee law as well as between the terms of “migrant” and “refugee”, on the 1951 Convention Relating to the Status of Refugees, on the principle of non-refoulement, and on some specific Central and Eastern European characteristics. Consequently, this book is not intended to be a textbook on international public law in general terms but rather a decent collection of papers on human rights related border areas of international public law.

As far as the target audience of this book is concerned, this edited volume may be worth the attention not only for Human Rights and Rule of Law LL.M. students, but it is also highly recommended for those undergraduate and Ph.D. students interested in conducting comprehensive research in international criminal law, humanitarian law or refugee law for their university thesis or Ph.D. dissertation. As this book is meant to represent high academic quality, it might as well offer some perspectives for fellow academic professionals, too.

Why is this book unique? One special feature of this edited volume is an outlook on the past and ongoing issues of Central and Eastern European States that are related to international criminal law (especially to the International Criminal Tribunal for the Former Yugoslavia), to international humanitarian law (especially war crimes in connection with the communist regimes) or to international refugee law (especially the refugee flows caused by the Russian-Ukrainian war ongoing since 2022). The academic perspective represented on the pages of this book is also meant to be specific since all of the authors of the chapters are from the Central and Eastern European region (i.e. Croatia, the Czech Republic, Georgia, Hungary, Poland, Serbia, Slovakia and Romania). Additionally, similar to the entire Human Rights and Rule of Law LL.M. book series, this edited volume unambiguously wishes to highlight the professional views of Central and Eastern European scholars, which might be a little underrepresented in current global academic debates.

This book includes eleven chapters: four chapters are in connection with the fundamentals of international criminal law, three chapters are devoted to international humanitarian law, another three chapters are related to international refugee law, while the last chapter is about special Central and Eastern European issues.

Chapter I, entitled “International criminal law I: The history of international criminal law”, written by Milan Škulić, is dedicated to the major antecedent events that led to the birth and rise of the branch of international criminal law, and it basically focuses on the development of international criminal justice. In this chapter, Škulić addresses (I) the trial of Peter von Hagenbach in Breisach in 1474; (II) the innovative idea of an international criminal court to hear war crime cases envisioned after

the Prussian-French war; (III) the post-World War I attempts to try Kaiser Wilhelm II before an international criminal tribunal seated in Leipzig; (IV) the unsuccessful aspirations of some international organisations between the two World Wars to create an international criminal court; (V) the establishment of the International Military Tribunal in Nuremberg and of the International Military Tribunal for the Far East after World War II, and also, the significance of the so-called Nuremberg principles that serve as a customary law foundation for international criminal law; (VI) the role the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda played in the evolution of international criminal justice; and (VII) the perspectives of international criminal law after the Rome Statute was adopted in 1998 and the permanent International Criminal Court was set up by its States Parties. Škulić concludes his chapter as

‘when it comes to the future of the International Criminal Court, one should be neither an optimist nor a pessimist, as for what lies ahead of the first permanent form of international criminal justice, the old truth holds that a glass halfway filled with water may be seen as either half-full or half-empty’.

We cannot help but agree with him: the eternal truth, *aurea mediocritas* shows the best approach to follow in this case, as realistic expectations lead to realistic conclusions in assessing the achievements and efficiency of international criminal justice.

Chapter II, entitled “International criminal law II: International crimes”, written by Lucija Sokanović, starts with (I) a detailed analysis of the distinction between domestic crimes and international crimes. In order to comprehend the roots of international criminal law, we need to depart from the customary law nature of international crimes: why is it necessary to have international criminal law as a separate body of law and part of international public law if all states have their own set of rules of criminal law under their domestic jurisdiction? In this chapter, the author adopts the view of Otto Triffterer that the distinctive element of international criminality can be described as ‘individuals can be punished even if there exists no corresponding punishability under their domestic law and jurisdiction or any other national legal system purporting to exercise jurisdiction’.¹⁰ This approach, which helps to fulfil the ultimate aim of international criminal law that core crimes ‘must not go unpunished’,¹¹ is applied throughout the book. In this vein, Sokanović gives an overview to the readers on the customary law roots of international crimes. Additionally, Chapter II deals with international crimes one by one: (II) the crime of genocide; (III) crimes against humanity; (IV) war crimes; and (V) the crime of aggression. In her paper, Sokanović departs from the contemporary definitions of core crimes provided under the Rome Statute of the International Criminal Court. In her discussion of the crime of genocide, she focused on the specific intent and

¹⁰ Triffterer, 2008, p. 25.

¹¹ Rome Statute of the International Criminal Court, 1998, Preamble.

actions by which genocide can be committed, while also highlighting the potential concurrency with crimes against humanity. Under the section on crimes against humanity, Sokanović examines the qualifications of the attack and the actions that constitute how crimes against humanity can be committed. Under the section on war crimes, the relationship between international criminal law and humanitarian law is analysed, and the author highlights the importance of the nexus of an international or a non-international armed conflict. The distinction between a crime of aggression and an act of aggression is examined under the last section of this chapter, whilst also providing the essentials on the acts of committing the crime of aggression.

Chapter III, entitled “International criminal law III: The legacy of the ICTY and the ICTR”, written by Ondřej Svaček, is about the ad hoc criminal tribunals set up by the United Nations Security Council in the early 90s. In his paper, Svaček firstly discusses (I) the creation, functioning and termination of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, and he also assesses the role of the United Nations Security Council. The advantages and disadvantages of the functioning of these tribunals helps us understand why international criminal law developed the way it eventually did in the 21st century. Secondly, Chapter III analyses (II) the jurisdictional framework of the ad hoc tribunals, their structure and procedural characteristics since one cannot understand the regime of international criminal law without studying jurisdictional matters and models. Thirdly, (III) the chapter deals with the ad hoc tribunal’s impact for the development of international criminal justice and points out the relevance and effect of their jurisprudence for the practice of their successors with special regard to the International Criminal Court. In this chapter, Svaček finally refers to (IV) selected landmark cases of the tribunals emphasising their jurisprudential legacy before the International Criminal Court. The paper concludes as ‘both tribunals gained their moment in the history of international criminal law’, while the author agrees with Robinson and MacNeil in the determination that ‘[i]t is most likely that ICL [international criminal law] would, by comparison, be greatly impoverished: thinner in details, weaker in scope, and perhaps still in its post-Nuremberg hibernation’.¹² By all means, the significance of the jurisprudential contribution of the ad hoc tribunals to international criminal justice simply cannot be overemphasised or underestimated.

Chapter IV, entitled “International criminal law IV: The International Criminal Court”, written by Piotr Hofmański, is undoubtedly an essential chapter of the book. The establishment of the first permanent International Criminal Court is one of the greatest and most symbolic achievements of the post-World War II international community besides the creation of the United Nations, and the International Criminal Court itself is the *ultima ratio* of the functioning of modern international criminal law. In his paper, Hofmański discusses certain characteristics of the court that are considered to be the most relevant for educational purposes. First of all, he focuses on (I) the creation of the first permanent International Criminal Court. Second,

12 Robinson and MacNeil, 2016, p. 209.

(II) the chapter concerns issues related to the scope of the court's jurisdiction and the triggering mechanisms, including the principle of complementarity and universal jurisdiction. And finally, (III) the paper also touches upon substantial criminal law issues, i.e. international crimes under the Rome Statute.

Chapter V, entitled “International humanitarian law I: The history of international humanitarian law”, written by Endre Domaniczky, marks the first chapter of the next pillar of this book, the one related to international humanitarian law. This chapter starts with (I) a conceptual analysis of certain terms of international public law: the meaning of *jus contra bellum*, *jus ad bellum* and *jus in bello* is explained. As one cannot understand humanitarian law without a (II) wider historical context, special consideration is paid under the next section to the early antecedents from ancient times to Jean Jacques Rousseau and to the 1863 Lieber Code, to the 1868 St Petersburg Declaration, to the 1899 and to the 1907 The Hague Conventions, as well as to the 1864, 1906 and 1929 Geneva Conventions. (III) The establishment of the International Committee of the Red Cross embodies a landmark of the evolution of humanitarian law, hence Domaniczky overviews the inspiring effect of the Solferino battle in Henry Dunant's idea, and the role and mandate of the non-governmental organisation today.

Chapter VI, entitled “International humanitarian law II: The principles of humanitarian law”, is written by Rebecca Lilla Hassanová. The author cites Pictet who observes that humanitarian law comprises two branches of law: the law of war and human rights.¹³ If we accept this approach, we may define humanitarian law as *lex specialis* that builds a bridge between armed conflicts and the legal demands of humanity and morality. In this vein, the paper reviews those principles that are considered as the customary law basis of humanitarian law. These are (I) the principle of military necessity; (II) the principle of humanity; (III) the principle of distinction of civilians and combatants; and (IV) the principle of proportionality. Hassanová analyses the principles of international humanitarian law in detail, including their position in the system of international law, from two perspectives. First, she derives their character from the classical theory of general principles of law, understood as one of the main sources of international public law. Second, the author distinguishes these principles from the cited general principles of law, referred to under Article 38 of the Statute of the International Court of Justice. According to Hassanová, the first view presents the similarities of the international humanitarian law principles, having the same function as the general principles of law, while the second view regards them as part of customary international law, which have been codified later into the treaty law.¹⁴

Chapter VII, entitled “International humanitarian law III: The 1949 Geneva Conventions and their Additional Protocols I-III”, written by Katarína Šmigová, examines the treaty regime background of humanitarian law. In this chapter, Šmigová explores (I) the adoption of the 1949 Geneva Conventions and its Additional Protocols in a historical and in a political context; (II) the functional term of armed conflict, international

13 Pictet, 1966, pp. 455–469.

14 Darcy, 2014, p. 140.

and non-international, respectively; (III) the rationale of avoiding the term “war” in treaty law instruments; (IV) the material scope of the 1949 Geneva Conventions and its Additional Protocols I-III including their main innovations and the emblem regime under Additional Protocol III; and (V) the relationship between contemporary Geneva law and the Rome Statute of the International Criminal Court focusing on the transformation between grave breaches of Geneva law and war crimes.

Chapter VIII, entitled “International refugee law I: Migration law v. refugee law. The perspectives of international law and EU law”, written by Eugen-Gheorghe Crișan, provides the readers with some general perspectives on migration law and refugee law. In his paper, Crișan discusses (I) the difference between the term “migrant” and the term “refugee”; (II) the material scope of international migration law and refugee law; similarly, he clarifies (III) the difference between refugees and other people in need of international protection with special regard to internally displaced persons; and finally, he weighs up (IV) the protection provided under the law of the European Union.

Chapter IX, entitled “International refugee law II: The 1951 UN Convention Relating to the Status of Refugees”, written by Nóra Béres, focuses on the treaty law basis of refugee law. The chapter starts with (I) an analysis of the adoption of the Refugee Convention under the auspices of the United Nations. Additionally, the paper comprises (II) a detailed examination of the definition of the term “refugee” under the Refugee Convention; it also argues (III) about the rights refugees are entitled to in accordance with the Refugee Convention. In her chapter, Béres highlights several relevant decisions from the case law of national and international courts and tribunals as well.

Chapter X, entitled “International refugee law III: The principle of non-refoulement”, written by Mariam Kevlishvili and Tamta Zaalishvili, analyses one of the fundamental principles of refugee law, i.e. the principle of non-refoulement. First of all, (I) the authors examine the definition under the Refugee Convention; subsequently, they reflect on (II) the case law of United Nations bodies and (III) the European Court of Human Rights as well as (IV) the case law of other regional international courts and national courts.

Chapter XI, entitled “Perspectives of certain Central and Eastern European States related to international criminal law, international humanitarian law and international refugee law”, written by Marcin Rau, is a special collection dedicated to some regional issues. In this chapter, a section is devoted to (I) Central and Eastern European States and international criminal law with special regard to the International Criminal Tribunal for the Former Yugoslavia; another section is about (II) issues related to Central and Eastern European States and international humanitarian law with special regard to war crimes (especially committed under the communist regimes); while the last section of the paper includes an analysis on the topic of (III) Central and Eastern European States and international refugee law with special regard to the refugee flows brought about by the Russian-Ukrainian war.

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International Criminal Law I: The History of International Criminal Law

Milan ŠKULIĆ

ABSTRACT

This text outlines the basic features of the history and development of international criminal law and international criminal justice, with a special emphasis on the establishment of the permanent International Criminal Court, which the author treats as a new beginning rather than the end of the development of international criminal justice. The author also provides an overview of the history of international criminal justice, closely associated with the general history of civilisation and military history.

The author includes some selected and significant moments for the development of the international criminal law: 1) the trial in Breisach of the Duke of Burgundy, Sir Peter von Hagenbach, in 1474, in the context of the juvenile stage of international criminal justice; 2) the idea of an international war crimes court, unrestrained by state borders, articulated after the war between Prussia and France; 3) the attempt at trying the former German emperor, Leipzig war crimes trials and parallel proceedings in France and Belgium after the WWI; 4) the activities of some international organisations between WWI and WWII and an unsuccessful attempt at establishing an international criminal court against terrorism; 5) the Nuremberg (IMT) and Tokyo Trials (IMTFE) after the WWII, with an explanation that the principles developed by the International Military Tribunal in Nuremberg represent an extremely important basis for the further development of international criminal law and that criminal law applied at Nuremberg formally became the backbone of international criminal law; 6) the establishment of the *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR); 7) the hybrid tribunals, with combination of national and international elements and 8) the perspectives of the International Criminal Law after the adoption of the Rome Statute and establishment of a permanent international criminal court (ICC).

The author concludes that, when it comes to the future of the International Criminal Court, one should be neither an optimist nor a pessimist, as for what lies ahead of the first permanent form of international criminal justice, the old truth holds that a glass half filled with water may be seen as either half-full or half-empty.

KEYWORDS

history, international criminal law, international military tribunals at Nuremberg (IMT) and Tokyo (IMTFE), international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), permanent international criminal court (ICC)

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1. Introduction

A historical overview and analysis of the development of international criminal justice cannot be reduced to a mere consideration of purely dogmatic, legal-technical, practical or theoretical questions of international criminal law. Just as the concept of international criminal law itself is complex, and contains a very specific relationship between two large areas or branches of law – criminal law and international law, so the history of international criminal law, especially in relation to specific trials, has developed with the influence of both these areas of law, but at the same time with a strong influence of general historical factors/. This is the reason why, in reviewing the dominant points of the development of international criminal law, and especially some cases of international criminal trials, great attention must be paid to the historical background of these forms of international criminal justice. Also, in the analysis of the historical development of international criminal law, due attention must be paid to historically documented or notorious cases of committed war crimes and other international crimes that have never been prosecuted as the result of international political influences. In this sense, the history of international criminal law consists of both the activity of various forms of international criminal justice, in the form of specific trials, as well as their inactivity, although there were legal prerequisites for this, i.e. the absence of a trial for which there were sufficiently strong legal and factual grounds.

Hence the necessity that in considering the history of international criminal justice, attention must be directed to certain factual and general historical circumstances that have had a great impact on specific legal issues, and also on certain actions or inactions of various forms of international criminal justice. Without a harmonious consideration of both the legal issues in the historical development of international criminal law and the general historical circumstances that have acted in relation to the prosecution or non-prosecution of specific international criminal cases, it is not possible to properly understand the history of international criminal law, which is nevertheless a part of the general history of mankind. That general history of mankind is, for the most part, the history of war, which, coupled with the fact that in a war, war crimes and other international crimes are inevitable, postulates a dominant link between major historic events, the defining moments in the history of war in particular, and specific international criminal trials. The history of international criminal justice is very closely connected to the war/military/general history of mankind/human society.

International criminal law has, so far, not developed as a “directly applicable legal system”. In theory, and particularly in relation to the two most important cases of international criminal trials (IMT/IMTFE), it is pointed out:

‘An ideal directly applicable system would include not only a judicial body, but a vertically integrated and comprehensive international criminal system,

which would consistently contain all the components that exist in national criminal systems, namely: prosecution, adjudication, enforcement of sanctions, and applicable law. The International Military Tribunals at Nuremberg (IMT) and Tokyo (IMTFE) represent such a comprehensive and vertically integrated system of law enforcement. But these two precedents have their own special place in the annals of legal history, and to this day such an international justice system has not yet been established, perhaps thanks to the refusal of states to relinquish their sovereignty in this area.¹

In fact, the conditions for a certain upheaval in relation to this issue have been created by the entry into force of the Rome Statute, which, of course, did not lead to the creation of a specific international coherent judicial system, which would encompass all the elements that exist in today's national legal systems. However this is not necessary, so with regards to the member states of the Rome Statute – because on the one hand, they are obliged to have in their legal system, in accordance with the rule of complementarity, all the necessary criminal law instruments provided for in the Rome Statute, while on the other hand, their national criminal judiciaries have primary jurisdiction, while only under certain conditions and in the alternative – jurisdiction belongs to the International Criminal Court.²

International criminal justice has not evolved in a linear fashion, but rather through a series of legal and occasionally (para)legal cases, developing under specific historical circumstances. The historical circumstances, and above all a great division between *victors in war* and *the defeated* in war, were, among other things, the key to whether a trial would be pursued after the war at all, who would be tried and often-times in what way a trial would be conducted. This post-war division between winners and vanquished, the basic factor which contributed to the fact that the international criminal law, generally did not have a universal character. The idea of establishing an international criminal court is not a new one, it originates from the 19th century, and it arose as part of the general understanding of international justice as a means of resolving international disputes, where the greatest theoretical obstacle to the realisation of this idea was the understanding of sovereignty as the basic feature of states, which prevented their subordination to any authority outside themselves.³ The turning point came with the establishment of a permanent international criminal court.

1 Bassiouni, 2003, p. 387.

2 Škulić, 2004, p. 211.

3 Milojević, 1997, p. 91.

2. The Case of Peter Von Hagenbach

One of the important historic moments in the context of beginnings of international criminal justice, i.e. the juvenile stage of development of international criminal justice, was the trial in Breisach of the Duke of Burgundy, Sir Peter von Hagenbach, in 1474. As the governor of an occupying power, Hagenbach was charged with a number of crimes – murder, rape and the confiscation of private property.

The citizens of Breisach established a “multinational tribunal” of 28 judges, eight nominated by Breisach, and two by each of the other nearby regions. Hagenbach pleaded superior orders, arguing that he had only carried out the Duke’s orders, but was nevertheless found guilty, sentenced to death and executed.⁴

From the point of view of modern criminal law standards, the Breisach trial can hardly be considered a serious international criminal trial, but it certainly has a certain historical significance, and in the manner of defence of the defendant and the final verdict, it seems that it anticipated some issues that are of great importance in modern international criminal law, which primarily refers to acting on a superior’s orders, individual criminal responsibility and command responsibility.

Some authors suggest too, that the “war crimes trial” of Conradin von Hohenstafen, in Naples, in 1268, might be one of the harbingers of an international criminal court.⁵ He was the Duke of Suabia and was tried, convicted and executed for initiating an unjust war.⁶ That trial cannot be considered a credible international criminal trial either, particularly in the light of the current prevailing concepts.

3. Early Attempts After WWI

The idea of an international war crime court, unrestrained by state borders and prompted to act by the failure of a national judiciary to prosecute, was explicitly articulated in the second half of the 19th century, when Gustave Moynier of Switzerland, the then president of the International Committee of the Red Cross, and appalled by the atrocities of the Franco-Prussian War, proposed that an international criminal court be established as a response to the war crimes.⁷ The war between Prussia and France (1870-1871) was one of the first modern wars, and a prelude to the unification of Germany. Gustave Moynier’s idea of an international war crime court was the First Valid Concepts of International Criminal Court as a Manifestation of “Universal Justice”.

4 Bring, 2001, p. 11.

5 Bassiouni, 1999a, p. 3.

6 Bantekas and Nash, 2003, p. 325.

7 Fastenrath, 1999, p. 632.

The idea of Gustave Moynier that arose after the victory of Prussia over France did not actually come to life, just as similar ideas of individuals, no matter how respectable they may be and how noble their ideas may be, have little chance of being implemented, until they become at the same time “ideas,” or rather, political ideas of the current great powers and powerful political “players” on the world stage. Therefore, the next serious attempt of this kind did not come until after the end of the First World War, although of course such ideas had already appeared during this war, but more as part of the war propaganda and general war effort, than as a serious legal and political attempt.

During the First World War the Allied leaders, i.e. the leaders of the triple entente, as an international military/war coalition, developed a new concept, that once victory was achieved defeated enemy leaders should face criminal charges for violations of international law, committed during the war. On 25th January 1919, during the Paris Peace Conference, the Allied governments established the Commission of Responsibilities with the task to make recommendations to that effect. As a result, articles 227–230 of the Treaty of Versailles stipulated the arrest and trial of German officials defined as war criminals by the Allied governments. Article 227 of the Treaty of Versailles made provision for the establishment a special tribunal, presided over by a judge from each of the major Allied powers.

The Treaty of Peace with Germany signed in Versailles prescribed too, that the former German Emperor should be called to account for ‘a supreme offence against international morality and the sanctity of treaties’, and that ‘a special tribunal will be constituted to try the accused’, but the intent never materialised, because the Netherlands, where the former monarch, Wilhelm II Hohenzollen, lived in exile, refused to extradite him.

The attempt at trying the former German emperor is believed to be one of the first cases taking into consideration ‘international individual criminal responsibility’ for violating ‘the rules of international customary law of war’.⁸ One of the theoretical highlights is that public international law does not provide for an opportunity to punish a state in terms of criminal law, which is based on the “concept of personal guilt,” and the first attempt at punishing an individual directly based on the rules of international law was made against Kaiser Wilhelm II after World War I.⁹

Under Article 227 of the Treaty of Versailles, the former German monarch, the commander-in-chief of Germany’s military forces, was also charged with command responsibility, regarding the crimes committed by members of his armed forces. The literature suggests that a trial of the former German emperor would be a kind of “the victor’s trial” of the defeated. Aside from Wilhelm II, the list of major criminals included Theobald von B. Hollweg, the chancellor of the German Empire (1909-1917), a German field marshal, Paul von Hindenburg, and General E. Ludendorff.

8 Malekian, 1999, p. 162.

9 Buergenthal et al., 2000, p. 160.

The Treaty of Versailles, *inter alia*, provided an opportunity for the victorious Allied Powers to bring before their military tribunals members of the defeated powers in World War I, which was attempted with respect to persons who had held high-ranking offices in the German Empire (even the highest-ranking, as one such attempt was made against the German emperor), but all these efforts eventually failed.

3.1. Leipzig War Crimes Trials and Parallel Proceedings in France and Belgium

Under the Law to Prosecute War Crimes and War Misdemeanour of 18th December 1919, nine war crimes trials were held in German city Leipzig against former members of the German Army and Navy who were acquitted, largely due to insufficient evidence.¹⁰

In 1920, the Allies, i.e., the main victorious states after the WW1, submitted a list of about 900 names of alleged war criminals to the German government, demanding officially and ultimately the extradition of these persons. The German government refused to extradite any German citizens to Allied states, because of the constitutional prohibition of extradition of the German citizens and proposed instead trying them within the German justice system in Leipzig. That proposal was finally accepted by the Allied leaders and in May 1920, Germany received a reduced list of 45 accused persons. However not all of these persons could be traced or it was not possible to identify them, and in other cases there was difficulty in finding credible evidence. Because of that, finally only twelve individuals from the revised list were actually brought to trial in Germany.

The “Leipzig Trials” are a clear example of the biased (in this case *in favore*) approach of “domestic” i.e. national courts in international criminal justice cases. Those former members of the German army who were found guilty in these trials were punished with relatively light sentences. Such outcomes of these proceedings have also influenced the view that it is difficult to expect sufficient impartiality of national courts in matters of war crimes trials.¹¹

Meanwhile, in other countries, especially in France and Belgium, several trials were held *in absentia* of members of the defeated German army, and sentences were passed, even to death by hanging, but these convictions and sentences were never carried out.¹²

This drastic disproportion in the decisions of different national courts in practically identical criminal cases clearly indicates major problems in the creation of universal international criminal law and, especially on a practical level, two basic and very characteristic features can be seen. On one hand, the national judiciary, as a rule, is not ready to conduct proceedings against its compatriots in a completely realistic and impartial manner, even when it comes to the most serious international

10 Wakaki, 1996, p. 13.

11 Škulić, 2005, p. 68.

12 Wakaki, 1996, p. 13.

crimes, and on the other hand, national courts are very ready to severely condemn members of the other warring party.

3.2. The Authority of Criminal Prosecution of the Victorious Powers After the First World War

The Treaty of Versailles provided, among other things, that the victorious powers had the right to conduct court proceedings before their military courts, of members of the defeated forces in World War I, which was also attempted in relation to persons who held very high positions in imperial Germany (even the highest position in the case of the German emperor). But such attempts were not fruitful in their final outcome. In the proposals for peace treaties with the other defeated states (Austria, Hungary, Bulgaria and Turkey),¹³ there were also such provisions, but in the final versions they were limited only to the general provisions on liability, which is considered to be mostly influenced by the political factor, i.e. new relations on the international scene and, as usual, the dominant interests of the great powers of the time and influential international political actors.

Namely, it is likely that the provisions on the responsibility of Turkey and its officials for crimes against Armenians were one of the reasons for not ratifying the treaty after the negotiations in Sèvres and in addition, there was probably a desire of the Allies not to hinder the major social reforms that had begun in Turkey after World War I. In 1923, another treaty was signed in Lausanne, which included an amnesty clause for crimes committed during the war.¹⁴ The Lausanne Peace Agreement, which replaced the non-ratified Treaty of Sèvres, practically confirmed the general amnesty that had previously entered into force in Turkey, thanks to which it formally prevented the prosecution of the perpetrators of serious crimes, including of the crimes against Armenians, who suffered terrible losses and whose population was almost decimated.¹⁵

13 The persecution and killing of Armenians by the Turkish authorities began even before World War I, and in 1915 there was a systematic deportation and destruction of the Armenian population in Turkey, which provoked condemnation of European public opinion, and Russia, France and United Kingdom sent a declaration to the Ottoman Empire in May 1915 containing the following warning: 'With regard to crimes against humanity and civilization..., The Allied government announces... To hold personally responsible all members of the Ottoman Government and their officials who are involved in such massacres.' Cited in Bring, 2001, p. 13.

14 See: Bassiouni, 1999b, pp. 35–36.

15 As many times before and of course, later in the history of mankind, in this case the interests of justice and fairness, as well as legal principles, were completely ignored and practically suppressed as irrelevant, in order to achieve certain political effects. Of course, such injustice, among other things, in addition to further growing distrust in international justice, has also led to some other direct effects, such as the subsequent actions of vengeful Armenians, in relation to Turkish officials, which is another indicator that often some problems that are not adequately solved in the legal field, result in the application of violence and various forms of extremism, including some terrorist acts.

3.3. The Activities of International Organisations Between WWI and WWII and an Unsuccessful Attempt at Establishing International Criminal Court Against Terrorism

The interwar period saw a flurry of energetic activities by international organisations to support the development of international criminal justice, spearheaded by intergovernmental bodies (the League of Nations and the Inter-Parliamentary Union). This drive also involved professional organisations in the domain of criminal law (the International Law Association and the International Association of Penal Law/ Association Internationale de Droit Pénal).

One of the central issues that a slew of expert bodies focused on in the interwar years was the effect of the principle *nullum crimen, nulla poena sine lege*.¹⁶ It is believed that

‘efforts towards the establishment of a permanent international criminal court were initiated by the League of Nations, and continued by the United Nations, the work of the latter developing along two paths – codification of international criminal offenses and the elaboration of a draft statute for the establishment of an international criminal court.’¹⁷

Terrorism was a serious problem in earlier historical epochs, although at that time, and especially in the century that has just passed, no one had any idea of the global scale of the problem of terrorism in general, as well as international terrorism in particular, or that terrorist attacks such as the one of September 11th 2001 in New York, could have serious international legal consequences, i.e. become the “cause of the war” and could be the reason for military intervention.

However, some of the roots of international concern about the problems of terrorism and terrorist activity can be traced back to the first half of the 20th century.¹⁸ At the Conference on the Fight against Terrorism held in Geneva on November the 16th 1937, two conventions were adopted; one on the prevention and punishment of terrorism (“*pour la prévention et la répression du terrorisme*”) and the other on the creation of an international court to try terrorists (“*pour la création d’une Cour pénale internationale*”). The aim of these conferences was generally “the fight against politically motivated terrorism.”¹⁹

16 Ahlbrecht, 1999, pp. 46–53.

17 Bassiouni, 1998, pp. 10–11.

18 The typical form of terrorism in the 20th century was assassination and at that time, no one envisioned terrorism with mass casualties.

19 Ahlbrecht, 1999, p. 57.

The International Community has tried, through the Convention on establishing an International Criminal Court against terrorism (ICC),²⁰ to create an effective international criminal justice system (albeit with a rather narrowly defined jurisdiction), but this idea never came to life, thanks to the outbreak of the Italo-Ethiopian war, i.e. the invasion that fascist Italy with colonialist aspirations, under the leadership of Mussolini, carried out against Ethiopia. In fact, by mid-1938, only 18 countries had signed the Convention on the Prevention and Punishment of Terrorism, while only 13 states had signed the Convention of Establishing the International Criminal Court against terrorism. Article 1(2) of the Convention on the Prevention and Punishment of Terrorism required merely three ratifications to come into force but received only one and was subsequently abandoned.²¹ In formal terms, neither of these two conventions had any legal effect. Of course, the political climate of the world community was not at all in favour of the realisation of such an idea, because it was a time of marked strengthening of fascist regimes, stabilisation of Nazi power in Germany, civil war in Spain and the feeling of a distinct political, economic and military weakness of the countries, former victors in World War I.

In addition, in political relations at the global level, and especially in Europe, there was a climate of potential revanchism and great distrust, which was a consequence of the new radically changed relations of power after World War I, and the disappearance of previously large and powerful states. The political map of Europe changed fundamentally after World War I; four empires met their end: Russia (1917), Germany (1918), Austria-Hungary (1918) and the Ottoman Empire (1922), and with the collapse of the Habsburg dual monarchy and the political upheaval in Russia, a number of new independent states were created in Eastern and Central Europe.²²

All these global, and especially European political and historical circumstances, have had a dominant influence on the fact that until the “new end” of the “new” world war and the new “division” into victorious and defeated countries, no trial for international crimes could be realised, which is a very striking indicator of the direct influence of international political factors and the real balance of power between states, in the field of international criminal law.

20 Here it is also possible to draw very interesting historical parallels with the situation at that time regarding the terrorist threat and labelling terrorism after the events of September 11th 2001 as a global threat, and the initiation of mass armed interventions by the United States in the name of dealing with terrorist groups, and above all the Muslim fundamentalist-terrorist organization “Al Qaeda”. Phenomenologically speaking, terrorism in the 1930s was primarily of an individual character, i.e. it consisted mostly of assassinations (such as the assassination of the Yugoslav King Alexander Karadjordjević by the Croatian Ustaša and Bulgarian VMRO members), while most of today’s terrorist organizations are oriented towards mass strikes on the civilian population, causing great human casualties and terrible material destruction. However, the idea of an international trial of terrorists is now less mentioned in the political public and international contacts, although there would probably be more factual predispositions for it.

21 Bantekas and Nash, 2003, p. 17.

22 Ziegler, 1994, p. 241.

4. The Nuremberg and Tokyo Trials

In the wake of the previous “unsuitable” efforts to create a viable international criminal court, came what appears to be a truly decisive step – the International Military Tribunal (IMT) was established in Nuremberg to prosecute and punish major war criminals from the defeated European Axis, whereas its “Asian counterpart”, the International Military Tribunal for the Far East was set up in Tokyo.

Certain political deals that had been reached during World War II paved the way to the Nuremberg trials, as the necessity to try those responsible for serious crimes had already presented itself. In October 1941, U.S. President Franklin Roosevelt and British Prime Minister Winston Churchill reached an agreement on a large-scale trial of Nazi leaders to be held in the future, and during the Moscow Conference in October 1943 a joint declaration was signed by Roosevelt, Churchill and Stalin, believed to be the source of the Nuremberg Trials.²³

The Charter of the International Military Court in Nuremberg was based on the London Agreement of 8th August 1945, an intergovernmental agreement by the four principal members of the Allies to secure the prosecution and punishment of the major war criminals of the European Axis.²⁴

It goes without saying that the trials in Nuremberg and Tokyo were of enormous importance, and it is undeniable that members of the Axis committed horrific crimes during World War II, but against the backdrop of common legal reasoning and standard evidentiary parameters, they were less than perfect. Yet the two trials still provide a proceeding point for most of the expositions of the roots of international criminal courts, and the experience arising from the operation thereof is essential in analysing the case-law of international criminal courts. They also constitute a rare historical example that in some respects, the principle of legitimacy may prevail over the formal principle of legality.²⁵

In fact, it is as if the scale and horror of the crimes committed, especially the mass executions and the brutal implementation of genocide against the Jews and also the Slavic peoples, especially in Russia, Poland, Serbia/occupied Yugoslavia, the creation of concentration camps and the “Holocaust”, the death camps (in the case of

23 Möller, 2003, p. 75.

24 Jescheck, 2004, p. 38.

25 Škulić, 2022a, p. 20.

German war criminals),²⁶ i.e. the mass destruction of the civilian population in the occupied territories, then torture and rape, especially during one period of the war in the Philippines in Manila, when it comes to Japanese war criminals, and the fact that both Germany and Japan,²⁷ treacherously attacked other countries without declaring war, and thus grossly violating international treaties of friendship,²⁸ that might have prompted the creators of these military tribunals not to pay much attention to some of the usual procedural and legal standards when it came to criminal cases.

In addition, it is a pity that the Allies did not have the moral strength to bring people from their own side to justice, who could certainly be charged with various international crimes. So although the Nuremberg and Tokyo trials were based on the pursuit of the principle of individual responsibility for crimes in the sense of international law, they could not avoid criticism.²⁹ Namely it is almost impossible to deny the criminal character of the mass bombing of the civilian population (e.g. in Dresden, Hamburg,³⁰ Berlin, Cologne, etc.), even at a time when the war was visibly coming to an end, and when it was absolutely clear that Germany would be defeated, as well as

26 It is interesting to recall that concentration camps are not an original German “invention” after all. They were practiced *en masse* by the British armed forces during the Boer War (1899–1902), in relation to the civilian population who were subjected to severe suffering and extremely brutal treatment in these camps, so that in October 1900 alone 3,156 of the 111,600 white Boers and 698 of the 43,800 Boer died in these camps. See: Seidler und de Zayas, 2002, p. 15. However, regardless of these historical facts, it is indisputable that the classic type of concentration camps, as an important part of the mechanism of physical destruction of undesirable peoples and ethnic groups, as well as ideological opponents (*death camps*), did not exist as such, until it was created by the decisions and practices of Nazi Germany.

27 The International Military Tribunal for the Far East was established on January 19th 1946 and was responsible for the war crimes that affected the Allies the most: war crimes against prisoners of war, which were widely practiced by the Japanese. Ambos points out that, from a subjective point of view, it was required that the responsible persons had knowledge, or at least that they did not know, negligently, that abuses were being committed in relation to the prisoners. See: Ambos, 2002, pp. 131 and 134–135.

28 Nazi German “führer” Adolf Hitler’s publicly stated position is well known: ‘all international treaties last as long as it suits our interests’, which, among other things, led the famous philosopher Karl Jaspers to express his position according to which the Nuremberg trials are a legitimate attempt to promote a new world order, which does not lose such significance, regardless of the fact that it is not based on legal grounds. In this context, a statement by Dr. Joseph Goebbels, Gauleiter of the Reich Capital, Reich Minister for National Information and Propaganda, and Reich Defense Commissar, is very interesting, in which he (Das Reich, 14th November 1943), points out: ‘As far as we are concerned, we have demolished the bridges behind us... We went all the way and finally decided... We will go down in history as the greatest statesmen or as the greatest criminals.’ Cited in Cartier, 1967, p. 362.

29 Damrosch et al., 2001, p. 1326.

30 The aerial bombing operations of Hamburg and Dresden, with the massive use of incendiary bombs, were basically aimed at turning the cities into “dust and ashes”, which is metaphorically perfectly illustrated by the official name of the air attack on Hamburg – “Gomorrah”, and in the German press at the time this bombing was described as ‘the days when fire fell from the sky’.

the dropping of atomic bombs on the Japanese cities of Hiroshima and Nagasaki,³¹ which is also very difficult to justify with military reasoning, because Japan was already practically on the verge of extinction.

However, as was explained in the previous text, practice shows that the victors are mainly not being put on trial, regardless of the gravity of the crimes they could have committed. When it comes to the massive (carpet) bombing of German cities, it was a terrible and completely unreasonable military destruction of almost entire cities, with the infliction of heavy civilian losses. Such long-range Allied air strikes were also common in other cities in occupied Europe. For example, Belgrade was heavily bombed on Easter 1944, when thousands of citizens were killed and even a maternity hospital was hit, in which new born babies and their mothers died, while the German occupiers suffered quite insignificant military losses.³²

The principles developed by the International Military Tribunal in Nuremberg (IMT) represent an important basis for the further development of international criminal law.³³ The criminal law applied at Nuremberg formally became the backbone of international criminal law, given the fact that at the first session of the UN General Assembly, Resolution No. Decree No. 95 of 11th December 1946 declared it a part of General International Criminal Law. The principles adopted at the Nuremberg and Tokyo trials thus became the foundation of international criminal law, and the former British chief prosecutor at Nuremberg, even pointed out that: ‘The West German government has finally, with an extraordinary awareness of responsibility, dealt with the problem of war crimes, and the West German judiciary has applied the Nuremberg Principles in a whole series of cases.’³⁴ Indeed, in Germany there has not been much challenge to the fairness of the verdicts rendered during the Nuremberg trials or in the numerous trials held according to the “Nuremberg patterns” (especially by more serious legal writers), although of course there have been reasoned criticisms of the standards of proof applied, and also in relation to the whole conception of such proceedings.

From a formal point of view, the fact that the Nuremberg and Tokyo tribunals were not created by the international community, but only by one, at least “victorious”

31 See: Minear, 1971, pp. 99–101. An interesting observation was made by the Dutch judge Röling, who in a commentary, 12 years after the end of the trial in Tokyo, pointed out: ‘...From the time of the Second World War, two things are remembered above all: the German gas chambers and the American dropping of atomic bombs.’ Minear, 1971, p. 101.

32 Thus, these massive Allied bombings were not only directly aimed at the civilian population, but their actors often did not make a relevant distinction even between the population of Germany itself, which started the war, and the countries that were occupied, and represented the victims of Nazi Germany. Namely, if the reason for the massive bombing of German civilian targets is sometimes cited as the intention to defeat the German population more quickly by breaking the morale of the German population, even such an otherwise extremely illegal reason cannot be cited as a justification for the bombing of civilian targets in the occupied countries.

33 Ambos, 2018, p. 114.

34 Gründler and Manikovsky, 1967, p. 13.

part of humanity is sometimes rather cautiously emphasised. Thus, for example, A. Esser states:

‘Although I, as a German, do so with a certain uneasiness, it remains for me to point out that the courts of Nuremberg and Tokyo were not founded by the whole world community, but unfortunately by the victorious powers of the Second World War, and that therefore their impartiality as the so-called “justice of victors” may be questioned.’³⁵

Similarly to this, the literature puts forward the view that the most famous of all the war crimes trials so far was the trial of the main war criminals in Nuremberg, by a tribunal which ‘was created by an international agreement between the United States, Great Britain and the USSR and was primarily an inter-Allied cooperation in punishing Nazi criminals.’³⁶ The Nuremberg Trial Rules contain provisions of general and specific part of international criminal law,³⁷ as well as procedural provisions of the “fair-trial” type.³⁸ Although the Statute of the International Military Tribunal at Nuremberg and the procedure applied can certainly be criticised (starting with the effect of the principle of legality),³⁹ the fact is that these rules have become a kind of “cornerstone” for the further development of international criminal law and for the idea of the International Criminal Court, and today there is no serious systematic work in the field of international criminal law which does not pay great attention to the legal analysis of that trial.

A modified Anglo-Saxon criminal law procedure was applied before the International Military Tribunal in Nuremberg. Chief Prosecutor Jackson said: ‘The only problem was that a procedure that is acceptable as a fair trial in countries accustomed to the Continental system of law may not be regarded as a fair trial in common-law countries.’⁴⁰ In addition to the Nuremberg IMT, the Allied powers occupying Germany also engaged in a large-scale policy of prosecuting war crimes in their respective occupation zones, which were undertaken under the authority of Control Council

35 Esser, 2001, p. 344.

36 Bloxham, 2001, p. 4.

37 These rules primarily were contained in the Seven Basic Principles, the Statute and other regulations pertaining to the Nuremberg Trials.

38 Ambos, 2002, p. 384.

39 It was problematic to prosecute for crimes against peace because of the question of retroactivity. The Briand-Kellogg General Treaty of 1928 made it illegal to wage war of aggression, but it was only about the responsibility of the state, and it did not stipulate individual criminal liability. In the view of the British prosecutor Shawcross, it is indisputable that a number of international treaties prohibited aggression and treated it as an international crime, and that Germany itself accepted these international obligations, so that (regardless of the fact that the crime against peace did not exist as a crime for which individual responsibility would be strictly envisaged), there was no “substantial retroactivity” at the Nuremberg trials – there was no element of *ex post facto* in the application of the concept of a crime against peace. See: Bring, 2001, p. 18.

40 Bassiouni, 1992, p. 21.

Law No. 10, which provided for domestic prosecutions of war crimes, crimes against humanity and crimes against peace.⁴¹

In a procedural and a functional sense, the main feature of this procedure is the passive role of the court in the collection and evaluation of evidence, which was primarily the main procedural task of the parties – the prosecution and the defence, and the court’s decision in principle depended on the degree of success in its implementation. It was a classic adversarial procedure, where the prosecution and the defence in the capacity of parties presented before the court all the evidence that they believed to support their point of view, and the court in principle had a passive role in terms of presenting evidence.⁴²

In addition, the well-known German bureaucratic orderliness in this respect made it possible to obtain certain evidence of crimes, sometimes with unexpected ease, because the Germans generally kept accurate records in relation to, for example the number of people in the camps, the list of internees, hostages, military operations, etc. The material evidence of the crimes committed was largely based on documentation catalogued and collated by Nazi Germany, totalling several million pages, which on the one hand convincingly supported the accusations, and on the other hand made it almost impossible for the defence to examine these materials in a short amount of time. In the last years of the war, the German authorities tried to destroy the evidence, but there was simply not enough time to do so, because the scale of the crimes was enormous.

In addition, the Allies made great and systematic efforts to discover material evidence, especially documentation, and sometimes they were lucky. For example, a huge number of important documents were discovered quite by accident, behind a false wall in Marburg Castle. These contained, among other things, the correspondence of A. Rosenberg.⁴³ During the hearing, the witnesses and the defendants themselves were heard primarily by the parties, although the court had the opportunity to ask a question to a witness or defendant at any time. All the defendants had defence attorneys, who were mostly German lawyers, but their great handicap was their lack of knowledge and experience in Anglo-Saxon substantive and procedural criminal law.⁴⁴ The defence had a lot of trouble with so-called personal sources of evidence, which, as with regard to other evidence, was her “party” task, in accordance with the rules of Anglo-Saxon criminal procedure. Thus, for example, it is pointed out that when it comes to witnesses who were part of the “chain of command”, i.e. those who had certain military functions, during the trial they were mostly dispersed in various camps or prisons, and while the prosecution had every opportunity to use these witnesses, the defence was hardly able to do so at all.⁴⁵

41 Cryer et al., 2010, p. 119.

42 Škulić, 2024, p. 57.

43 Bloxham, 2001, p. 58.

44 Kirchheimer, 1981, p. 500.

45 Knieriem, 1953, p. 196.

As an important principle of this procedure in Nuremberg, the dominant standard of the Anglo-Saxon types of processes has been established. This is the principle of fair trial, which in fact basically represents the right of the defendant to a fair trial.⁴⁶ From a formal point of view, apart from the shortcomings already explained, there were no major violations of this fundamental right of defence. However, it is another thing that in principle the defence did not comply with the rules of procedure that are by no means typical for Europe, and were in fact quite different from some of the usual procedural and legal standards for this area. In addition, in principle it is unusual for a first-instance verdict to automatically become final, which was the case here, because there were no rights of appeal against the verdicts. Regardless of all this, the gravity of the obviously committed crimes and the fact that Germany had started a war that was unprecedented in its scale and casualties, and the existence of a large amount of material evidence, were sufficient in themselves. However, there is no doubt that the absence of the right to appeal under the rules of procedure of the International Military Tribunal at Nuremberg (the same applied to the Tokyo Tribunal), regardless of the realistically low chances of success of such a legal remedy, cannot be considered to be an aspect that favoured the principle of due process and fair procedure.

The trial of the “major war criminals” of the European Axis began on 18th October 1945 in Berlin, and from 20th November 1945 continued in Nuremberg, where between the 30th of September and the 1st of October 1946 the judgment was pronounced and published, including 12 death sentences, three life imprisonment sentences, three time sentences, three acquittals.⁴⁷

In addition, certain German organisations, i.e. legal persons were declared criminal, namely the SS Units (the elite German party military units serving as protective squads), the German security service known as *der Sicherheitsdienst* (commonly known as the “SD”), the Gestapo (secret police), as well as the leadership of the National Socialist German Workers’ Party (*Nationalsozialistische Deutsche Arbeiter Partei – NSDAP*), as the leading body.⁴⁸ Membership therein was not treated as a delict in the context of criminal law, but it was a basis for the so-called denazification procedure, which effectively narrowed otherwise guaranteed civil rights in a certain period of time, denying some altogether, banned the exercise of certain duties and offices, imposed special obligations, etc. A very important principle of the Nuremberg trial was the principle of individual criminal responsibility.

46 See: Miljuš, 2022, pp. 17–18.

47 In his dissenting opinion, the Soviet member of the IMT, Judge Nikitchenko, stated that three acquittals and a life sentence for Rudolf Hess were unfounded, arguing that the three acquitted defendants should have been sentenced, and that the only justified sentence for Hess was death penalty. The Soviet judge also maintained that the General Staff and the supreme military command, *Oberkommando der Wehrmacht (OKW)* should have been declared criminal organisations. See: Maser, 1977, pp. 295–297.

48 Ahlbrecht, 1999, p. 93.

The objection of the violation of the fundamental legal principle ‘*nullum crimen nulla poena sine lege*’ was loudly taken up by critics of the Nuremberg Trials, as well as by ordinary people in Germany (“people in the street”), who felt burdened by the thesis of collective guilt, but above all by those accused in Nuremberg of crimes against peace. The illegality of aggressive war was manifested in the Kellogg-Briand Pact for the Prevention of War of 27th August 1928 and because of that the actions of individual persons, which constitute the features of crimes against peace within the meaning of the London Conference, were punishable until 1945, both nationally and internationally.⁴⁹ This was in fact the basis of the well-known thesis that the principle of legality was not substantially violated during the Nuremberg trials, that is, its substantial violation did not occur, given that it was not disputed that even before the commission of the crimes for which the defendants were charged, the initiation of an aggressive war was prohibited, albeit for states, but not strictly for individuals.

The Nuremberg Trials were conceptually intended to be a kind of great “lesson”, both to the German people in the processes of legal and factual “denazification”, and to potential future “ignitors of the world war conflagration”, which was the main reason why none of the “power factors” at that time were overly concerned with “excessive legal formalities”. This was also the reason why the Nuremberg Trials are completely legitimate, despite the fact that formally, the main actor in the judiciary function was the International Military Tribunal, composed of representatives of the four great powers, which was not based on any broader international legal basis. Besides, no one could seriously object to the strict international character and legitimacy of the IMT. For example, in a famous “classic early work” from the very extensive literature devoted to that famous trial, it is emphasised that:

“The endless devastation and indescribable mass horrors that accompanied the war, as well as the growing realisation that a subsequent war might bring about the end of modern civilization, contributed to the fact that the whole world demanded the condemnation and punishment of those responsible for the aggressions and the horrors of war.”⁵⁰

The gravity of the crimes committed during World War II by Nazi Germany and its allies was enormous,⁵¹ previously unseen and unrecorded in history, which made it quite pointless to insist on respecting all “formal” requirements, which especially applied to crimes against peace, because the commission of that act, i.e. the start of the aggressive war, was practically the initial trigger for all subsequent crimes that would be committed during the war and within its framework, and for these understandable reasons, one can hardly show or expect, great enthusiasm in proving that

49 Rückert, 1982, p. 93.

50 Taylor, 1951, p. 11.

51 Adamowitsch, 1987, p. 22.

the Nuremberg conviction for crimes against peace (crime of aggression) violated the principle of legality.

The Nuremberg Trials, or rather the legal basis for the convictions of the defendants in those proceedings formed in the Charter of the International Military Tribunal, represent a historically exceptional and even extremely rare case, which may probably occur “once in a thousand years”, in which the principle of legitimacy, based on the necessity that the perpetrators of the most serious and hitherto unprecedented mass crimes be justly punished, absolutely justifiably prevails over the principle of legality.

Compared to the trial at Nuremberg, the Tokyo War Crimes Trial is less frequently referenced in studies of the international military criminal courts following World War II. One of the reasons for this might be Japan’s physical distance from Europe, which was considered the place where the war began and actually ended, even though it effectively ended sometime later in the Far East. The International Military Tribunal for the Far East was established on 19th January 1946 and was focused on the war crimes that affected the Allies most strongly – war crimes against prisoners of war, in which the Japanese had broadly engaged.

The Tribunal was established by the Tokyo Charter, which was actually the decree issued by General Douglas MacArthur, following the blueprint developed by a U.S. lawyer, Joseph Keenan, who was later appointed as the Tribunal’s chief prosecutor. Certain differences notwithstanding, the rules applied by the IMT in Tokyo were quite similar to those used at Nuremberg. The Tokyo court found all the defendants guilty, and seven were sentenced to death.

Respect for the principle of legality was also challenged in relation to the trial in Tokyo. Namely, from May 8th 1946 to November 12th 1948, 28 leading Japanese politicians, officials and military personnel were tried before the International Military Tribunal for the Far East (IMTFE) as “major war criminals”, with the process based on the claim that Japan had pursued an aggressive, conquering and warlike policy since the early 1930s.

One dissenting opinion is very interesting and historically significant regarding the Tokyo trial. The statement of the Indian judge Radhabinod Pal, who had a dissenting opinion, is very compelling and indicative too, because he was a judge who was originally from Asia, which at that time was almost entirely under colonial rule.

In his dissenting opinion judge Pal pointed out that the situation in Japan was significantly different from that in Germany. He concluded that the constitutional system of Japan had been functional and the attitude within Japanese society had been that the emperor, military personnel and civil servants had been fully integrated into society. Pal wrote in his dissenting opinion that Japanese society had supported and helped the Japanese government. He also concluded that the defendants had acquired their positions in accordance with the Constitution and they had not abused their power at any time, nor had they usurped power and because of that, Japanese society

had experienced these processes as an inevitable evil and as the justice of the victor, without connecting this with the necessity of moral re-examination.⁵²

At the trial in Tokyo, the problem of possible retroactivity in the implementation of criminal law emerged as an important issue in relation to the conduct of proceedings for crimes against peace (aggression), because this criminal offense was not strictly envisaged as a crime for which someone would bear individual responsibility, but rather aggression, i.e. the crime against peace, was prohibited in interstate relations.⁵³ The views of individual judges from the Tokyo Tribunal regarding this issue are interesting:⁵⁴ Judge Bernard of France disputed that the charge of a crime against peace could be based on the “Pact of Paris” (Kellogg-Briand Pact) which concerned the relations of states,⁵⁵ but argued that waging an aggressive war was nevertheless illegal because it arose from “natural law”. Judge Röling of the Netherlands agreed that a crime against peace was not defined as a crime before the London Agreement, but like Judge Bernard, “provided” other rational arguments for concluding that waging an aggressive war was illegal, considering that it arose from a factual situation and that special provisions applied to this crime, similarly to the relationship between political crimes and other classic crimes in “domestic” national legislations.

Finally, Indian judge Radhabinod Pal, famous due to his dissenting opinion at the trial in Tokyo, refused to agree that the aggressive Japanese war had been illegal in concrete specific circumstances, arguing that this could not be inferred from the Pact of Paris, and ultimately concluded that in reality ‘only a lost war is a crime’.⁵⁶

5. The Establishment of the *Ad Hoc* Tribunals (ICTY, ICTR)

The international criminal tribunals for the former Socialist Federative Republic of Yugoslavia (ICTY) and Rwanda (ICTR) were established based on the resolutions of the United Nations Security Council, which opened the doors for contesting their legality.⁵⁷ The doctrine notes that ‘at the beginning of the 1990s, following the end of the Cold War, the United Nations activated its peace enforcement mechanisms’, and ‘this development triggered a renaissance of international criminal law, which many

52 Ahlbrecht, 1999, p. 103.

53 Škulić, 2010, p. 93.

54 Ahlbrecht, 1999, pp. 53–54.

55 With this pact, the member states of the League of Nations renounced war as an instrument of national policy and committed themselves to resolving their disputes peacefully, but although the states “condemned” war, the Pact’s shortcoming was that there was no appropriate mechanism to ensure its full implementation. In addition, this pact also did not mention any possibility of criminal responsibility of an individual, i.e. a person, for a crime against peace.

56 Ahlbrecht, 1999, p. 54.

57 The literature says: ‘The Charter of the United Nations does not provide legal grounds for the establishment of an international criminal court...’ ‘The establishment of an international tribunal by the U.N. Security Council was a new legal realm.’ See more: Satzger, 2018, pp. 155–156.

had thought a dead letter'.⁵⁸ The Statutes of the ICTY and ICTR reiterate the customary characteristics of international criminal law,⁵⁹ i.e. Statutes of both *ad hoc* tribunals that claim and strive to reflect "hard core" of existing criminal law.⁶⁰

There are fairly strong arguments that can be used to challenge this, but in terms of facticity, the work of the two tribunals in the given time is no longer disputatious, which given the gravity of the cases before them, as well as the considerable weight of the current and potential consequences of their decisions, cannot and must not be ignored.

As to the impact of the *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) on the development of international criminal law, theoretical resources suggest that in some situations, the case-law developed during the proceedings before these criminal tribunals influenced comparable solutions in the Rome Statute of the International Criminal Court, but sometimes in a direction that was quite the opposite, as it contributed to the development of completely different normative solutions in the Rome Statute.⁶¹ To illustrate the former, the Statue prescribes that a crime against humanity (contrary to the case-law developed at Nuremberg) may be committed in peacetime as well as in war or during an armed conflict, whereas the latter is confirmed by a failure to integrate the Hague Tribunal's case-law into the rules of the Statute excluding coercion as possible grounds for the exclusion of illegality or criminal responsibility.⁶² Even though the case-law of the two *ad hoc* international criminal tribunals clearly had an impact on the development of international criminal law, it appears that their influence should not be overestimated.

5.1. The Idea of Establishing an International Criminal Court and the Impact of Ad Hoc International Criminal Tribunals on Its Development

Although it is commonly considered that the "path" to a permanent international criminal tribunal began after World War II, this is not entirely true. Despite the fact that the importance of the International Military Tribunal at Nuremberg should not be underestimated, this trial was by no means the first step towards achieving a

58 Werle, 2005, p. 15.

59 Of course, this opinion/attitude (Werle) refers to the time of the creation of the both *ad hoc* tribunals (ICTY/ICTR), and since the establishment of the permanent International Criminal Court (ICC), the international criminal law, although historically rooted to a certain extent in customary law, when it comes to states parties to the Rome Statute, is primarily contained in the Rome Statute itself, as well as in other sources of criminal law (substantive and procedural), which are applied in proceedings before the International Criminal Court. Besides, in accordance with the principle of complementarity, there are adequate complementarity and essential correlation between the content of the Rome Statute, primarily the content of the provisions of material criminal law therein, and the corresponding segments of national criminal law of the state parties to the Rome Statute.

60 Werle, 2005, p. 16.

61 Schabas, 2017, pp. 12–13.

62 Ibid.

kind of supranational criminal tribunal for certain crimes.⁶³ The legal and historical significance of the Nuremberg trials, as well as those in Tokyo, is certainly momentous, although, the question can also be raised of how much *ad hoc* tribunals after the IMT and IMTFE were in fact the “right way” or at least the “shortest way” to the establishment of a permanent International Criminal Court,⁶⁴ and generally to the development of a universal and stable international criminal law system. The previously cited author, A. Eser in a cited article of his,⁶⁵ gives the title “from Nuremberg through The Hague to Rome” (Von Nürnberg über Den Haag nach Rom) to one of the chapters, which in a metaphorical way attempts to highlight the “evolutionary” and even “proper” or goal-oriented path of international criminal law, where *ad hoc* tribunals represented a kind of “precursor” to the permanent International Criminal Court.

According to some scholars (e.g. Jeffrey W. Davis, Hans Köchler, Julio Barboza, Stevan Đorđević, Zoran Stojanović),⁶⁶ the legality of the establishment of the International Criminal Tribunal for the former Yugoslavia is, at the very least questionable and can be attacked with strong legal arguments, which is constantly present in one part of the literature.⁶⁷ Critics of the legality of the ICTY point out in particular that the normal and correct approach to the establishment of an international tribunal would be to conclude an international agreement,⁶⁸ and that the legal basis amounting to a broad interpretation of the provision in Chapter VII of the UN Charter, according to which the Security Council may take action to maintain or restore peace and security, after the necessary determination that there is a threat to the peace, a breach of the peace, or an act of aggression, is not valid in a legal sense, because the term “court” can in no way be subsumed under the term “measure”.⁶⁹

Similarly, some other authors are of the opinion that ‘the ICTY was created both by powers that far exceeded those of the Security Council and that were contrary

63 Eser, 2001, p. 342.

64 See: Stojanović, 1999, pp. 6–11.

65 Eser, 2001, p. 342.

66 The views and main arguments of these authors are stated below in the text.

67 Đorđević, 1997, p. 157.

68 In fact it was quite clear from the beginning that the legally better way to form an international criminal court /tribunal, even when it comes to the “case of the former Yugoslavia”, was to use the mechanism of a multilateral international treaty, but it was assessed that this would be almost impossible in the specific concrete circumstances. Namely, in response to a request by the UN Security Council in Resolution 808 (1993), the Secretary-General recommended the idea of creating a tribunal by resolution, claiming that the possibility of establishment the tribunal by international treaty was canvassed, but rejected on the basis that it would take too long, and there was no guarantee that all the relevant States (‘in particular those in what was by then Former Yugoslavia’) would ratify that concrete international treaty. See: Cryer et al., 2010, p.123. It is noted in the literature too, that ‘the establishment of the ICTY under Chapter VII was a measure not involving the use of force and, thus, fell squarely within the ambit of Art 41 of the 1945 UN Charter, despite the fact that the indicative list of measures envisaged in that article make no reference to judicial bodies’, formally defined as a subsidiary organ under art. 29 of the UN Charter; See: Bantekas and Nash, 2003, pp. 339–340.

69 Stojanović, 2018, p. 57.

to traditional canons of statutory interpretation’,⁷⁰ and that ‘both traditional judicial doctrines and the customary practices for tribunal establishment lead to the clear conclusion that the ICTY was created illegally’.⁷¹

This part of doctrine also emphasises that the Security Council did not have the right to establish a court, because the establishment of a court is not a measure that can be taken in accordance with Chapter VII of the UN Charter, and moreover in the specific case of the establishment of an *ad hoc* tribunal, the Security Council acted not only as the creator of the court, but also went a step further and had a significant role in the process of appointing the judges of the Tribunal.⁷² But the same author (Davis), who claimed that the tribunal was established illegally, also concluded that ‘the Security Council’s action was inventive and clever, albeit unlawful’. Some scholars (e.g. Barboza) also⁷³

‘remarked that the Security Council did not possess the power to create an international criminal tribunal and that the creation of the Tribunal amounted to an unacceptable stretching of the power conferred to the UN Security Council by Chapter VII (art. 4) of the Charter’.⁷⁴

However, there are also other opinions – for example, it is emphasised that the establishment of the Hague Tribunal under Chapter VII of the UN Charter falls within the domain of a kind of discretionary right of the Security Council, that to date its practice has greatly developed and is no longer challenged by any state in the international community, and that its legitimacy is indisputable and significantly strengthened. It was founded by the international community as a whole.⁷⁵ It is also pointed out in legal theory that the solutions applied in Security Council Resolution No. 827 (1993) were introduced in practice for the global community for the first time, and that therefore they could not be perfect and indisputable in all respects, but that they nevertheless represented an important novelty which the UN should continue to develop consistently, and that it would be more disadvantageous to stop it at the beginning, but rather to ‘in addition to the existing shortcomings in the first phase, apply this form of intervention’ in order to re-establish endangered peace and security.⁷⁶

The setting up of the ICTY has given rise to some objections, like the principal criticism that the Tribunal was established to make up for the impotence of diplomacy and politics, and revealed the inhibition of both the Great Powers and the UN Security Council to find a swift and proper solution to the conflict in the former Yugoslavia.

70 Davis, 2002, p. 397.

71 Ibid.

72 Köchler, 2003, pp. 171–172.

73 Davis, 2002, p. 405.

74 Ibid., pp. 404–405.

75 Paunović, 1997, p. 126.

76 Vasilijević, 1995, p. 167.

The ICTY was therefore conceived of as a sort of “fig leaf”.⁷⁷ The objection is that in establishing the Tribunal the Security Council exceeded its powers under the Charter, adopting an act that was patently *ultra vires*, and that by creating a criminal court dealing only with crimes allegedly committed in a particular country, instead of granting to the new court jurisdiction over crimes committed everywhere in the world, the Security Council opted for “selective justice”.⁷⁸

Antonio Cassese, the first president of the ICTY, accepted a part of a criticism, but concluded that ‘however, half a loaf is better than pie in the sky’ and because of that ‘as long as an international criminal court endowed with universal jurisdiction was lacking, the establishment of *ad hoc* Tribunals proved salutary’.⁷⁹

Still, on the whole, the doctrine of international law/international criminal law does not consider or feel there is any major legal problem concerning the action taken by the Security Council acting under Chapter VII of the UN Charter and more or less routinely both *ad hoc* tribunals (ICTY/ICTR), treated as “the United Nations tribunals”.⁸⁰

The question of the legality of the ICTY must essentially be considered exclusively from the point of view of an expert assessment of the (in)validity of the legal basis for its creation, and political arguments must not play any role in this regard. It is noticeable that the judgments of the *ad hoc* tribunal, especially the one established for the territory of the former Yugoslavia, are becoming widely commented on as the basis for the further development of international criminal law, and in doing so, the commentators are primarily acting in accordance with the classic rule of Anglo-Saxon case law,⁸¹ according to which final judgments become legally binding for other identical or similar cases, i.e. they become a source of law.⁸² The most prominent representative of this doctrinal thought is certainly M. Cherif Bassiouni, who states for example, that

‘the establishment of *ad hoc* tribunals for the former Yugoslavia and Rwanda is very important, although they were created by the activities of the Security Council, and despite the fact that a sufficient number of judgments has not yet been produced, the establishment of these tribunals is an important indicator of how much has already been done’.⁸³

When it comes to the practice developed by the *ad hoc* tribunals, it seems that since the Statute and other formal sources of law of the permanent International Criminal Court now exist, the precedential influence (and the influence of practice in general)

77 Robertson, 2003, p. 300.

78 Ibid.

79 Cassese, 2003, p. 338.

80 See: Werle, 2005, p. 15.

81 See: Škulić, 2023, p. 34.

82 See: Ambos, 2002, pp. 259–360.

83 Bassiouni, 1998, p. 34.

of the ad hoc tribunals, should be completely excluded from the work of the permanent International Criminal Court (ICC). It is not correct to impose the practice that has already arisen from the decisions of the *ad hoc* tribunals, as something that is self-evident and without any explanation, to the newly established permanent International Criminal Court, because these are fundamentally different institutions.

Given the ad hoc character of the tribunals for the former Yugoslavia and Rwanda (which is clearly reflected in their names, as well as the territorial and temporal limitations in their activities), their nature, legal and even factual essence is actually their temporality and impermanence, which is unambiguously marked by the term “*ad hoc*”. Therefore the legal effect of their decisions should not be of a permanent nature in relation to other permanent institutions, primarily in relation to the permanent International Criminal Court. On the contrary, they could be possibly and very cautiously, in rare situations, applied only as a restrictive exception.

6. Hybrid Tribunals

It is a generally held view, that there is a tendency in the theory of public international law, dealing in part with international criminal law as well, for all criminal courts and tribunals before which international crimes are prosecuted, as well as certain forms of their specialised jurisdiction, to be defined as forms of international criminal justice, more precisely of the criminal justice involving an appropriate “international law component.” Accordingly, the “international criminal courts and tribunals” include: the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and in connection with these two ad hoc tribunals – the International Residual Mechanism for Criminal Tribunals, the permanent International Criminal Court (ICC), and a special category of “hybrid courts and other internationalised domestic courts and tribunals”, namely, the Special Tribunal for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the participation of international judges in criminal proceedings in Kosovo and Metohija under the UNMIK rules, established in 2000 and based on U.N. Security Council Resolution 1244 (UNMIK Regulations 64 Panels, 2000/64), Special Panels for Serious Crimes in East Timor, panels involving international judges in war crimes proceedings in Bosnia and Herzegovina, the Special Tribunal for Lebanon, the Iraqi High Tribunal, and specialised war crimes chambers in Serbia.⁸⁴

Hybrid tribunals are treaty-based courts, with a combination of national and international elements, created through an agreement between a national government and an international organisation, such as the United Nations. They are mostly locally based courts dealing with serious international crimes and generally, comprised of both international and national judges, some practitioners, and investigators and prosecutors, who are engaged in hybrid tribunals. In this category of tribunals

84 Shaw, 2014, pp. 286–309.

are the Special Panels and Serious Crimes Unit in East-Timor, the Special Tribunal for Lebanon, Extraordinary African Chambers, and the Kosovo Specialist Chambers and Specialist Prosecutor's Office. Typical examples of hybrid courts/tribunals are the Special Court for Sierra Leone (SCSL), and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The UN and the Sierra Leone government jointly established the Special Court for Sierra Leone (SCSL) in 2002, with the mandate to try persons who bear the greatest responsibility for serious violations of both international humanitarian law and Sierra Leonean law, committed in the territory of Sierra Leone since 30th November 1996.⁸⁵ The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in 2004, through an international agreement between the UN and Cambodia, to try persons responsible for crimes committed under the Khmer Rouge regime from 1975 to 1979.

7. Perspectives of the International Criminal Law

After a series of unsuccessful efforts to act upon the principles of *ad hoc* tribunals, a large part of the international community managed to establish a permanent international criminal court. The adoption of the Rome Statute and other sources of law applied in the proceedings before the permanent International Criminal Court (ICC), created the necessary normative requirements for the further and more closely aligned development of international criminal law, which prior to the establishment of the Court, had not possessed secure and stable sources, instead relying on the hitherto judicial formations, which had rather assumed an *ad hoc* character. Consequently many solutions in international criminal law depended directly on the actors involved in the criminal proceedings, above all judges, in charge of rendering judgments.

The Court was established by a multilateral international treaty, the Rome Statute, in July 1998. Having been ratified by more than sixty countries, the Rome Statute entered into force on 1st July 2002. It was not until the Rome Statute took effect that the factual and normative conditions were met to implement a codified criminal law of international character. More precisely, the sources of this law are now largely unified and practically summarised by the ICC Statute and other sources, including the Rules of Procedure and Evidence and the Elements of Crimes.

In summary, the activity of the International Criminal Court should be perceived as a completely new beginning for international criminal law. It would of course be wrong to deny the importance of the case-law already created in international criminal law, but it should not be overestimated either, much less given a dominant role, as it was built under a considerably different set of normative conditions.

Contrary to the rules of the *ad hoc* international criminal tribunals exercising primary jurisdiction, or rather having a formal advantage over national judiciaries

⁸⁵ Schabas, 2017, pp. 12–13.

with respect to the crimes falling within their jurisdiction, the principle of complementarity mandates that primary jurisdiction lies with the national criminal justice system of a state whose bodies are establishing the jurisdiction, and only subsidiarily, due to the absence of the necessary conditions or a relevant will for criminal prosecution to be conducted “on the national level”, shall the criminal proceedings develop before the International Criminal Court.

In other words, the national criminal courts have primary jurisdiction here, and the ICC has only subsidiarity jurisdiction. The ICC is meant to complement rather than to replace national courts, and it can only act when the national courts have been found unable or unwilling to try a case. The first aspect of the principle of complementarity has two basic effects – firstly to regulate a potential conflict of interests between national criminal courts and the ICC, and the other, to define which criminal law will apply as a primary one.

In terms of both effects of the first aspect of the principle of complementarity, the national criminal justice system and national criminal law shall enjoy an advantage, which is an excellent example of respect for the principle of state/national sovereignty in the Rome Statute. It is only logical though, as the Statute is a multinational (inter-governmental) treaty established, just like any other treaty, by a consensus that the member states/parties had reached.

The other aspect of the principle of complementarity is essentially the request for adequate complementarity and correlation between the content of the Rome Statute, primarily the content of the provisions of material criminal law therein, and the corresponding segments of national criminal law of the State Parties to the Rome Statute, the interpretation of which should not be the existence of absolutely identical norms as those prescribed by the Statute and other sources of law applied before the International Criminal Court, but the substantial content of the relevant norms of national criminal law should be similar to a necessary degree, or perhaps identical if so required. In other words, there should be no legal voids in national criminal legislation with respect to the demands of the Rome Statute.

Respect for the sovereignty of the States Parties to the Rome Statute on the Establishment of a Permanent International Criminal Court is, in particular, reflected in addition to the principle of complementarity, in the principle of *ne bis in idem*, which is defined completely differently than in the statutes of *ad hoc* tribunals (ICTY/ICTR). The principle *ne bis in idem* (the prohibition of double jeopardy) means that no one shall be tried twice for the same criminal offense. The Rome Statute contains the *ne bis in idem* principle as one of the aspects of complementarity insofar as, on the one hand, it pertains only to the crimes falling within the jurisdiction of the International Criminal Court (Article 5 of the Statute), and on the other, it is established as a rule to which certain exceptions are permitted, although there is a form of the effect of this principle that acts in absolute terms, or rather, exclusively as a rule, without any exceptions.

The principle of *ne bis in idem* applies absolutely to the decisions of the ICC, and primarily to the decisions of national courts, with some possible exceptions. In the

Statute, the principle also defines the relationship between national judiciaries, or rather specific decisions made by national courts and their legal effect, and the Court's decisions.

Perceived from a legal and technical point of view, and given the scope of the *ne bis in idem* principle and the goal orientation thereof, the Statute has defined the principle with respect to potential new proceedings before two courts: 1) before the International Criminal Court which has previously conducted criminal proceedings regarding a specific defendant, or before that court, but on the condition that criminal proceedings were previously conducted before another court regarding the same case, but that certain abuses or anomalies have been identified; 2) before another court, when the International Criminal Court has previously conducted criminal proceedings and made a decision.

Owing to this normative solution, provided by Article 20 of the Rome Statute, it is possible to differentiate between three modalities of the effect of the *ne bis in idem* principle. The first modality is regulated by Article 20, paragraph 1 of the Statute, prescribing that no person shall be tried before the Court with respect to "conduct" which formed the basis of crimes for which the person has been convicted or acquitted by the Court (procedural rule), except for the cases prescribed by the Statute (procedural exception).

The other modality of the effect of the *ne bis in idem* principle has been defined by Article 20, paragraph 2 of the Statute, mandating that no person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court. The second modality is prescribed only as a rule, and the Statute does not provide for the existence and effect of an exception. The third modality of the procedural and legal effect of the principle of *ne bis in idem* is regulated by Article 20, paragraph 3 (a) and (b) of the Rome Statute, stipulating that no person who has been tried by another court for conduct also prescribed under Articles 6, 7, 8 or 8bis of the Statute shall be tried by the International Criminal Court (rule) with respect to the same conduct, unless proceedings before another court were conducted to achieve some of the alternatively prescribed goals, involving an abuse, or a gross error: a) for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, or b) when the proceedings before other court were not conducted independently or impartially in accordance with the norms of due process recognised by international law, and were conducted in a manner which, under the circumstances, was inconsistent with an intent to bringing the person concerned to justice.

The creation of the International Criminal Court, as well as the performance of the bodies proceeding before the Court, and in the first place the Prosecutor, give hope that international criminal law may play an important role in the struggle against war crimes and other international crimes, but that there are not many reasons for excessive optimism.

This engagement has concerned African states, and has been ineffective quite often, but when it comes to the armed conflicts in progress, it may even create a "peace

versus justice” collision, urging a kind of compromise between the two values. The criminal proceedings before the International Criminal Court that involved heads of states and other senior officials from various African states has sparked objections regarding selective justice in the continent, and some states, including the Republic of Burundi, Gambia, and even the Philippines (not an African state) decided to cancel their accession to the Rome Statute.

Ever since the International Criminal Court opened its doors, the major objection to this form of international criminal justice was that major powers have not joined the Statute, namely the United States, China and Russia, as well as some very populous countries, such as India.⁸⁶ Their restraint is quite logical, because it’s difficult to imagine a war without the occasional war crime – there are always people with psychopathic traits (including members of military/armed forces), prepared to commit crimes under the circumstances permitted by a war.

In addition, the very concept of command responsibility, which in some of its forms is very close to objective responsibility, is a serious threat to military commanders, whereas some broader categories of complicity with far-reaching effects, including the concept of conspiracy, may lead to the criminal responsibility of persons very far away from the actual perpetrators of war crimes and other international crimes under the subject-matter jurisdiction of the International Criminal Court.⁸⁷ Accordingly, states that possess a capacity to wage a war simply do not want to accept any risk of their soldiers and officers being called to account before “some” international criminal court.

Of course, as opposed to some *ad hoc* international criminal tribunals, the International Criminal Court was created in a completely valid and legal way, using for that purpose a multinational treaty (the Rome Statute), and it will persist as long as the Statute persists, or rather as long as the commitment of the State Parties to the multinational treaty and the obligation prescribed therein persists. Even though some states have given up the Rome Statute, it is certain that it will remain in force in the near future.

The major powers have not expressed any intent to accede to the Rome Statute, but a large number of leading states joined it, mostly the member states of the European Union, which for candidate countries has made accession to the Union conditional on accepting the Statute as part of the concept of rule of law.

In a word, one should not be pessimistic regarding the future of the International Criminal Court, although excessive optimism is not recommended either. In terms of a conclusion about the future of the first permanent form of international criminal justice, the old truth holds that a glass halfway filled with water may be seen as either half-full or half-empty.⁸⁸

86 See: Stojanović, 2024, p. 18.

87 See: Ristić, 2003, p. 17.

88 Škulić, 2020, p. 78.

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International Criminal Law II: International Crimes

Lucija SOKANOVIĆ

ABSTRACT

After a short recollection of the notion of International criminal law the author considers various doctrinal definitions of international crimes. Although there is not necessarily consensus on a definite list of crimes under international law, it is widely accepted that it would certainly include genocide, crimes against humanity, war crimes and the crime of aggression. In analysing the differences between international crimes and national crimes, several arguments highlight their origins in international customary or conventional law. The crimes of genocide, crimes against humanity, war crimes and finally the crime of aggression are presented by their definitions from the Rome Statute, doctrinal clarification and the case law of ad hoc tribunals as well as the International Criminal Court. The discussion surrounding accusations and institutes of international criminal law often reflects a variety of expert opinion and different case laws. In this chapter, aimed at students, the author emphasises the importance of maintaining a balanced perspective on definitive determinations.

KEYWORDS

international crimes, genocide, crimes against humanity, war crimes, the crime of aggression

1. Introduction, or How International Crimes Differ from National Crimes?

The aim of this chapter is to explain how international crimes differ from national crimes and to introduce basic information and elements of the crimes widely accepted as international crimes: genocide, crimes against humanity, war crimes and the crime of aggression. The structure of the chapter, as well as the depth of the analysis, was limited by the instructed volume. In following subchapters, the crimes are presented by their definition from the Rome Statute, doctrinal clarification and relevant case law (when possible).

International criminal law (ICL) is a complex body of law that evades simple classification. It can be understood as a direct outgrowth of international humanitarian law, while it can also be described as a hybrid body of law employing principles drawn

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from the civil and common law models of criminal adjudication.¹ Great significance in the development of contemporary ICL derives from the influences of domestic criminal law, human rights law, and transitional justice principles.² Not only do these three influences play an important role in the evolution of many doctrines of contemporary ICL, including joint criminal enterprise, but are also the cause of the unique gap between procedural rights and principles of substantive fairness.³

International crimes are breaches of international rules entailing the personal criminal liability of the individuals concerned.⁴ Cassese defines international crimes as violations of international customary rules which are intended to protect values considered important by the whole international community, and there is a universal interest in repressing these crimes.⁵ According to Borgh, although essentially there is no consensus on a definite list of crimes and under international law it is widely accepted that it would certainly include war crimes, crimes against humanity, genocide and torture.⁶ Genocide, crimes against humanity, war crimes and crime of aggression – as enumerated in Article 5 (1) (a)-(d) of the Rome Statute⁷ – are most commonly labelled as international crimes or as ones prominently laid down in the preamble of the same Statute as ‘the most serious crimes of concern to the international community as a whole’. These labels imply a powerful stigmatisation and rightfully recall their atrocious nature.⁸ It can be assumed that they shock the “conscience of humanity” or “universal conscience”.⁹

But what makes international crime distinctive from the national crime? O’Keefe negates the existence of a common understanding, or the common definition of an international crime.¹⁰ Similarly, Bassiouni assesses that the writings of scholars are uncertain, if not tenuous, as to what they deem to be the criteria justifying the establishment of crimes under international law.¹¹ On contrary, Heller states that in fact, nearly all scholars share a common understanding of what makes an international crime distinctive: namely, it involves an act that international law deems universally criminal.¹²

‘The international law requirement is what distinguishes an international crime from a domestic crime: although some acts that qualify as domestic crimes are universally criminal – murder, for example – their universality

1 Marston Danner, 2004, p. 186; Sluiter, 2007, p. 67; Fletcher, 2009, pp. 104–110.

2 Marston Danner and Martinez, 2005, p. 80.

3 Robinson, 2008, p. 927.

4 Cassese, 2003, p. 23.

5 Ibid., pp. 23–25.

6 Borgh, 2007, p. 87.

7 ICC, 2023, p. 3.

8 Ibid., p. 555.

9 Orentlicher, 2004, p. 1057.

10 O’Keefe, 2015, p. 47.

11 Bassiouni, 2008, p. 142.

12 Ibid., p. 142.

derives not from international law, but from the fact that every state in the world has independently decided to criminalise them. And the universality requirement is what distinguishes an international crime from a transnational crime: although the criminality of a transnational crime emanates from international law – a treaty requiring a particular act to be domestically criminalised – international law does not deem a transnational crime universally criminal, because it leaves the decision to criminalise to states themselves.¹³

In earlier literature Jescheck identified the following three criteria which are to be satisfied to attribute the label of “international crime”: (a) the criminal norm has to emanate directly from international (conventional or customary) law; (b) there have to be provisions allowing prosecution by international courts or third states (on the basis of universal jurisdiction); and (c) the international status requires bindingness from a wide majority of states.¹⁴ Cassese recalls that the recognition of international crimes as such will in general be achieved through the creation of customary international law since ratification of international conventions rarely achieves the necessary universality.¹⁵ On another occasion Cassese notes that the international crimes are ‘premised on the general notion that international legal prescriptions are capable of imposing obligations directly on individuals, without the intermediary of the state wielding authority over such individuals’.¹⁶ Cryer similarly notes that ‘the fundamental point to understand about these crimes’ is that ‘states have decided that international law, in exceptional circumstances, ought to bypass the domestic legal order, and criminalise behaviour directly’.¹⁷ According to Triffterer what is distinctive about international criminality is that ‘individuals can be punished even if there exists no corresponding punishability under their domestic law and jurisdiction or any other national legal system purporting to exercise jurisdiction’.¹⁸ The International Tribunal for Former Yugoslavia (ICTY) states precisely that international crimes are ‘universally condemned wherever they occur’,¹⁹ because they are ‘peremptory norms of international law or *jus cogens*’.²⁰ “*Jus cogens*” refers to a small class of fundamental norms of international law that are non-derogable — that prohibit states from assuming treaty obligations inconsistent with the norm.²¹

May points out the principles that transcend national borders and achieve universal binding force: ‘In international law, some crimes so clearly harm the international

13 Heller, 2017, p. 354.

14 Jescheck, 1992, pp. 1119–1120.

15 Cassese, 2008, p. 12.

16 Ibid., p. 9.

17 Cryer in Bassiouni 2008, p. 108.

18 Triffterer, 2008, p. 25.

19 ICTY, *Prosecutor v. Furundžija*, 1998, p. 156.

20 ICTY, *Prosecutor v. Kupreškić*, 2000, p. 520.

21 Malanczuk, 1977, pp. 57–58.

community that they must be proscribed in all societies.²² Cassese similarly argues that because international crimes involve violations of rules ‘intended to protect values considered important by the whole international community’, they are ‘consequently binding on all states and individuals’.²³ According to Gaeta, ICL

‘has its roots in the gradual emergence of a set of ‘supra-national’ values, proper to the international community as a whole that must be safeguarded against those states that – through their individual organs or their whole apparatus – disregard them.’²⁴

Freeland moreover affirms that the internationalisation of justice ‘recognises that there are certain norms of ICL that transcend national boundaries and, like fundamental human rights norms, are regarded as universal in acceptance and thus should be universal in application’.²⁵ Werle and Jessberger use the “universal nature of international crimes” to reason why states are permitted to exercise universal jurisdiction over them,²⁶ while Meron reaches the same conclusion based on the fact that international crimes are “recognised by the community of nations as of universal concern” and attract “universal condemnation”.²⁷ In Croatian literature, ICL is defined as a relatively new branch of law that encompasses the totality of norms of international law defining certain individual behaviours as international criminal offenses and that regulate the conditions of liability for them independently of national law.²⁸ It is supranational law that international community applies directly through its courts regardless whether it has been transformed into national law.²⁹ International crimes *stricto sensu* are only those crimes that violate the rules of customary international law and are therefore considered international crimes by the entire international community.³⁰ Finally, it can be concluded that international crimes attack the fundamental values of the international community: international peace, security and well-being; they are committed in a context of systematic or widespread use of force; organised, collective violence usually involves holders of state power; there is a universal interest in their repression; the jurisdiction of international courts is linked to them; they are not subject to a statute of limitations; perpetrators do not enjoy immunity; the attempt and preparation of all international crimes are punishable.³¹

As referred to earlier, the initial acquittance with international crimes in the following subchapters is perceived by the relevant articles of the Rome Statute.

22 May, 2004, p. 24.

23 Cassese, 2005, p. 436.

24 Gaeta, 2010, p. 259.

25 Freeland, 2007, p. 45.

26 Werle and Jessberger, 2014, p. 73.

27 Meron, 1995, p. 554.

28 Novoselec, 2016, p. 14.

29 Ibid., p. 14.

30 Munivrana Vajda, 2018, p. 4.

31 Ibid., pp. 3–4.

It should be noted here that according to Article 9 of the Statute in the interpretation and application of Articles 6 (genocide), 7 (crimes against humanity), 8 (war crimes) and 8 *bis* (the crime of aggression) the Elements of Crimes, adopted at the Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC) in 2002 and the Review Conference in Kampala in 2010, shall assist the Court. Article 9 clearly indicates that the elements themselves are to be used as an interpretative aid and are not binding upon the judges, they must be consistent with the Statute and this consistency must be determined by the Court.³² So when deciding a case of war crimes for example, judges still need to look at the relevant legal instruments of international humanitarian law and to analyse the state practice and *opinio iuris* in order to determine existing rules of customary international law.³³

2. Genocide

Genocide is deliberate commission of certain acts against members of a national, ethnic, racial or religious group with the aim of its complete or partial physical or biological destruction.³⁴ The term “genocide” was introduced by the Polish-Jewish American lawyer Raphael Lemkin in his book “Axis Rule In Occupied Europe: Laws of Occupation, Analysis of Government, Proposals For Redress” as a coin of the Greek word *genos* (race, genus) and the Latin word *occidere* (to kill).³⁵ The book was published in Washington in November 1944 with the support of the Carnegie Endowment for International Development.³⁶ The first official document to mention the term genocide was the Nuremberg Tribunal indictment of 18th October 1945 stating that the accused committed deliberate and systematic genocide – the extermination of racial and ethnic groups, the destruction of the civilian population of the occupied territories for liquidation of certain nations and classes, some national, ethnic and religious groups, particularly Jews, Poles, Gypsies and other peoples.³⁷

Article 6 of the Rome Statute defines the crime of genocide as:

‘any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.’

32 Dörmann et al., 2003, p. 8.

33 Dörmann, 2003, p. 402.

34 Turković, 2007, p. 105.

35 Holovchenko, 2017, p. 52.

36 Ibid., p. 52.

37 Turković, 2007, p. 105; Holovchenko, 2017, p. 52.

It reproduces the text of Article II of the Convention for the Prevention and Punishment of the Crime of Genocide,³⁸ which was adopted by the United Nations General Assembly on 9 December 1948. The first important ruling by one of the *ad hoc* tribunals, the 2 September 1998 judgement of the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) in *Prosecutor v. Akayesu*, was issued several weeks after the adoption of the Rome Statute.³⁹

2.1. Special Intent

Special intent inherent to the crime of genocide is the intent to destroy, in whole or in part, a particular group. It is specially outlined in the case law of ICC, ICTR and ICTY. ICC has confirmed the significance of a subjective element or *dolus specialis*, according to which any genocidal acts must be carried out with the intent to destroy in whole or in part the targeted group.⁴⁰ An ICTR Trial Chamber noted that the special intent of a crime

‘is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.’⁴¹

Similarly, an ICTY Trial Chamber reasoned:

‘An examination of theories of intent is unnecessary in construing the requirement of intent in Article 4 paragraph 2. What is needed is an empirical assessment of all the evidence to ascertain whether the very specific intent required by Article 4 paragraph 2 is established, that is, the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.’⁴²

The ICTR Appeals Chamber has confirmed that genocide is a crime of specific intent.⁴³ According to the ICTY Appeals Chamber, special intent may be directed to destroy a substantial part of the group:

‘The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in

38 UN, 1948.

39 ICTR, *Prosecutor v. Akayesu*, 1998.

40 ICC, *Prosecutor v. Bashir*, 2009, p. 139.

41 ICTR, *Prosecutor v. Akayesu*, 1998, p. 188.

42 ICTY, *Prosecutor v. Sikirica et al.*, 2001, pp. 58–59.

43 ICTR, *Prosecutor v. Ntakirutimana et al.*, 2004, p. 364.

relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial.⁴⁴

In addition, a Trial Chamber of the ICTY concluded that it might be possible to infer the requisite genocidal intent from the ‘desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such’.⁴⁵

Four groups are enumerated as possible targets of the crime of genocide. Groups must be defined by positive characteristics, and not their absence.⁴⁶ The drafters rejected proposals aimed at enlarging the scope of the list, but political, economic and social groups were quite intentionally excluded, because the drafters did not believe they should be protected by the terms of the Convention.⁴⁷

2.2. Acts of Genocide

Acts of genocide encompass forms of physical and biological genocide, but not cultural genocide, which was intentionally omitted by the drafters in 1948.⁴⁸ The term “killed” is interchangeable with the term “caused death” according to the Elements of Crimes.⁴⁹ In the *Akayesu* judgement, an ICTR Trial Chamber found the term killing to be too general, in that it might include involuntary homicide as well as intentional killing.⁵⁰ “Causing serious bodily or mental harm” may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.⁵¹ The ICTR has stated that causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable.⁵² The ICTR made a particularly useful contribution in extending the notion of bodily and mental harm to cover rape and other forms of sexual violence, although this does not mean that every rape committed while genocide is underway can be prosecuted as a genocidal act.⁵³ ‘Inflicting ... conditions of life’ include the case of deportation, placing a group of people on a subsistence diet, reducing required medical services below a minimum and withholding sufficient living accommodations, but only to the

44 ICTY, *Prosecutor v. Krstić*, 2001, p. 12.

45 ICTY, *Prosecutor v. Jelisić*, 1999, p. 82.

46 Schabas, 2016, p. 135.

47 Ibid.

48 Ibid., p. 136.

49 ICC, 2013, p. 2.

50 Schabas, 2016, p. 138.

51 ICC, 2013, p. 2.

52 ICTR, *Rukundo v. Prosecutor*, 2010, p. 263.

53 Ibid.

extent that such measures are imposed with the intent to destroy the group in whole or in part.⁵⁴

‘The means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, inter alia, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.’⁵⁵

Imposing measures intended to prevent births within the group is one of two forms of biological genocide contemplated by Article 6. ‘*The travaux préparatoires* of Article II paragraph d of the 1948 Convention suggest that such measures could include sterilisation, compulsory abortion, segregation of the sexes and obstacles to marriage’.⁵⁶ The ICTR Trial Chamber outlined in that context:

‘In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.’⁵⁷

Concerning “forcibly transferring children” the term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.⁵⁸

2.3. Concurrency with Crimes Against Humanity

There is an obvious overlap between the definitions of genocide and crimes against humanity, set out in Articles 6 and 7, respectively, of the Rome Statute.⁵⁹ In that context, the question arises whether cumulative convictions are allowed in the case when charges proceed based on both provisions. At the *ad hoc* tribunals, cumulative

54 Schabas, 2016, p. 139.

55 ICTR, *Prosecutor v. Akayesu*, 1998, p. 247.

56 Schabas, 2016, p. 139.

57 ICTR, *Prosecutor v. Akayesu*, 1998, p. 248.

58 ICC, 2013, p. 3.

59 Schabas, 2016, p. 142.

charging, in some cases for both genocide and crimes against humanity, has been allowed.⁶⁰ The ICTR Appeals Chamber confirmed that

‘reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other.’⁶¹

‘An element is considered to be “materially distinct” if it requires proof of a fact not required by the other offence. In articulating the approach, the ad hoc tribunals have relied heavily on the Blockburger decision of the Supreme Court of the United States.’⁶²

Schabas states that with respect to cumulative convictions for genocide and crimes against humanity, there is much authority for the proposition that genocide is an aggravated form of crimes against humanity.⁶³ The ICTR Appeals Chamber held that convictions for genocide and for extermination as a crime against humanity, based on the same set of facts, are permissible.⁶⁴

‘Genocide requires proof of intent to destroy, in whole or in part, a national, ethnic, racial or religious group, whereas the crime against humanity of extermination requires proof that the crime was committed as part of a widespread or systematic attack on a civilian population.’⁶⁵

3. Crimes Against Humanity

The concept of crimes against humanity first received explicit international legal recognition in the St. Petersburg Declaration of 1868 limiting the use of explosive or incendiary projectiles as contrary to the laws of humanity.⁶⁶ Further recognition was accomplished when the First Hague Peace Conference in 1899 unanimously adopted the Martens Clause as part of the Preamble to the Hague Convention respecting the laws and customs of war on land.⁶⁷ The Martens Clause has been incorporated vir-

60 Ibid.

61 ICTR, *Prosecutor v. Musema*, 2001, pp. 369–370.

62 Schabas, 2016, p. 142.

63 Ibid.

64 ICTR, *Prosecutor v. Musema*, 2001, pp. 369–370.

65 ICTR, *Prosecutor v. Musema*, 2001, p. 366.

66 Hall and Ambos, 2016, p. 152.

67 Ibid., p. 153.

tually unchanged in most subsequent humanitarian law treaties.⁶⁸ The first formal reference to some of the crimes which would be included in the concept of crimes against humanity was given in the Declaration of France, Great Britain and Russia on 24 May 1915 denouncing the massacres by the Ottoman Empire of Armenians in Turkey as ‘crimes against humanity and civilisation for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres’.⁶⁹ The London Charter of 1945, which established the International Military Tribunal of Nuremberg, is the first international instrument to define the concept of crimes against humanity explicitly.⁷⁰ The International Law Commission adopted a Draft Code of Crimes against the Peace and Security of Mankind in 1996.⁷¹

According to Article 7 of the Rome Statute Crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

‘(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.’

3.1. *Qualifications of the Attack*

The term “widespread” has mainly a quantitative meaning referring to the scale of the attack or, equivalently, to the (large) number of victims.⁷² The ICTY Appeals Chamber has interpreted the term expansively to refer ‘to the large-scale nature of the attack and the number of targeted persons’.⁷³ According to the jurisprudence of ICTY Appeals Chambers and ICTR Trial Chambers the term systematic entails: ‘The organised nature of the acts of violence and the improbability of their random

68 Ibid.

69 Ibid.

70 Pillai et al., 2024, p. 6.

71 Ibid.

72 Hall and Ambos, 2016, p. 168.

73 ICTY, *Prosecutor v. Krnojelac and others*, 2002, p. 57; *Prosecutor v. Kunarac*, 2001, p. 428; *Prosecutor v. Blaškić*, 2000, p. 202.

occurrence.⁷⁴ In addition, the patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence.⁷⁵ It is important to note that only the attack, not the individual acts of the accused, must be widespread or systematic.⁷⁶ Indeed,

‘the acts of the accused need only be a part of this attack, and all other conditions being met, a single or limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.’⁷⁷

“Population” refers to a multiplicity of persons sharing common attributes, but this requirement does not mean, however, that the entire population of a state, entity, or territory must be subjected to the attack, it implies the collective nature of the crimes to the exclusion of single acts.⁷⁸ Civilian population comprises all persons who are civilians.⁷⁹ Early judgements of the ICTY and ICTR Trial Chambers had adopted a narrower concept of the term “civilian” based on common Article 3 of the Geneva Conventions as including all persons who have taken no active part in hostilities, or are no longer doing so, including members of armed forces who laid down their arms and persons placed *hors de combat* by sickness, wounds, detention or any other reason.⁸⁰ The use of the word any in Article 7 paragraph 1 indicates that the civilian population includes people of any nationality.⁸¹ Crimes against humanity can, thus, be committed against civilians of the same nationality as the perpetrator, and stateless persons.⁸² ICTY Trial Chamber stated that in ‘determining the existence of a civilian population, a court must consider the specific situation of the victim at the moment the crimes were committed, rather than his status’.⁸³ This approach is in line with the humanitarian purpose of crimes against humanity, since everyone, except an active combatant of a hostile armed force, is in a specific situation requiring protection.⁸⁴ The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.⁸⁵ The attack may be directed against a sufficient number of individuals, not against the

74 ICTY, *Prosecutor v. Kordić*, 2004, p. 94; *Prosecutor v. Blaškić*, 2004, p. 101; ICTR, *Prosecutor v. Muvunyi*, 2006, p. 512; *Prosecutor v. Musema*, 2000, pp. 203–204.

75 Ibid.

76 ICTY, *Prosecutor v. Kordić*, 2004, p. 94; *Prosecutor v. Blaškić*, 2004, p. 101.

77 Ibid.

78 Hall and Ambos, 2016, p. 172.

79 Additional Protocol I, art. 50. para. 2; Sukanović, 2021, pp. 183–184.

80 ICTY, *Prosecutor v. Tadić*, 1999, pp. 637–638; *Prosecutor v. Blaškić*, 2004, p. 114; ICTR *Prosecutor v. Akayesu*, 1998, p. 582.

81 Hall and Ambos, 2016, p. 174.

82 Ibid.

83 ICTY, *Prosecutor v. Blaškić*, 2000, p. 214.

84 Hall and Ambos, 2016, p. 174.

85 Additional Protocol I, art. 50. para. 3.

civilian population as a whole.⁸⁶ Article 7 explicitly requires that the perpetrator must commit the acts with knowledge of the broader widespread or systematic attack on the civilian population. In addition, the second contextual element in the Elements of Crimes, common to all the individual acts of crimes against humanity of Article 7, requires that the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.⁸⁷ This requirement is consistent with the jurisprudence of the ICTY and ICTR, which has concluded that the perpetrator must know that there is an attack on a civilian population and that he knows that his acts are part of that attack.⁸⁸ The knowledge requirement constitutes an additional mental element to be distinguished from the general *mens rea* requirement of Article 30.⁸⁹ In structural terms, the knowledge requirement provides the necessary connection between the perpetrator's individual acts and the overall attack by means of the perpetrator's mindset, and ensures that single, isolated acts, which only happen to have been carried out contemporaneously with an overall attack, so-called opportunistic acts do not qualify as crimes against humanity and, therefore, cannot be prosecuted under Article 7.⁹⁰ While the perpetrators must be aware that their acts form part of the collective attack, this does not mean that they must have knowledge of the entire attack in all of its detail.⁹¹ It has long been settled that under customary international law the acts need not be committed with a discriminatory intent on any particular ground, except for persecution.⁹²

3.2. Acts of Commission

ICTR Trial Chamber in *Akayesu* established that the *actus reus* for “murder” as a crime against humanity requires that the victim to be dead and that the death resulted from an unlawful act or omission of the accused or a subordinate.⁹³ The same conclusion was established by ICTY.⁹⁴ The first fundamental split in the jurisprudence of the international criminal courts with regard to the mental element of murder as a crime against humanity is whether as part of the *mens rea* the perpetrator has premeditated the murder.⁹⁵

‘The Trial Chamber in *Akayesu* did not require premeditation under Article 3 of the ICTR Statute and this view has been followed by some other ICTR Trial Chambers.⁹⁶ However, other ICTR Trial Chambers have insisted that

86 ICC, *Prosecutor v. Katanga*, 2014, p. 1105.

87 ICC, 2013, p. 4.

88 ICTY, *Prosecutor v. Kordić*, 2004, p. 99; *Prosecutor v. Blaškić*, 2004, p. 124.

89 Hall and Ambos, 2016, p. 176.

90 Ibid.

91 Ibid.

92 Ibid.

93 ICTR, *Prosecutor v. Akayesu*, 1998, p. 589.

94 ICTY, *Prosecutor v. Blaškić*, 2000, p. 217.

95 Hall and Stahn, 2016, p. 181.

96 ICTR, *Prosecutor v. Musema* 2000, pp. 214-216; *Prosecutor v. Akayesu*, 1998, p. 588.

premeditation is required under the ICTR Statute, although not under customary international law.⁹⁷ Such premeditation need not be an intent to kill a particular individual; it is sufficient that the accused had a premeditated intention to murder civilians as part of the widespread or systematic attack on discriminatory grounds.⁹⁸

In contrast, several ICTY Trial Chambers have concluded that premeditation is not required.⁹⁹ In *Akayesu*, the ICTR Trial Chamber stated that the crime of murder as a crime against humanity under Article 3 of its Statute

‘was the unlawful, intentional killing of a human being, when at the time of the killing the accused or a subordinate had the intention to kill or inflict bodily harm on the deceased having known that such bodily harm is likely to cause the victim’s death, and is reckless whether death ensues or not.’¹⁰⁰

ICC held in the *Katanga and Ngudjolo Chui* that the offence of murder ‘encompasses, first and foremost, cases of *dolus directus* of the first and second degree’.¹⁰¹ “Extermination” includes according to Article 7 paragraph 2 (b) the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine calculated to bring about the destruction of part of a population. Extermination differs from murder by the element of mass killing and as a type of criminality may, in particular, require a substantial degree of preparation and organisation.¹⁰² “Enslavement” was established in the *Katanga* Judgement in connection with the right of ownership over the victim with the creation of a situation of dependence that deprives the victim of all autonomy.¹⁰³ The victim’s own subjective perception of the situation was particularly assessed.¹⁰⁴ The exercise of ownership can be shown by a combination of factors such as,

‘the detention or captivity in which the victim was held and its duration, the limitations to the victim’s free movement, measures taken to prevent or deter escape, the use of force, threat of force or coercion, and the personal circumstances of the victim, including his/her vulnerability.’¹⁰⁵

97 ICTR, *Prosecutor v. Kayishema and Ruzindana*, 1999, p. 588; *Prosecutor v. Bagilishema*, 2001, p. 84.

98 Hall and Stahn, 2016, p. 181.

99 ICTY, *Prosecutor v. Kordić and Čerkez*, 2001, p. 235; *Prosecutor v. Jelisić*, 1999, p. 51; *Prosecutor v. Blaškić*, 2000, p. 216.

100 ICTR, *Prosecutor v. Akayesu*, 1998, p. 589.

101 ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, 2008, p. 423.

102 Hall and Stahn, 2016, p. 181.

103 ICC, *Prosecutor v. Katanga*, 2014, p. 976.

104 Ibid.

105 ICC, *Prosecutor v. Ntaganda*, 2014, p. 209.

Article 7 paragraph 1 (d) protects ‘the right and aspiration of individuals to live in their communities and homes without outside interference’.¹⁰⁶ “Deportation” is understood as ‘the forced removal of people from one country to another, while “forcible transfer of population” relates to the “compulsory movement of people from one area to another within the same state’.¹⁰⁷ The term “forced” is not limited to physical force; it may also include the ‘threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment’.¹⁰⁸ ‘The essential element is that the displacement was involuntary in nature, that the relevant persons had no real choice. In other words, a civilian is involuntarily displaced if he is not faced with a genuine choice as to whether to leave or to remain in the area.’¹⁰⁹ In *Kordić and Čerkez*, the ICTY clarified that the term imprisonment ‘should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population’.¹¹⁰

Even if the initial imprisonment was lawful, it could become unlawful subsequently, for example, by keeping a person in prison after a court had ordered the person’s release or the sentence of imprisonment had come to an end.¹¹¹ The term “other severe deprivation of physical liberty” has a wide meaning which would encompass the broad definition of imprisonment under customary international law and would include a wide variety of restrictions on physical liberty, including house arrest, restriction to a closed city or similar restrictions which might not be considered to fit within the customary international law definition.¹¹² “Torture” is moreover defined in Article 7 paragraph 2 (e). ICC established in *Bemba* that the rape was used as an instrument of torture.¹¹³

In *Akayesu*, six weeks after the Rome Diplomatic Conference, after noting that there was at the time no commonly accepted definition of “rape” in international law, the Trial Chamber of the ICTR, reflecting in part the approach of the UN Special Rapporteur and legal arguments advanced in an *amicus curiae* brief submitted by non-governmental organisations, defined rape as ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive’.¹¹⁴ It further noted that

106 Hall and Stahn, 2016, p. 192.

107 Ibid.

108 ICTY, *Prosecutor v. Simić et al.*, 2003, pp. 125–126.

109 Ibid.

110 ICTY, *Prosecutor v. Kordić and Čerkez*, 2001, p. 302.

111 Ibid.

112 Hall and Stahn, 2016, p. 201.

113 ICC, *Prosecutor v. Bemba*, 2009, p. 199.

114 Hall and Stahn, 2016, p. 209.

‘coercive circumstance did not need to be evidenced by a show of physical force: threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence.’¹¹⁵

“Sexual slavery” includes: limitations on one’s autonomy, freedom of movement and power to decide matters relating to one’s sexual activity.¹¹⁶ Sexual slavery thus also encompasses situations where women and girls are forced into marriage, domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors.¹¹⁷ “Enforced prostitution” might cover a situation that does not amount to slavery or enslavement, but in which a person is compelled to perform sexual acts in order to obtain something necessary for survival or to avoid further harm.¹¹⁸ Such situations might also not be covered by rape if they do not meet the requirement of an element of coercion or force or threat of force.¹¹⁹ “Sexual violence” is considered to be any act of a sexual nature committed on a person under circumstances which are coercive.¹²⁰ It is not limited to a physical invasion of the human body and may include acts that do not involve penetration or even physical contact.¹²¹ Sexual violence can take many forms, some more obvious than others. It can include acts committed with a sexual motive or for the sexual gratification of the perpetrator; scenarios where two or more unwilling participants are forced to carry out sexual acts on each other; acts committed for the purpose of humiliation or degradation, such as forcible public nudity; or acts which target the victim’s sexual organs or sexual function, such as forcible castration, genital mutilation or sexualised torture.¹²²

4. War Crimes

War crimes are in Article 8 paragraph 2 of the Rome Statute incriminated as grave breaches of the Geneva Conventions of 12 August 1949:

‘... namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (I) Wilful killing; (II) Torture or inhuman treatment, including biological experiments; (III) Wilfully causing great suffering, or serious injury to body or health; (IV) Extensive destruction and appropriation of property, not justified by military necessity

115 ICTR *Prosecutor v. Akayesu*, 1998, p. 688.

116 Hall and Stahn, 2016, p. 212.

117 Ibid.

118 Ibid., p. 215.

119 Ibid.

120 ICTR, *Prosecutor v. Akayesu*, 1998, p. 688.

121 Ibid.

122 Hall and Stahn, 2016, p. 217.

and carried out unlawfully and wantonly; (V) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (VI) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (VII) Unlawful deportation or transfer or unlawful confinement; (VIII) Taking of hostages.’

Article 8 categorises the offenses mainly according to the type of conflict in which the respective war crime is applicable. War crimes committed in international armed conflicts are listed in sub-paragraphs (a) and (b), while war crimes committed in non-international armed conflicts with a threshold according to Common Article 3 are contained in sub-paragraph (c) and war crimes committed in a non-international armed conflict with a threshold spelled out in Article 8 paragraph 2 are contained in sub-paragraph (e).¹²³ In Addition, Article 8 to some degree distinguishes war crimes according to their humanitarian law source which primarily are broadly or even universally ratified treaties.¹²⁴ Subparagraph (a) contains grave breaches of the four Geneva Conventions of 1949 with eight acts of commission, while the war crimes under sub-paragraph (b) have been drawn from a number of sources, namely Additional Protocol I, the 1907 Hague Regulations, other particular international instruments such as treaties prohibiting certain weapons and customary international humanitarian law with twenty-six acts of commission.¹²⁵ The war crimes under sub-paragraph (c) reflect violations of Common Article 3 with four acts of commission. The war crimes under sub-paragraph (e) are primarily, but not exclusively based on Additional Protocol II of 1977 with twelve acts of commission.¹²⁶

4.1. International Humanitarian Law and War Crimes

War crimes are violations of international humanitarian law (IHL) criminalised under treaty or customary international law.¹²⁷ War crime can be briefly described as a serious violation of IHL that entails individual responsibility under international law.¹²⁸ Not every violation of IHL is a war crime, but serious violations must be proven.¹²⁹ Elements required for a specific conduct to amount to a war crime are according to Cottier:

‘existence of an armed conflict; nexus of the conduct to this armed conflict; violation of a specific rule of IHL; is this violation of IHL criminalised under

123 Cottier, 2016, p. 318.

124 Ibid.

125 Cottier, 2016, p. 318; Omerović, 2021, p. 169.

126 Ibid.

127 Cottier, 2016, p. 305.

128 Munivrana Vajda, 2018, p. 25.

129 Omerović, 2021, p. 169.

international law, and if so, does the conduct fulfil all requisite material and mental elements of the offence.’¹³⁰

IHL is also called the law of armed conflict or *ius in bello*, more archaically also the laws and customs of war or simply law(s) of war.¹³¹

In the literature two branches of IHL are commonly distinguished: the so called “Hague law” and “Geneva law”. Persons protected under the so-called “Geneva law” branch of IHL most particularly include the wounded, sick, shipwrecked, prisoners of war and any other person detained, interned or otherwise deprived of liberty in connection with an armed conflict, and civilians, particularly the population in an occupied territory.¹³² Such persons in the hands of an adversary must be treated humanely. In general, protected persons that are deprived of liberty are entitled to a judicial examination of their status and, insofar they are prosecuted, to fair trial guarantees.¹³³ The main sources of this branch are: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I); the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II); the Geneva Convention relative to the Treatment of Prisoners of War (GC III); the Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV); Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I); Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II).¹³⁴ The provisions of the Geneva Conventions are applied in international armed conflicts, and only one Article – Article 3, the content of which is identical in all four Conventions, so it is often attributed as “Common Article 3” refers to armed conflicts that are not of an international character.¹³⁵ The “Geneva law” branch of IHL also protects property in the hands of an adversary and particularly protects the population, property and pre-existing order of an occupied territory.¹³⁶

The “Hague law” sets limits on how armed warfare and military operations may be conducted in armed conflicts.¹³⁷ Important sources of this branch of IHL are most particularly the 1907 Hague Regulations and the First Additional Protocol of 1977, but also the 1899 and 1907 Hague Conventions and the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict.¹³⁸

130 Cottier, 2016, p. 305.

131 Ibid.

132 Ibid.

133 Ibid.

134 Munivrana Vajda, 2018, pp. 25–26.

135 Ibid.

136 Cottier, 2016, p. 306.

137 Ibid.

138 Ibid., p. 307.

‘The treaty rules applicable to non-international armed conflicts are far less numerous and detailed than those applicable in international armed conflicts. However, there is a clear tendency in practice and evolving customary international law to apply rules initially intended for international conflicts also to non-international conflicts. The adoption of the Rome Statute with Article 8 paragraph 2 (c) and (e) in July 1998 consolidated the view that there is, today, individual criminal responsibility directly under customary international law for war crimes committed in non-international armed conflicts. However, the rules applicable to international armed conflicts do not automatically apply to an internal armed conflict.’¹³⁹

Article 8 thus embodies, in accordance with the principle *nullum crimen sine lege*, the broadest concept of acts of the commission of war crimes so far, and in this regard it amounts to the codification of international criminal law.¹⁴⁰

4.2. International and Non-International Armed Conflict

The applicability of the *ius in bello* must be strictly separated from issues relating to the so-called “*ius ad/contra bellum*” regulating under what circumstances a state may lawfully use force against another state.¹⁴¹ The war crimes listed under Article 8 paragraph 2 (a) and (b) are applicable only in international armed conflicts. In contrast, the war crimes under Article 8 paragraph 2 (c) are applicable to non-international armed conflicts according to “Common Article 3”, while those under Article 8 paragraph 2 (e) apply in situations of a non-international armed conflict, the threshold of which is defined anew in Article 8 paragraph 2 (f).¹⁴² While an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state,¹⁴³ an international armed conflict always exists when there is a conflict between two or more states, but wars of national liberation, i.e. struggles of peoples against colonial domination and foreign occupation in order to exercise the right to self-determination are also considered international conflicts.¹⁴⁴ In addition,

‘in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some

¹³⁹ Ibid.

¹⁴⁰ Omerović, 2021, p. 170.

¹⁴¹ Cottier, 2016, p. 312.

¹⁴² Ibid.

¹⁴³ ICTY, *Prosecutor v. Tadić*, 1995, p. 70.

¹⁴⁴ Munivrana Vajda, 2018, p. 28; Sokanović, 2021, pp. 184–189.

of the participants in the internal armed conflict act on behalf of that other State.’¹⁴⁵

Not every form of influence necessarily leads to the conflict becoming internationalised. In this respect, the ICTY decided that “control by a state over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training).¹⁴⁶ The criterion of “overall control” is achieved when the foreign state ‘has a role in organising, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group’.¹⁴⁷ Involvement must therefore go beyond mere logistical support, but that involvement does not imply that everything done by the group concerned is directed by the state taking part from a distance.¹⁴⁸

In order to possibly qualify as a war crime a conduct must have a sufficient *nexus* to the armed conflict by being closely related to it.¹⁴⁹ Generally, it seems that a sufficient *nexus* first exists where a war crime is committed in the course of armed hostilities.¹⁵⁰ In addition,

‘an offence appears also sufficiently related to the armed conflict where it is shaped or dependent upon the environment of the armed conflict in which it is committed, even if occurring temporally and geographically remote from any actual fighting. The armed conflict must, at a minimum, have played a substantial part on the perpetrator’s ability or decision to commit it, the manner in which it was committed, or the purpose for which it was committed.’¹⁵¹

5. The Crime of Aggression

Article 8 *bis* of the Rome Statute defines the Crime of aggression as:

‘... the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.’

¹⁴⁵ ICTY, *Prosecutor v. Tadić*, 1999, p. 84.

¹⁴⁶ Vité, 2009, p. 71.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Cottier, 2016, p. 316.

¹⁵⁰ Ibid.

¹⁵¹ ICTY, *Prosecutor v. Kunarac et al.*, p. 58.

International peace and security are protected by this criminal offence, so it is also called a crime against peace in international law.¹⁵² Article 8bis paragraph 1 provides that certain acts of aggression, namely those which due to their character, gravity and scale, constitute manifest violations of the Charter of the United Nations, entail individual criminal responsibility under the Court's statute.¹⁵³ Article 8bis thereby confirms the idea that certain qualified violations of the prohibition of the use of force and thus the *jus ad bellum*, just like serious violations of the *jus in bello*, as well as acts of genocide and crimes against humanity, do not only entail state responsibility, but also carry with them individual criminal sanctions under international law.¹⁵⁴

5.1. Crime vs. Act of Aggression

The preparation of plans for a future aggression does not amount to the liability for this offence if the aggression does not take place, as it results from the third of the Elements of Crimes concerning Article 8bis: 'that the respective act of aggression must indeed have been committed'.¹⁵⁵ This deliberate limitation to exclude mere attempts of aggression from the scope of application of Article 8bis, which must be taken at face value, stands in line with customary international law, given that all relevant precedents only considered acts of aggression that had actually taken place to eventually constitute a crime of aggression.¹⁵⁶ Only the participation in the development of specific (military or other) plans and operations of the state concerned with the commitment of a specific act of aggression that ought to fall within the meaning of the term "planning", in order not to excessively extend the scope of application *ratione temporis* of the crime.¹⁵⁷ The "preparation" of such an act refers to the taking of concrete steps to implement the plan which may consist, in the transport of weaponry or other military material to be used for the act of aggression, in the actual deployment of troops to the vicinity of a border to start hostilities, or in acts of a similar nature that will, when seen from an outside perspective, form part and parcel of the forthcoming actual violation of the prohibition of the use of force.¹⁵⁸

Perpetrators may be heads of state and government officials, as well as ministers of defence and other military leaders, such as high-ranking generals, due to leadership requirement dictated by the norm. Given the wording of the provision which refers to the ability to effectively exercise or direct the action of the state from which the act of aggression emanates, it is the factual capability to exercise such control or direction that is decisive, rather than the formal rank, *de jure* position or title of the person concerned.¹⁵⁹ Heads of state exercising merely ceremonial functions, but not being able,

152 Munivrana Vajda, 2018, p. 14.

153 Zimmermann and Freiburg in Triffterer and Ambos, 2016, p. 587.

154 Ibid.

155 ICC, 2013, p. 30.

156 Zimmermann and Freiburg in Triffterer and Ambos, 2016, p. 588.

157 Ibid., p. 589.

158 Ibid.

159 Ibid., p. 591.

either *de jure* or *de facto*, to participate in the decision-making process which leads to the alleged act of aggression are not capable of committing the crime of aggression.¹⁶⁰ In order to possibly commit the crime of aggression, a person concerned must either have alternatively been able to exercise control over, indicating commission of the crime by the way of supervision or to direct the political or military action of the state in question.¹⁶¹ An act of aggression must by its character, gravity and scale constitute a manifest violation of the Charter in order to be considered crime of aggression. According to Article 2 paragraph 4 of the Charter of the United Nations, all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. Article 8 *bis* thus limits criminal liability to severe acts by using a threshold which captures the qualitative difference between an act of aggression and the individual crime.¹⁶²

Article 8 *bis* aims primarily at upholding the general prohibition of the use of force, as contained in Article 2 paragraph 4 of the Charter of the United Nations, the latter generally prohibiting both the threat and use of force. As noted earlier, according to Article 2 paragraph 4 of the UN Charter, states have the obligation to refrain from the threat or use of force against the territorial integrity or political independence of another state, or in any other manner inconsistent with the purposes of the UN. In addition, Article 39 of the Charter gives the Security Council the authority to take measures under Chapter VII of the UN Charter when it determines that an act of aggression has been committed.¹⁶³ Thus, all wars that are not defensive or not undertaken as part of collective UN measures are prohibited.¹⁶⁴ The term “of another state” indicates that only situations involving two states are covered, so neither mere inner-state conflicts, nor acts against private actors are encompassed unless, obviously, such acts, while being directed against non-state actors take place on the territory of another state.¹⁶⁵ In modern international law, a declaration of war does no longer constitute a necessary requirement for either the existence of an armed conflict, or indeed an act of aggression.¹⁶⁶

5.2. Acts of Commission

Acts of commission relay on General Assembly resolution 3314 (XXIX), with the Definition of Aggression annexed to it, adopted on 14 December 1974. An “invasion” requires that the aggressor state’s armed forces illegally trespass another state’s frontiers, thereby breaching the principle of the inviolability of state borders.¹⁶⁷

160 Ibid.

161 Ibid.

162 Ibid., p. 594.

163 Munivrana Vajda, 2018, p. 14.

164 Ibid.

165 Zimmermann and Freiburg in Triffterer and Ambos, 2016, p. 606.

166 Ibid.

167 Sayapin, 2014, p. 266.

The term “attack” describes the act of falling upon with force or arms, of commencing battle, an offensive operation; an onset or an assault.¹⁶⁸ For the purposes of *jus in bello*, the “armed forces” of a party to an armed conflict (and thus also of a state when it comes, as in then scenarios covered by Article 8 *bis*, to international armed conflicts) are defined in Article 43 paragraph 1 of Additional Protocol I as all organised armed forces, groups and units which are under a command responsible to that state for the conduct of its subordinates, regardless of whether they constitute land, naval or air forces.¹⁶⁹ In order to make a finding as to whether an act of aggression in the form of an invasion or attack has taken place, the court will eventually have to make a finding as to whether (as might be claimed) the alleged aggressor state has a valid title to the territory concerned, or rather not.¹⁷⁰ Under Article 42 of the Hague Regulations of 1907, having codified customary law on the matter, (military) “occupation” refers to situations where a state’s military forces exercise effective control and authority over the territory of another state.¹⁷¹

‘Annexation covers the forcible acquisition of a state’s territory by another state in violation of international law.¹⁷² In line with the practice of the Security Council, even acts of a state purporting to extend its domestic laws to occupied territory and assimilating it to its own territory, while not formally “annexing” as such, might nevertheless amount to a (de facto) annexation.’¹⁷³

The term “bombardment” describes any attack from land, sea, or air bases with heavy weapons which, like artillery, shells, missiles, or aircraft, are capable of destroying enemy targets at a greater distance beyond the specific battle lines, while the term “blockade” describes belligerent operations to prevent vessels from entering or exiting ports or coastal areas belonging to another nation.¹⁷⁴ Paragraph 2 (e) includes two specific forms of acts of aggression, one being the use of force in contravention of the specific conditions of the agreement providing for the stationing of troops, while the second encompasses the use of force after the armed forces should have already left the foreign territory due to the lapse or termination of the agreement. Paragraph 2 (f) regulates a state assisting another state in perpetrating an act of aggression by allowing its territory to be used by said other state to commit an act of aggression.¹⁷⁵ It covers forms of “indirect” aggression by sending irregular forces of various kinds into another state to then carry out acts of armed force in such latter state.¹⁷⁶

168 Ibid.

169 Zimmermann and Freiburg in Triffterer and Ambos, 2016, p. 609.

170 Ibid.

171 Ibid., p. 610.

172 Ibid.

173 Ibid.

174 Ibid., p. 611.

175 Ibid., p. 614.

176 Ibid., p. 615.

Concerning the necessary degree of control that is required to equate the sending and conduct of the mentioned non-state actors – armed bands, groups, irregulars and mercenaries – with direct acts of the sending state, in *Nicaragua* judgement, the ICJ held that such control must amount to “effective control”.¹⁷⁷ By “effective control”, the court meant a situation where the state directly controls the perpetration of specific acts.¹⁷⁸ The Appeals Chamber of the ICTY contested the *Nicaragua* judgement’s effective control test arguing that the *Nicaragua* test was inconsonant with both the logic of the law of state responsibility and with judicial, as well as with state practice, the required degree of control being one of “overall” control over subordinate armed forces or military or paramilitary units ‘going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations’.¹⁷⁹

177 Ibid.

178 Ibid.

179 ICTY, *Prosecutor v. Duško Tadić*, 1999, p. 145.

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International Criminal Law III: The Legacy of the ICTY and the ICTR

Ondřej SVAČEK

ABSTRACT

This chapter focuses on the legacy of the ICTY (International Criminal Tribunal for the former Yugoslavia) and the ICTR (International Criminal Tribunal for Rwanda), the ad hoc international criminal tribunals. It explores its creation, functioning, and termination and assesses the role given here to the UN Security Council. The contribution analyses the jurisdictional framework of both tribunals, their structure and procedural characteristics. It also stresses their importance for the development of international criminal law and points out the relevance and effect of their jurisprudence for the practice of their successors, namely the International Criminal Court. The contribution refers to the selected leading cases of the ICTY and the ICTR.

KEYWORDS

ICTY, ICTR, UN security council, jurisdiction, war crimes, crimes against humanity, Tadić, development of IHL (international humanitarian law), development of ICL (international criminal law), joint criminal enterprise, superior responsibility, article 21 Rome Statute

1. Introduction

The aim of this chapter is to provide readers with a basic overview of the law concerning the ICTY and the ICTR. It explores their relationship with the UN Security Council (UN SC), defines the jurisdictional framework, describes their structure, outlines basic features of their procedure, evaluates their contribution to the development of international law, and assesses how far their work is transferrable or has already been transferred to the practice of their successors, namely the International Criminal Court (ICC or Court). The text refers to the selected leading cases of both tribunals.

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2. The *Ad Hoc* Tribunals and the UN SC

The ICTY and the ICTR owe their existence to the UN SC. They both were created in response to two ongoing conflicts in the 1990s, related to the dissolution of the former Yugoslavia and genocide in Rwanda, which the UN SC qualified as threats to the international peace and security what enabled it to employ its powers under Chapter VII of the UN Charter. Other options for the creation of international criminal tribunals were not available at that time,¹ and in particular, the possibility of creating the tribunal through international treaty was rejected as it was expected that the process would be too long and there was no guarantee that the relevant states (e.g., the successor states of the former Yugoslavia) would join any such treaty.²

Under paragraph 2 of the UN SC (Security Council) Resolution 827 (1993), the SC, acting under Chapter VII of the UN Charter:

‘Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the SC upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the report [of the Secretary General pursuant to paragraph 2 of the UN SC resolution 808 (1993)].’³

The UN SC reiterated this procedure 18 months later in relation to the ICTR. Under paragraph 1 of Resolution 955 (1994), the SC, acting once more under chapter VII of the Charter:

‘Decides hereby [...] to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto.’⁴

The fact that both the ICTY and the ICTR had been established to act under the SC coercive authority led to important legal consequences. Firstly, both tribunals benefited from the stronger, vertical, ‘supra-state’ model of cooperation with states

1 For these options see O’Keefe, 2015, pp. 89–98.

2 Cryer et al., 2014, p. 128.

3 UNSC Res. 827, 1993.

4 UNSC Res. 955, 1994.

(see *infra* part 4).⁵ Secondly, there is a wide consensus in theory and practice of the international criminal law (ICL) that the SC-based international criminal tribunals are exactly those “certain international criminal courts”⁶ where the personal immunity of troika is unavailable and is not a bar for international criminal prosecution. This conclusion derives from the fact that the SC resolutions are legally binding⁷ and takes precedence over other international legal obligations, here the obligation to respect personal immunity of troika.⁸ Thirdly, the function and powers of the SC towards the *ad hoc* tribunals were significantly stronger compared to the ICC, where the drafters of the Rome Statute endowed the SC only with the capacity to refer the situation to the ICC and trigger its operation,⁹ and eventually defer it for a period of maximum 12 months, with the possibility of a renewal.¹⁰ Speaking about the ICTY and the ICTR, the SC not only created these tribunals, but predetermined and defined their jurisdictional framework.

From the perspective of the accused person, the process of creation of the ICTY and the ICTR might be assessed through the prism of human rights guarantees, namely the fair trial guarantees. As provided under Art 14 of the International Covenant on Civil and Political Rights, in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The process of the establishment of any international criminal tribunal must therefore be closely scrutinised, because potential unlawfulness, or excess of powers (*ultra vires* act) – typically given had the UN General Assembly (UN GA) decided to establish an international criminal body – would bring the tribunal to closure virtually before the commencement.¹¹ Unsurprisingly, the authority of the SC to set up an international criminal court/tribunal¹² was challenged in the very first case before the ICTY (*Tadić*) and led to the seminal decision of October 1995.¹³ The Appeals Chamber (AC) decided it had competence-competence and ruled in favour of the legality of the ICTY creation, invoking Article 41 of the UN Charter. The AC also rejected the argument that the accused person’s fundamental right to be tried

5 Cassese and Gaeta, 2013, p. 302; O’Keefe, 2015, p. 111.

6 ICJ, *Democratic Republic of Congo v. Belgium*, Judgement of 14 February 2002, para. 61.

7 UN Charter, art. 25.

8 UN Charter, art. 103. See also discussion concerning the precedence of the UN Charter obligations over the international customary law obligations. Study Group of the ILC, 2006, p. 72, para. 345.

9 ICC Statute, art. 13:b.

10 ICC Statute, art. 16. Discussion on the eventuality for the SC to extend the jurisdictional framework of the ICC, especially through the denial of the personal immunity, exceeds the subject matter of this chapter; Cf. Svaček, 2025.

11 The conclusion that the UN GA cannot create an international criminal body relates to the impossibility for the UN GA to adopt coercive measures. It is only the SC which can require enforcement by coercive action. Cf. ICJ, *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, p. 163.

12 These terms are treated here as synonyms. See O’Keefe, 2015, p. 85.

13 ICTY, *Tadić*, AC, Decision of 2 October 1995.

by his national courts under his national laws was breached and concluded that ‘this principle is not breached by the transfer of jurisdiction to an international tribunal created by the Security Council acting on behalf of the community of nations’.¹⁴

The SC accompanied the *ad hoc* tribunals throughout their whole lives. Neither the ICTY nor the ICTR were established to be permanent. Quite to the contrary, already in 2000, the SC started to emphasise the idea of a ‘completion strategy’ with the aim to ensure that tribunals will conclude their mission successfully, in a timely manner and in coordination with the domestic level. The SC extended the number of judges: it established a pool of *ad litem* judges in the ICTY and increased the number of judges in the AC (common to both tribunals) in order enable the tribunals to expedite the conclusion of their work at the earliest possible date.¹⁵ The same measure was later taken also in relation to the ICTR.¹⁶ The SC endorsed a three-phase plan in Resolution 1503 (2003) which envisioned completion of investigations by the end of 2004, completion of all first instance trials by the end of 2008, and completion of all work in 2010. The completion strategy was later expanded as the SC called on the ICTY and the ICTR Prosecutors¹⁷ to review the case load of the ICTY and the ICTR, respectively, in particular with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions, based on respective Rules 11 *bis* of the Rules of Procedure and Evidence (RPE).

In the next step, the SC decided to establish the International Residual Mechanism for Criminal Tribunals (Mechanism), with two branches that commenced functioning on 1 July 2012 (branch for the ICTR) and 1 July 2013 (branch for the ICTY).¹⁸ By the same resolution, the SC requested the ICTY and the ICTR to take all possible measures to expeditiously complete all their remaining work no later than 31 December 2014, to prepare their closure and to ensure a smooth transition to the Mechanism. During the initial years of the Mechanism’s existence, it operated in parallel with the ICTR and the ICTY. The deadline for the completion of the tribunals’ mandate envisaged in the resolution was not met. The closure of the ICTR became effective on 31 December 2015, and of the ICTY only on 31 December 2017. After these dates, the Mechanism continues to operate as a stand-alone institution whose purpose is to continue the jurisdiction, rights and obligations and essential functions of both tribunals and maintain their legacy.

Until its closure, the ICTY indicted 161 individuals, secured arrest of them all, sentenced 90, and transferred 13 for trial to countries of the former Yugoslavia.¹⁹

14 Ibid., para. 62.

15 UNSC Res. 1329, 2000.

16 UNSC Res. 1431, 2002.

17 The position of the Prosecutor was originally unified for both institutions and was separated only by the SC resolution 1503.

18 UNSC Res. 1966, 2010.

19 ICTY, Infographic: ICTY Facts and Figures.

The statistics of the ICTR show that until its closure, it indicted 93 individuals, with six remaining fugitives, sentenced 61, and referred 10 mostly to Rwanda.²⁰

3. Jurisdictional Framework of the *Ad Hoc* Tribunals

Traditionally, jurisdictional framework encompasses (a) subject matter jurisdiction (jurisdiction *ratione materiae*), (b) temporal jurisdiction (jurisdiction *ratione temporis*), (c) personal jurisdiction (jurisdiction *ratione personae*), and territorial jurisdiction (jurisdiction *ratione loci*). These respective heads of jurisdiction will be analysed in relation to each of the tribunals separately.

3.1. Jurisdictional Framework of the ICTY

The founding document of the ICTY, the SC resolution 827, and also the opening provision of the ICTY Statute defines the subject matter jurisdiction of the tribunal by reference to serious violations of international humanitarian law (IHL). The Statute then establishes jurisdiction over grave breaches of the Geneva Convention of 1949 (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5).

The Statute of the ICTY includes two distinct categories of war crimes, as a serious breach of IHL, criminalised by international treaty or customary international law.²¹ Article 2 penalises grave breaches, a category applicable only in International Armed Conflict (IAC). The following Article 3, as interpreted by the ICTY, serves as a general clause covering all violations of humanitarian law not falling under the scope of grave breaches, crime of genocide, or crimes against humanity, regardless of whether the violation occurs within the context of an IAC or Non-International Armed Conflict (NIAC).²²

This latter conclusion of the AC in the *Tadić* case adopted as early as in 1995 contributed to the discussion about the international criminalisation of violations of IHL committed in NIAC (in relation to common Article 3 to the Geneva Conventions) whose outcome was not entirely clear at that time. The ICTY subscribed under the so-called assimilation thesis and concluded that criminal responsibility for serious violations of the laws or customs of war arises also in NIAC and considered that this rule stems from general/customary international law.²³ The ICTY built this conclusion on a presumption that ‘what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife’.²⁴ These findings were greeted with some controversy and hesitation. According to W. Schabas, the

20 ICTR, Key Figures of Cases.

21 Schwarz, 2017, p. 1303.

22 ICTY, *Tadić*, AC, Decision of 2 October 1995, para. 89.

23 Ibid., paras. 126–132. In relation to common Art 3 to the Geneva Convention, see: para. 134.

24 ICTY, *Tadić*, AC, Decision of 2 October 1995, para. 119.

ICTY ‘stunned international lawyers by issuing a broad and innovative reading of [...] war crimes’.²⁵

Both provisions concerning war crimes contain the essential element requiring that the relevant criminal conduct must be connected to an armed conflict (war nexus). Therefore, the *Tadić* AC rightly defined the substantive, geographic and temporal bounds of an ‘armed conflict’ for jurisdictional purposes of the tribunal.²⁶ It stated:

‘[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.’²⁷

The Appeals Chamber (AC) in the *Tadić* (1999) later issued a groundbreaking judgement regarding the classification of armed conflicts, particularly the distinction between IAC and NIAC. It overturned the Trial Chamber’s (TC) judgement that had acquitted the accused of charges related to grave breaches of the Geneva Conventions (Article 2 of the ICTY Statute) and found that the armed conflict in Bosnia and Herzegovina, involving the armed forces of the Republika Srpska (VRS) under the command of Ratko Mladić, and the central authorities of Bosnia and Herzegovina should be classified as an IAC, even after the formal withdrawal of the Yugoslav People’s Army from Bosnia and Herzegovina on 19 May 1992. The crucial issue here at stake was whether the VRS acted as *de facto* organs of the Federal Republic of Yugoslavia (FRY). The AC famously rejected the effective control test for the establishment of the link between a state and non-state actor confirmed by the International Court of Justice. It ruled that

‘The “effective control” test propounded by the International Court of Justice as an exclusive and all-embracing test is at variance with international judicial and State practice: such practice has envisaged State responsibility in circumstances where a lower degree of control than that demanded by the Nicaragua test was exercised [...] this practice has upheld the Nicaragua test with regard to individuals or unorganised groups of individuals acting

25 Schabas, 2024, pp. 22–23.

26 Gustafson, 2009, p. 945.

27 Gustafson, 2009, para. 70.

on behalf of States. By contrast, it has applied a different test with regard to military or paramilitary groups.²⁸

The AC defined a less stringent ‘overall control test’ with respect to military or paramilitary groups to establish necessary factual link as between a state and non-state actor which stresses out (mere) equipping, financing, but also the coordinating or helping in the general planning of non-state actor’s military activity.²⁹ Based on this test, the AC concluded that the VRS was controlled and acted on behalf of the FRY what made the conflict in Bosnia Herzegovina to be an IAC even after 19 May 1992. The AC therefore established the first requirement for the prosecution of the grave breaches of the Geneva Conventions.³⁰

The ICTY’s case law later also clarified the meaning of the war nexus. The first aspect refers to the temporal and geographic context and dictates that the crimes occur during an armed conflict and on a territory in which there is an armed conflict. In the *Kunarac*, the AC explained that there is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war,³¹ meaning that the crime can be temporally and geographically remote from the actual fighting. This conclusion is unproblematic given the broad geographical and temporal bounds of an ‘armed conflict’ elaborated in the aforementioned *Tadić* definition. The second aspect of the war nexus dictates that crime must be closely related to the conflict.³² This part of the test serves the purpose to exclude from the scope of war crimes those criminal activities that are not committed under the guise of the armed conflict (e.g., murder of a neighbour purely out of jealousy, or a bank robbery perpetrated out of personal greedy motives).³³ In determining whether or not the act in question is sufficiently related to the armed conflict, the AC stressed the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.³⁴

The requirement of the war nexus is the well settled legal ingredient of the war crimes, but restriction of crimes against humanity under Article 5 of the ICTY Statute to those ‘committed in armed conflict, whether international or internal in character’ appears to be the anomaly.³⁵ As explained (once again) in *Tadić*, by incorporating the requirement of an armed conflict, the SC may have defined the crime in Article 5

28 ICTY, *Tadić*, AC, Judgment of 15 July 1999, para. 124.

29 Ibid., para. 131.

30 For the second requirement, concerning the status of protected person, cf. *infra* part 5.1.

31 ICTY, *Kunarac*, AC, Judgement of 12 June 2002, para. 57.

32 Ibid., para. 58.

33 Cryer, 2014, pp. 281–282.

34 ICTY, *Kunarac*, AC, Judgement of 12 June 2002, para. 59.

35 International Law Commission (ILC), A/74/10, 2019, p. 52, para. 16.

more narrowly than necessary under customary international law, since customary international law no longer requires any nexus between crimes against humanity and armed conflict. Therefore, Article 5 of the ICTY Statute was intended to reintroduce this nexus for the jurisdictional purposes of the ICTY and not to codify customary international law.³⁶ Accordingly, despite this departure from customary international law, in the prosecution of crimes against humanity before the ICTY, the existence of an armed conflict must have been proved, as well as the link between the crime charged and the armed conflict.

Temporal jurisdiction of the ICTY is open-ended and defined by a period beginning on 1 January 1991 and a date to be determined by the SC upon the restoration of peace.³⁷ Nevertheless, the SC never determined this ending date. It means that the jurisdictional framework was circumscribed only factually and indirectly through the aforementioned dates provided for in the completion strategy.

Personal jurisdiction encompasses only natural persons.³⁸ Theoretically, the ICTY might have prosecuted minors as well, as there was no expressed requirement limiting the individual responsibility at the age of 18 years, similarly to that in Article 26 of the Rome Statute. Nevertheless, the youngest individuals to be prosecuted before the ICTY were Anto Furundžija and Dražen Erdemović, both 23 years old at the time the crime was committed.³⁹ In the case of the death of the accused, the proceeding terminates.⁴⁰

Territorial jurisdiction of the ICTY extends to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters.⁴¹

3.2. *Jurisdictional Framework of the ICTR*

The subject matter jurisdiction of the ICTR is formulated different compared to the ICTY, given the non-international character of the conflict in Rwanda. Under its Statute, the ICTR has jurisdiction over genocide (Article 2), crimes against humanity (Article 3), and violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II (Article 4). As already referred to earlier, at that time, in 1994, these provisions concerning the criminalisation of Common Article 3 and Additional Protocol II had been an innovative and important contribution to the debate on prosecution of war crimes committed in NIAC. The seminal *Tadić* AC decision described in the previous part was adopted only one year later, in 1995. With respect to crimes against humanity provided in Article 3 of the ICTR Statute, the AC in the *Akayesu* clarified that despite the wording in chapeau which defines crimes against humanity to be crimes committed as part of a widespread or systematic attack against

36 ICTY, *Tadić*, TC, Judgement of 7 May 1997, para. 627.

37 UNSC Res. 827, 1993.

38 ICTY Statute, art. 6.

39 Quénivet, 2017, p. 446.

40 Cf. ICTY, *Milosević*, TC, Order Terminating the Proceedings of 14 March 2006.

41 ICTY Statute, art. 8.

any civilian population on national, political, ethnic, racial or religious grounds, this provision does not require that all crimes against humanity – except for the crime of persecution – enumerated therein be committed with a discriminatory intent.⁴² This conclusion is compatible with customary international law.⁴³

Temporal jurisdiction is already defined in the founding document of the ICTR, the SC Resolution 955 and extends to the period from 1 January to 31 December 1994.⁴⁴ In the *Nahimana*, case concerning the prosecution of the director of the RTLM, the infamous radio that played a significant role in inciting the Rwandan genocide, the AC confirmed that the ICTR may only convict an accused for criminal conduct having occurred in 1994 and stressed that the existence of continuing conduct is no exception to this rule. It reversed the TC's opposing findings and ruled that where such conduct commenced before 1994 and continued during that year, a conviction may be based only on that part of such conduct having occurred in 1994.⁴⁵

Similarly to the ICTY, the ICTR has personal jurisdiction over natural persons.⁴⁶ Even if it was possible to prosecute minors, the ICTR Prosecutor ruled this possibility out.⁴⁷

Territorial jurisdiction of the ICTR encompasses both the territory of Rwanda, and also the territory of neighbouring states given – in the latter case – that they were committed by Rwandans.

4. Structure and Procedural Characteristics of the *Ad Hoc* Tribunals

The structure of both tribunals is very similar and comprises the Office of the Prosecutor, the Registry, and the Chambers.⁴⁸ Originally, both tribunals shared a Prosecutor whose office was split only in 2003 into two separate positions related to each of the tribunals. It is the organ which conducts investigations, issues indictments and brings the case to trial. The Registry serves an administrative function. The judicial role is represented by the Chambers, including three TCs in each tribunal and one joint AC based in The Hague. Each TC is composed of three judges, hears and conducts trial proceedings initiated against the accused persons by the Prosecutor. These chambers are responsible for issuing judgements, and if the accused is found guilty, for imposing sentences. The AC, comprised of five judges, hears appeals from the accused or from the Prosecutor relating to a decision or judgement and/or a sentence by a TC. The AC is the final authority on matters of law. In the *Aleksovski* case, the AC concluded

42 ICTR, *Akayesu*, AC, Judgement of 1 June 2001, para. 469.

43 Cryer, 2014, p. 234.

44 ICTR Statute, art. 7.

45 ICTR, *Nahimana*, AC, Judgement of 28 November 2007, para. 317. Case cited in O'Keefe, 2015, p. 496.

46 ICTR Statute, art. 5.

47 Quénivet, 2017, p. 446.

48 ICTY Statute, art. 11; ICTR Statute, art. 10.

that in the interests of certainty and predictability, the AC should follow its previous decisions but should be free to depart from them for cogent reasons in the interests of justice. At the same time, given the hierarchy between the AC and the TC, it ruled that the *ratio decidendi* of its decisions is binding on TCs.⁴⁹

The criminal procedure before the *ad hoc* tribunals, as established by the RPE, is a unique blend of the adversarial and inquisitorial models.⁵⁰ The key procedural stages concern the investigation and indictment, the pre-trial, the trial, and the appeal phase, accompanied – if applicable – by the enforcement of the sentence. It is not possible to analyse the course of proceedings in any detail in this contribution, only to present the following brief summary:⁵¹

- a) Investigation is initiated by the Prosecutor who has complete discretion and independence in this decision; once the Prosecutor establishes a *prima facie* case and is satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the tribunal, he/she issues the indictment and submits it for confirmation;
- b) the confirming judge then reviews the indictment and confirms it or returns it to the Prosecutor;
- c) at this point in time, the Prosecutor may issue an arrest warrant;
- d) after the accused is transferred to the tribunal, or voluntarily surrenders, he/she will have his/her initial appearance at which he/she may plead guilty or not guilty;
- e) if the accused pleads not guilty, a hearing will be held; a pre-trial judge is appointed from the TC judges to coordinate communication between the parties to the proceedings;
- f) at the trial, the evidence is presented; the trial follows a traditional adversarial model whereby each party, the prosecution and the defence, presents its “case” to the tribunal: first the prosecution case and then the defence case;⁵²
- g) an accused person benefits from the human rights guarantees during the trial;⁵³ the Statutes specifically provide that the accused person has a right to be tried in his/her presence, thus excluding the possibility of trials *in absentia*;⁵⁴

49 ICTY, AC, *Aleksovski*, Judgement of 24 March 2000, paras. 107, 113.

50 For the distinction between these models, cf. Cryer, 2014, p. 424.

51 ICTY, Criminal Proceedings.

52 Friman, 2009, p. 366.

53 In the *Nikolić* case, the ICTY held that in a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. In this particular case, the assumed facts did not show that the accused, abducted from the territory of the FRY by some unknown individuals, was subjected to such egregious treatment and his objection concerning the lack of jurisdiction was rejected. Cf. ICTY, *Nikolić*, TC, Decision of 9 October 2002, paras. 111–115.

54 ICTY Statute, art. 21(4)(d); ICTR Statute, art. 20(4)(d).

- h) at the end of the trial, the prosecution may present closing arguments, followed by the defence, the accused person has his/her right to the final words;
- i) after the trial is closed, the TC deliberates and renders judgement by a majority;
- j) the convicted person may be sentenced to life-imprisonment at maximum; those convicted will serve their sentences in states that have concluded respective agreements with the tribunals; in case of acquittal, the accused is released immediately;
- k) as a part of human rights guarantees, the judgement on guilt and the sentence is subjected to the appeal; if a new fact is discovered which was not available through either the trial or the appellate proceedings, and could not have been discovered through the exercise of due diligence, either party can ask for a review of the judgement;
- l) the Statutes of the ICTY and the ICTR do not authorise victims to participate in the proceedings, they are only allowed to be heard as witnesses and generally speaking, their position is significantly weaker compared to the proceedings before the ICC;⁵⁵ although both tribunals offer the possibility of compensation and restitution, they never made a reparation order and never paved the way for the concept of restorative justice, available in the proceedings before the ICC.⁵⁶

The mutual relationship between the ICTY, the ICTR, and domestic judiciary is defined through the principle of concurrent jurisdiction with primacy over national courts assuring that at any stage of the domestic procedure, the tribunal may formally request national courts to defer to the competence of the tribunal.⁵⁷ Neither one of the two tribunals were obliged to exercise this primacy that is supported by the practice of referral under Rule 11*bis* of their respective RPE, which formed part of the completion strategy.

The ICTY and ICTR scheme of cooperation was cleared up in the famous *Blaškić* subpoena decision in 1997.⁵⁸ Due to the fact that both tribunals were set up by the SC resolutions, the cooperation scheme can be described as vertical and is built on the following basis. The ICTY and the ICTR can issue binding orders to any states and subpoenas to individuals acting in private capacity. Obligations arising from the Statutes prevail over any legal impediment which may exist under national law or extradition treaties. Next, the ICTY/ICTR Prosecutor is authorised to undertake investigation and collect evidence directly on the territories of the former Yugoslavia and Rwanda, on the territories of those states which have passed implementing legislation authorising such prosecutorial/investigative activity, and, finally, also on the

55 De Hemptinne, 2009, p. 562.

56 ICTY Statute, art. 24:3; ICTR Statute art. 23:3; Moffett, 2013, p. 371.

57 ICTY Statute, art. 9; ICTR Statute, art. 8.

58 ICTY, *Blaškić*, AC, Judgement of 29 October 1997.

territories of states whose authorities prevent international tribunal from fulfilling its functions (e.g. states which have not enacted implementing legislation and are not willing to assist). Lastly, although states may invoke national security as a ground for refusing the cooperation, it is the international tribunal which has the final say on the matter. The obligation to cooperate with the *ad hoc* tribunals encompassed virtually every member of the international community.

5.1. Contribution to the Development of ICL/IHL

The contribution of the ICTY and the ICTR to the development of IHL and ICL can hardly be contested. It is enough to mention the *Tadić* definition of the term “armed conflict” as a prerequisite to the prosecution of war crimes that was missing in the corpus of IHL until its pronouncement by the ICTY. This *Tadić* formulation is accepted to reflect customary international law and was also accepted by the subsequent international criminal tribunals, including the Special Court for Sierra-Leone (SCSL) and the ICC.⁵⁹ The ICTY authoritatively ended debate by affirming that individuals can be held responsible for committing war crimes in NIAC.⁶⁰ It confirmed that the war nexus requirement in the definition of crimes against humanity is an anomaly that paved the way to the adoption of warless definition of this category of crimes under international law in Article 7 of the Rome Statute. To give at least one similar example from the practice of the ICTR, it is possible to refer to the definition of rape. The ICTR’s definition of rape in the *Akayesu* case was groundbreaking for the development of IHL/ICL as it responded to the fact that despite the prohibition of this act by Article 27 of the Geneva Convention IV there is no definition included in this provision.⁶¹ The ICTR filled in this gap. The practice of *ad hoc* tribunals then proved that rape is not only a war crime, but also *actus reus* of other crimes, such as torture, or also genocide (as the infliction of serious bodily or mental harm, or as a measure to prevent birth).⁶² The clarification of these basic concepts, accompanied by the introduction of innovative procedures designed to protect vulnerable victims,⁶³ prompted the prosecution of sexual offences at international level. Simply put, without the ICTY and the ICTR, ICL and IHL as it currently stands, would not be the same.

In his analysis of the ICTY’s contribution to the development of IHL, T. Hoffmann points out that the practice of this tribunal shows examples of a clear judicial

59 Bradley, 2024, p. 176.

60 See: ICTY, *Tadić*, TC, Judgement of 7 May 1997.

61 Bradley, 2024, pp. 181–184.

62 ICTR, *Akayesu*, TC, Judgement of 2 September 1998, paras. 597, 706, 731. It goes without saying that it is specifically the practice of the ICTR that ‘transformed the Genocide Convention from a mere registration of protest against Nazi crimes to the source of one of the most significant developments in international criminal law jurisprudence’. Cf. Akhavan, 2016, p. 79. Starting out from the *Akayesu* case, the jurisprudence of tribunals (and predominantly that of the ICTR) tested each term of the definition of genocide, be it specific intent (*dolus specialis*), extent of destruction, specification of protected groups, depersonalisation of victims, and the means of destruction (elements of underlying offences).

63 ICTY, Crimes of Sexual Violence.

law-making and observes that this judicial activism was disguised by the extensive reliance on customary law that should have demonstrated that the tribunal's conclusions are already rooted in practice and *opinio juris* of states.⁶⁴ Despite the ICTY's mandate to apply only those rules of IHL that were beyond any doubt part of customary international law,⁶⁵ it regularly put forward rather innovative and liberal readings of customary international law, i.e. interpretations that hardly achieved the legal status required by the mandate. The ICTY regularly adopted two techniques to achieve this outcome.

Firstly, the ICTY provided remarkably few instances of state practice to prove the existence of customary international law. This implies that it used a very relaxed methodology in the identification of rules of customary international law. Very illustrative is the example on the prohibition of perfidy in NIAC, which was deemed to have a customary status by the ICTY citing only a single Nigerian judicial decision in support, which in turn was based on the Nigerian Criminal Code.⁶⁶ The same holds true with respect to the ICTY's findings concerning the extended form of joint criminal enterprise (JCE III) in which one participant commits "excess" that goes beyond the common plan. The *Tadić* AC established that each participant may be held responsible if the consequence (excess) is a natural and foreseeable consequence of the common plan and the respective participant by its participation willingly took the risk of its occurrence.⁶⁷ In this case, the AC relied only on a rather small number of post-war trials to support its finding on the customary character of the JCE III what led the Pre-Trial Chamber (PTC) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in the *Sary and others* case to conclude – after a review of the same materials as the ones ICTY relied upon – that these materials do not constitute a sufficiently firm basis for subjecting the JCE III under the realm of customary international law between 1975 and 1979.⁶⁸

Secondly, the ICTY's judicial activism expanded the protective scope of IHL through the purposive/teleological interpretation of applicable law. This approach 'allowed the ad hoc tribunals to steer a necessary development in broadening

64 Hoffmann, 2024, p. 23.

65 Secretary-General, 3 May 1993, S/25704, para. 34.

66 ICTY, *Tadić*, AC, Decision of 2 October 1995, para. 125. Case cited in Hoffmann, 2024, p. 23.

67 ICTY, *Tadić*, AC, Judgement of 15 July 1999, para. 228. The JCE is a form of co-perpetration inferred from art. 7(1) of the ICTY Statute, including the following elements: a) involvement of the plurality of persons; b) existence of a common plan; c) participation of the accused in the form of a significant contribution, and (di) shared intent for the basic form of JCE – JCE I; (dii) knowledge of the criminal system and intent to further its criminal purpose for the systemic form of JCE – JCE II; and (diii) indirect intent (*dolus eventualis*) described *supra* for the extended form of JCE – JCE III. In the *Karadžić* case, regarding the trial of the former leader of Bosnian Serbs, the TC found that the accused was (among else) member of the Srebrenica JCE established as Srebrenica fell on 11 July 1995, with a common plan to eliminate the Bosnian Muslims in Srebrenica, later through the killing of the men and boys (ICTY, *Karadžić*, TC, Judgement of 24 March 2016, para. 5741).

68 ECCC, *Sary and others*, PTC, Decision of 20 May 2010, para. 83.

individual criminal responsibility to respond to modern international inter-ethnic conflict'.⁶⁹ The best-known example concerns the ICTY's case law on nationality requirement in Article 4 of Geneva Convention IV. This provision states:

'Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it.

Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.'

At the first look, the text of the provision clearly stipulates that its protection applies only to nationals of the adversary party to the conflict. Nevertheless, the ICTY held that in the context of present-day inter-ethnic conflicts Article 4 should be given a wider construction so that a person may be accorded protected status even if he or she is of the same nationality as his or her captors.⁷⁰ The AC concluded that the requirement of nationality is less adequate to define protected persons, because

'in such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.'

The AC clarified that the determinative factor of national allegiance is ethnicity.⁷¹

This approach was later found compatible with the principle of legality (*nullum crimen sine lege*) and expressly sanctioned by the AC in the *Aleksovski* case which confirmed that 'this principle does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime'.⁷² This means that potential arguments of critiques pointing out to the unacceptable transgression of the ICTY's mandate through the judicial creativity might have been rebutted by the counter-argument of what the tribunal actually does is nothing else but the routine interpretation of (customary) international law.

Finally, concerning the assessment of the *ad hoc* tribunals' contribution, it is possible to recap a metaphor of fish in water: the legacy of the tribunals is like the water

69 Viswanath, 2024, p. 82.

70 Dörmann, 2004, p. 28.

71 ICTY, *Tadić*, AC, Judgement of 15 July 1999, paras. 166–168.

72 ICTY, *Aleksovski*, Judgement of 24 March 2000, para. 127.

in which we swim every day and thus cease to notice.⁷³ The tribunals' impact on the development of ICL/IHL is today taken for granted because some of their originally innovative interpretations now form part of the well settled canon of ICL/IHL.

5.2. *Practice of the ICTY and ICTR Before the ICC*

Already at the time of the adoption of the ICC Statute, there were opinions in the literature that the ICC could benefit from the experience of its predecessors, in particular the ICTY and the ICTR.⁷⁴ Given the importance of the two *ad hoc* international criminal tribunals for the development of ICL (see *supra*) and the scope of their agenda, it is therefore not surprising that the arguments of the defence and the prosecution in proceedings before the ICC contain numerous references to the case law and practice of the ICTY and the ICTR. Finally, the decisions of the *ad hoc* tribunals are also used by the judicial organs of the ICC from the very beginning of its existence, be it PTC, TC, or AC.⁷⁵ It is therefore relevant to address the position of external judicial decisions in the system of law applicable to the ICC.⁷⁶

Looking at Article 21 of the ICC Statute, it is clear that external judicial decisions are not explicitly mentioned in the system of applicable law, which limits their application from the outset. It is true that the decisions of the ICC's predecessors are not binding on this court, and there is no institutional link between the ICC and the *ad hoc* international criminal tribunals. The Rome Statute does not contain a rule similar to Article 20(3) of the Statute of the SCSL stipulating that the judges of the AC of the SCSL shall be guided by the decisions of the AC of the ICTY and ICTR.⁷⁷ Prior judicial decisions coming from the external jurisdiction have a status before the ICC similar to the status of an external decision (e.g., the judgement of the Nuremberg and Tokyo Tribunal) before the ICTY and ICTR, i.e., the court may use them as a source of inspiration in tracing the normative content of the ICC Statute [Article 21(1)(a) of the ICC Statute] or the principles and rules of international law [Article 21(1)(b) of the ICC Statute]. In the words of Judge Kaul, 'the ICC does not exist in autistic isolation from developments in international criminal law'.⁷⁸ Careful reading of Judge Kaul's reasoning might imply to some extent that judicial decisions are given a weaker status than in the ICJ Statute. Whereas the ICJ Statute speaks of judicial decisions as a means of determining the content of primary rules (international treaties, customary international law, general principles of law),⁷⁹ Judge Kaul gives judicial decisions importance only for the purpose of determining the content of secondary rules, i.e. rules that

73 Robinson and MacNeil, 2016, p. 191.

74 Pejic, 1997, pp. 841–860.

75 ICC, *Lubanga*, TC I, Judgement of 14 March 2012, paras. 533, 603.

76 Cf. Svaček, 2017, pp. 124 et seq.

77 ICC, *Situation in Kenya*, PTC II, Dissenting Opinion of Judge Hans-Peter Kaul to Decision of 31 March 2010, paras. 29–30.

78 ICC, *Situation in Kenya*, PTC II, Dissenting Opinion of Judge Hans-Peter Kaul to Decision of 31 March 2010, para. 30.

79 ICJ Statute, art. 38.

apply only when the primary rules, with the Rome Statute at the top of the hierarchy, are *lacunae*. However, ICC practice shows that external judicial decisions can also be used to interpret primary sources. In any case, formally speaking, external judicial decisions are of limited value for the ICC.⁸⁰

This methodology is already presented in the early practice of the ICC. In the decision on the confirmation of charges in the *Lubanga* case, the PTC I dealt with the classification and definition of armed conflict in *Ituri*, what was essential for the prosecution of the crime of conscription or enlisting children under the age of 15 years into the armed forces or their use for active participation in hostilities. The PTC noted that the definition of armed conflict is not contained in the ICC Statute or in the Elements of Crimes (EoC). Subsequently, referring to Article 21(1)(b) of the ICC Statute, the chamber analysed the applicable international treaties, principles and rules of international law and referred to the ICTY/ICTR AC's seminal decision in the *Tadić* case, which – as discussed earlier – provides a widely accepted definition of armed conflict, both of international and internal character.⁸¹ The TC I then followed the approach of the PTC and also referred to the jurisprudence of the ICTY, though unlike the PTC, it qualified the conflict in *Ituri* as non-international.⁸² Elsewhere, referring to SCSL case law on the use of child soldiers, it was stated that the 'SCSL's case law potentially assists in the interpretation of the relevant provisions of the Rome Statute'.⁸³

In the decision on the confirmation of charges in the *Ruto, Kosgey and Sang* case, the PTC I had to deal with the defence argument that the form of responsibility proposed by the Prosecutor, namely the indirect co-perpetration, was not part of customary international law and as such, was rejected by the ICTY (*Stakić*).⁸⁴ In its consideration of the case, the PTC reiterated the thesis set out above: the jurisprudence of *ad hoc* tribunals does not constitute a separate category of law applicable before the ICC; it can only be used to illustrate the content of relevant principles and rules of international law. Moreover, external case law should be allowed to step in only where the ICC Statute is not applicable.⁸⁵ However, since the ICC Statute can be interpreted in a way as to establish the specific form of indirect co-perpetration,⁸⁶ the PTC did not take the ICTY jurisprudence into account even in the indicated subsidiary role.

Obviously, the case law of the ICTY and ICTR cannot be transferred into the legal framework of the ICC mechanically. Its application must conform to the hierarchy of rules applicable in proceedings before the ICC, with the Rome Statute at its peak.⁸⁷

80 ICC, Situation in Kenya, PTC II, Dissenting Opinion of Judge Hans-Peter Kaul to Decision of 31 March 2010, para. 30.

81 ICC, *Lubanga*, PTC I, Decision of 7 February 2007, paras. 208 et seq.

82 ICC, *Lubanga*, TC I, Judgement of 14 March 2012, paras. 533, 567.

83 Ibid., para. 603.

84 ICC, *Ruto, Kosgey and Sang*, PTC I, Decision of 23 January 2012, para. 288.

85 Ibid., para. 289.

86 Ibid., para. 287.

87 ICC Statute, art. 21.

Deviations from the established practice of international tribunals are therefore not surprising, as they were already instructed by the adoption of the Rome Statute itself. A good example is the explicit rejection of the JCE doctrine (as a form of co-perpetration – see *supra*). In the *Lubanga*, the PTC held that the JCE as a form of commission (co-perpetration) of crime under international law is based on a subjective approach focused on the culpability (state of mind) of the perpetrator. In contrast, according to the PTC, the co-perpetration envisaged in Article 25(3)(a) of the ICC Statute is based on the concept of control over a crime. Control over a crime is manifested by the fact that the contribution of each of the co-perpetrators to the commission of the crime must be absolutely essential, i.e. each of them may, by failing to perform his or her task, frustrate the commission of the crime as a whole.⁸⁸

Another example is the concept of superior responsibility.⁸⁹ Even here, variances between the ICC's and *ad hoc* tribunals' case law can be explained by differences in the text of the Rome Statute and the ICTY/ICTR Statutes. The first difference – not yet elaborated in the ICC's practice – concerns the mental element of civilian superior under Article 28(2)(a) of the Rome Statute which is clearly a higher standard than employed by the ICTY and ICTR. In the *Bemba* case, concerning the application of the doctrine towards a military commander, the PTC II was also 'mindful of the fact that the "had reason to know" criterion embodied in the statutes of the ICTR, ICTY and SCSL sets a different standard to the "should have known" standard under Article 28(a) of the Statute'.⁹⁰ The relationship between the standards of mental elements applicable before *ad hoc* tribunals and the ICC in relation to military commanders is nevertheless far from being settled.⁹¹ The same holds true with respect to the causality requirement introduced by the Rome Statute that provides that the crime of subordinates be committed as a result of the superior's failure to exercise control properly over subordinates. The case law of *ad hoc* tribunals entirely rejected this element. The practice of the ICC is still blurred, even after the involvement of the ICC (including the AC) in this issue in the *Bemba* case. In the opinion of the PTC II, this requirement should in any case apply only to the omission of preventive measures, being sufficient that the superior's failure to act increases the risk that the subordinate will commit the crime.⁹²

88 ICC, *Lubanga*, PTC I, Decision of 7 February 2007, para. 347. In contrast, the concept of JCE required only a qualitatively lower significant, and not the more demanding essential contribution. Cf. Wirth, 2009, p. 332.

89 Although there is still some disagreement about the doctrinal classification of this concept (Werle and Jessberger, 2020, p. 266), its requirements include: a) superior/subordinate relationship; b) mental element encompassing actual or at least inferred knowledge about crimes under international law committed by subordinates; and c) failure to take preventive or repressive measures.

90 ICC, *Bemba*, PTC II, Decision of 15 June 2009, para. 434.

91 O'Sullivan, 2022, pp. 668–671.

92 ICC, *Bemba*, PTC II, Decision of 15 June 2009, paras. 424–425; Cf. Werle and Jessberger, 2020, p. 276.

The practice of the ICC reveals that the external judicial decisions are adopted with considerable caution and always on the basis of careful analysis. This cautious approach has clearly been evident in the application of certain procedural institutes that have been consistently used in the practice of international criminal tribunals. As early as in 2005, the ICC Prosecutor responded with a position paper to the PTC's decision to remove certain factual information (e.g. dates, locations, nature of the attack) from the arrest warrant against the accused persons in the Ugandan situation and, through an accompanying motion sought reconsideration of the conclusion reached. The Prosecutor's arguments were based, *inter alia*, on the practice of *ad hoc* international criminal tribunals which allowed similar submissions. In its decision, the PTC II first analysed the relevant provisions of the ICC Statute and the RPE. It concluded that neither of the documents provided for a remedy in the form of a motion for reconsideration of decision. The Chamber referred to the remedies expressly provided in the legal framework of the ICC.⁹³ Given the lack of legal support in the sources applicable before the ICC, the Prosecutor's procedural action was dismissed. The reference to the practice and decisions of *ad hoc* tribunals was simply refuted by summarising the aforementioned methodology of Article 21 of the ICC Statute. The PTC expressly stated that 'the law and practice of the *ad hoc* tribunals, which the Prosecutor refers to, cannot per se form a sufficient basis for importing into the Court's procedural framework remedies other than those enshrined in the Statute'.⁹⁴

The ICC followed a similar approach in relation to the witness proofing.⁹⁵ The scenario is identical to the previous case, but the result is quite different. The issue of witness preparation was first addressed before the ICC by the PTC in the *Lubanga* case in 2006, then by the TC in the same case in 2007, and further at the same level in the *Katanga* (2009) and *Bemba* (2010) cases.⁹⁶ In neither case was the institution of witness preparation used, primarily citing the fact that it is not enshrined in the ICC Statute. The Prosecutor's arguments, which referred to the established practice of international criminal tribunals, were repeatedly rejected. For example, in the *Lubanga*, the TC I emphasised, along the lines of the reasoning used in the previous cases, that the practice of international *ad hoc* tribunals is in no way precedential and is not binding on the ICC.⁹⁷ The TC stated that

'in the instant case, the issue before the Chamber is procedural in nature. While this would not, ipso facto, prevent all procedural issues from scrutiny

93 ICC, *Situation in Uganda*, PTC II, Decision of 28 October 2005, para. 18. The PTC referred to arts. 15:5, 19:10, and 61:8 of the ICC Statute. It emphasised art. 82 of the ICC Statute particularly, which regulates interlocutory appeals against decisions other than final decisions on guilt and sentence.

94 ICC, *Situation in Uganda*, PTC II, Decision of 28 October 2005, para. 19.

95 Witness proofing/preparation consists of the witness meeting with the party calling the witness shortly before giving evidence. The purpose of the preparation is to discuss the witness testimony. Example is given in Bitti, 2009, pp. 298–299.

96 IBA, 2013.

97 ICC, *Lubanga*, TC I, Decision of 1 December 2007, para. 44.

under Article 21(l)(b), the Chamber does not consider the procedural rules and jurisprudence of the *ad hoc* Tribunals to be automatically applicable to the ICC without detailed analysis.⁹⁸

The TC then gave its reasons for not considering the practice of international criminal tribunals. This is because the ICC Statute creates a procedural framework that differs substantially from that of its predecessors. Proceedings before the ICC are built on specific premises not found in, for example, the ICTY Statute or the ICTR Statute. In particular, the TC referred to a greater objectivity on the part of the ICC Prosecutor, who is obliged to investigate both aggravating and mitigating circumstances (Article 54 of the ICC Statute), or an accentuated status of victims (Article 75 of the ICC Statute).

Subsequent decisions, however, have completely reconsidered this established line of the ICC practice concerning witness proofing. In the *Ruto and Sang*, the TC V agreed that the witness preparation is implicit in Article 64 of the ICC Statute, which should be interpreted expansively. In the words of the TC V, ‘silence on a particular procedural issue does not necessarily imply that it is forbidden’.⁹⁹ The TC V then referred to the practice of *ad hoc* tribunals that have approved the preparation of witnesses, despite the fact that their founding documents, like that of the ICC, do not expressly provide for this procedural action. The TC V concluded that, despite the non-binding nature of the jurisprudence of *ad hoc* international criminal tribunals, their conclusion was meaningful for the evaluation of the analogous provision of the ICC Statute.¹⁰⁰ This decision of the TC V departed from the previous jurisprudence of the ICC, gave an expansive interpretation of the ICC Statute and, most importantly in terms of the topic at hand, gave considerable space to the jurisprudence of *ad hoc* international tribunals.¹⁰¹ However, this does not change the above methodology. Even in this last case, the ICC primarily relied on the wording or interpretation of the ICC Statute.

In addition to clarifying the primary and subsidiary rules set out in Article 21 of the ICC Statute, the jurisprudence of *ad hoc* international criminal tribunals can also be applied to resolve potential normative conflicts between the ICC Statute and the

⁹⁸ Ibid.

⁹⁹ ICC, *Ruto and Sang*, TC V, Decision of 2 January 2013, para. 27. art. 64:3(a) of the ICC Statute provides: Upon referral of a case for a main trial under the present Statute, the Trial Chamber to which the case has been assigned shall: a) after consultation with the parties, take such measures as may be necessary to facilitate a fair and expeditious hearing of the case.

¹⁰⁰ ICC, *Ruto and Sang*, TC V, Decision of 2 January 2013, para. 29.

¹⁰¹ Similarly cf. ICC, *Lubanga*, TC I, Judgement of 14 March 2012, para. 603. The jurisprudence of the ICTY has been extensively applied in the interpretation of art. 28. of the ICC Statute (superior responsibility), cf. ICC, *Bemba*, ICC-01/05-01/08-424, PTC II, Decision of 15 June 2009, paras. 404 et seq. This heavy reliance on the case law of the ICTY/ICTR is clearly visible also in the TC judgement on the merits. Cf. ICC, *Bemba*, TC III, Judgement of 21 March 2016, paras. 170 et seq. Still, as argued in the previous part, differences in the wording of respective statutes must be taken into account.

EoC. While cases of conflicts between these two documents are unlikely to be very frequent and are ultimately resolvable by reference to Article 9(3) of the ICC Statute confirming that the EoC and amendments thereto shall be consistent with this Statute, they cannot be entirely ruled out. This is evidenced by the arrest warrant decisions issued by the PTC in the *Al-Bashir* case.¹⁰² Simply put, the PTC considered the consistency between the definition of genocide contained in Article 6 of the ICC Statute and the definition provided in the EoC, which adds a so-called contextual element. Under the EoC, the underlying offence must take place in the context of a manifest pattern of similar conduct directed against the protected group or can itself effect destruction of this group. Nevertheless, the definition of genocide, enshrined in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, in the Statutes of *ad hoc* tribunals, customary international law, and the Rome Statute itself, does not deal with the contextual element. In both decisions on the arrest warrant, the PTC concluded that there is no irreconcilable conflict between Article 6 of the ICC Statute and the definition contained in the EoC. What is important, the PTC interpreted the two definitions as being consistent, and supported its conclusion by reference to the jurisprudence of *ad hoc* tribunals.¹⁰³

The preceding considerations lead to the following conclusions: the ICC has from the very beginning of its judicial existence consistently held that prior external judicial decisions are not part of the system of law applicable before it. A possible departure from the practice of *ad hoc* international criminal tribunals, as long as it is based on the wording of the ICC Statute, is formally unproblematic and the only correct one. The basic source of regulation for the ICC is its founding document, the Rome Statute. On the other hand, since the ICC does not exist in the autistic isolation, it can grant the external case law relevance by using it to justify and to give reasons to its own conclusions. However, without the existence of at least an implicit mandate in the ICC Statute, argumentation by the previous *ad hoc* tribunals' jurisprudence is insufficient. It can simply be summarised that the ICC has dealt with the earlier jurisprudence of external jurisdictions in a manner similar to that of the ICTY and the ICTR (in relation to post-World War II cases): *non exemplis, sed legibus iudicandum est*.¹⁰⁴ The added value is the possibility of using external case law to resolve any inconsistencies between the wording of the ICC Statute and other rules, which form the primary rules of law applicable before the ICC. Here again, however, external jurisprudence only balances the normative conflict, as the solution is primarily enforced by the weight of the ICC Statute, specifically Article 9(3) thereof. While it is true that ICC's decisions that do not refer to the case law of the previous *ad hoc* tribunals are still rather the exception, it is also true that the decisions of the ICC's predecessors are in no way binding on this

102 In these decisions, the ICC for the first time revealed its understanding of applicability of personal immunity with respect to sitting head of states of the third states what gave rise to (in) famous *Al-Bashir* saga; ICC, *Al-Bashir*, PTC I, Decision of 4 March 2009.

103 ICC, *Al-Bashir*, PTC I, Decision of 4 March 2009, para. 119.

104 ICTY, *Kupreškić*, TC, Judgement of 14 January 2000, para. 540.

court. It can be expected that, as the ICC's own jurisprudence develops, references to external jurisprudence will gradually diminish.

6. Final Thoughts

This chapter explores issues concerning the relationship between *ad hoc* tribunals and the SC, analyses the jurisdictional framework of both tribunals, the basics of their procedure, and also assesses their contribution to the development of ICL/IHL, including possibilities and limits on transfer of their practice into the practice of their successors, namely the ICC. The summary of conclusions would be redundant here as they are clearly drafted in the text. The author of this contribution limits to conclude with the general reflection that “all roads lead to The Hague and Arusha” to mean that any discussion in ICL as it now stands would be incomplete without the proper analysis of the respective practice of the ICTY and the ICTR. Despite some legitimate critique (concerning e.g. the length of the proceedings), in whole, both tribunals gained their moment in the history of ICL. As rightly observed by Robinson and MacNeil, without both tribunals, ‘[i]t is most likely that ICL would, by comparison, be greatly impoverished: thinner in details, weaker in scope, and perhaps still in its post-Nuremberg hibernation’.¹⁰⁵

105 Robinson and MacNeil, 2016, p. 209.

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International Criminal Law IV: The International Criminal Court

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ABSTRACT

This study does not have the ambition to cover all the issues related to the functioning of the International Criminal Court. It is devoted only to selected elements considered to be the most important in the context of the purpose it is supposed to serve. The focus was therefore on the creation of the first permanent international criminal court, pointing to this event as the result of a long process of evolution. This work is mainly focused on issues related to the scope of the ICC jurisdiction and the mechanisms of its activation. Of course, this approach also forces us to deal with issues related to the principle of complementarity, and the rules of universal jurisdiction. The final part of the work is devoted to the discussion of core crimes under the Rome Statute, and this approach is more informative. The volume of the study does not allow for an in-depth analysis of all the material elements of international crimes, nor the contextual elements. Beyond the scope of consideration are also – as a rule – issues related to the forms of committing crimes provided for in the Rome Statute.

Procedural issues were completely omitted; this certainly deserves a separate study, in particular bearing in mind the legacy of the ICC in shaping standards of protection of individual rights. Only marginally, when discussing the process of creating the ICC, was the created system of applied sources of law mentioned, which is of key importance for decoding the rules governing proceedings before the ICC.

In the end, three very important blocks of issues were omitted. The first one concerns constitutional issues, i.e. the structure of the Court and the rules of its functioning, the election of elected officials, the relationship of the Court to the UN, the role of the Assembly of State Parties, etc. The second concerns the rights of victims in proceedings before the ICC and their right to reparations. In the latter area, the Rome Statute brought revolutionary and, most importantly, effective solutions. Thirdly, the whole issue of international cooperation, the effectiveness of which is of key importance for the functioning of the entire system of the Rome Statute has remained outside the scope of consideration.

KEYWORDS

international criminal court (ICC), jurisdiction of the ICC, universal jurisdiction, complementarity principle, triggering mechanisms, core crimes, genocide, crimes against humanity, war crimes, crime of aggression

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1. Introduction

Many argue that the establishment of the International Criminal Court (hereinafter referred to as the ICC) was a natural consequence of the international community's prior need to respond to the crises in the Balkans and Rwanda, which led to the establishment of the UN special (*ad hoc*) criminal tribunals. This finding is not without reason, because it was justified and logical to think that we must be prepared for similar crises in the future. Responding to each new crisis with the creation of new structures would not only be illogical, but also extremely costly.

Bearing the above in mind, however, it must be emphatically emphasised that the establishment of the ICC took place using a historical moment. Before this point the international community would never have agreed to such a step. Unfortunately, this would not be possible today in the face of the tense state of international relations.

However, the victory of 1998¹ was not complete, as indicated by the scope of the Court's jurisdiction and the way it was exercised. For many participants of the Intergovernmental Conference, solutions were adopted that were not radical enough, and in the case of others they even go too far. Thus despite the agreement on the text of the Rome Statute, not everyone left Rome satisfied, and as a result, the scope of ratification of the negotiated treaty was ultimately smaller than expected. It is not about the number of ratifications itself, since in just over two years 60 ratifications were collected, opening the way to the constitution of the Court in July 2002. The point is that the biggest world players did not decide to deposit ratification documents, despite the fact that they have previously signed a negotiated treaty. This applies to countries such as the USA, China, India and Russia. This, as it will turn out, will be of key importance for the functioning of the entire system of the Rome Statute.

The International Criminal Court is not a human rights court. However, this book could not have missed an opportunity to discuss this institution, because in three important aspects it affects the level of protection of individual rights in the world:

1. The Rome Statute (hereinafter: RS) provides for a punitive response to the most drastic violation of human rights imaginable. There is empirical evidence that the very existence of the ICC limits the use of violence to resolve escalating social and political conflicts.
2. In its jurisprudence, the ICC makes extensive use of the case law of the European Court of Human Rights and the Inter-American Court of Human Rights, and thus, thanks to its authority, disseminates and consolidates the highest standards of protection of individual rights.
3. The entire system of the Rome Statute is focused on the victims of international crimes, giving them not only the right to participate in proceedings before the

1 On 17 July 1998, the Rome Statute of ICC was adopted at the United Nations Diplomatic Conference of Plenipotentiaries in Rome.

ICC, but also the right to reparations. In this way, it effectively protects those whose fundamental rights have been drastically violated.

2. The Establishment of the First Permanent International Criminal Court

The idea of creating an international court took shape after World War I, when the Treaty of Versailles stated that ‘[t]he Allied Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties’.² It also provided for the establishment of military tribunals for violations of the laws and customs of wars and obliged Germany to hand over war criminals.³ Despite the advancement of the preparatory work⁴ however, no international tribunal was established, and Kaiser William managed to avoid accountability thanks to the asylum granted to him by the Dutch.⁵

The issue of the creation of a permanent international criminal tribunal returned in the work of the League of Nations in the 1930s in the context of the Convention on the Prevention of Terrorism.⁶ The text of the convention on the establishment of an International Criminal Court was even adopted,⁷ but it was only signed by 13 countries and never entered into force.⁸

However, the attempt to create international tribunals to adjudicate crimes committed during World War II, the International Military Tribunal at Nuremberg⁹ and the International Military Tribunal for the Far East at Tokyo¹⁰ ended in success. These tribunals undoubtedly laid the foundations for the development of international criminal law, and their legacy, particularly the Nuremberg Judgment of October

2 Versailles Peace Treaty of 28 June 1919, art. 227:1.

3 Ibid., arts. 228:1, 229:1–2.

4 The Commission appointed by the Paris Peace Conference prepared a draft of the Elements of Crimes, which provided for four groups of crimes: crimes against sanctity of treaties, crimes against international morality, violations of the laws of humanity and war crimes. The list of international crimes proposed at that time then influenced the content of Article 6:b of the Nuremberg Charter; Werle and Jessberger, 2020, p. 3.

5 Schabas, 2018.

6 League of Nations, Convention on the Prevention and Punishment of Terrorism, 1937.

7 League of Nations, Convention for the Establishment of an International Criminal Court, 1937.

8 Bassiouni, 2012, pp. 540 et seq.

9 It was created by the London Agreement of 8th August 1945 by four victorious powers, i.e. the USA, Great Britain, France and the Soviet Union. The Nuremberg Charter was an annex to this agreement.

10 The Court was established on 19th January 1946 by a directive from the commander-in-chief of the Allied forces. That directive also established the Court’s law.

1st 1946, was an inspiration for further projects undertaken by the international community.¹¹

The need for further reactions to the atrocities was not long in coming. It appeared in connection with crimes that took place during the conflict in the former Yugoslavia in the early 1990s¹² and in Rwanda in 1994.¹³ This time, to adjudicate international crimes, international tribunals were established by the UN Security Council (hereinafter referred to as UN SC) resolutions, which was not without significance for the strength of their mandate.¹⁴

Regardless of the fact that both the tribunals established after World War II, and the *ad hoc* tribunals established by the UN SC in the 1990s played a huge role in the development of international criminal law¹⁵, it is impossible not to notice that they were affected by a certain “original sin”. All of them were created *ex post*, i.e. in response to events, which were then subjected to juridical evaluation.¹⁶ This, of course, weakened their legitimacy and provoked negative assessments when confronted with the elementary principles of criminal law, with the prohibition of retroactivity at the forefront. Resistance was caused, especially by the fact that retroactivity concerned not only systemic and procedural solutions, but also substantive legal assessments. The substantive legal basis for the prosecution of international crimes was still in its development phase.¹⁷

Avoiding this “sin” in the further development of the ICL was possible only on the assumption that an international court would be created, which firstly, would be permanent, and secondly, would only allow events committed after its creation and the final formation of the elements of the crime to fall within the scope of its jurisdiction. However, this step was only possible if there was an appropriate climate in international relations, which took place after the end of the Cold War in the 1990s.

Earlier attempts to start work on the establishment of the Court failed due to a lack of agreement on the definition of aggression.¹⁸ However, in 1989, at the initiative of Trinidad and Tobago, the UN GA undertook a decision authorising the International Law Commission (hereinafter referred to as ILC) to consider the creation of an

11 On the importance of Tokyo Tribunal see: Dittrich et al., 2020; UNGA Res. 95(I), 1946; GA Resolution 95 (I) of 11th December 1946, Affirmation of the Principles of International Criminal Law Recognized by the Nuremberg Tribunal.

12 Bassiouni, 1992–1994, pp. 1–60.

13 Van den Herik, 2005, pp. 11 et seq.

14 UNSC Res. 808, 1993; UNSC Res. 955, 1994.

15 Sterio and Scharf, 2019; Pocar et al., 1996, pp. 67–124; Ambos, 2016, pp. 24–43.

16 The violation of the prohibition on retroactivity of criminal law in the context of the mandates of the Nuremberg and Tokyo tribunals has been the reason for many years of criticism of the adopted solutions. It was not only about the creation of courts that were to hear crimes committed at a time when these courts did not yet exist. The key was the violation of the principle of *nullum crimen sine lege certa* in the situation of conviction for conduct that was not typified either in the German law of the time or in the legal systems of other countries where the crimes were committed. Also see: Schmitt, 1945, in Werle and Jessberger, 2020, pp. 587–588.

17 Bassiouni in Sadat, 2002, p. 30; Ambos, 2016, pp. 19–24.

18 Werle and Jessberger, 2020, pp. 18–19; cf. Politi and Nesi, 2004.

international criminal court,¹⁹ although an agreement on the definition of the crime of aggression was still far from being reached.

A draft of the Statute for an International Criminal Court was presented by the ILC in 1994 to UN GA,²⁰ and an *ad hoc* Committee set up to evaluate this draft²¹. The Committee presented its Report in 1995.²² It resulted in the establishment of the Preparatory Committee, which was entrusted with the preparation of drafts for the Intergovernmental Conference. This Committee presented its report to the UN GA in 1996,²³ and the road to intergovernmental negotiations was opened.

The international treaty on the establishment of the ICC was adopted and opened for signature in Rome on 17th July 1998.²⁴ As defined in Article 126 (1) of the Rome Statute (hereinafter referred to as RS) the treaty had reached the required number of ratifications (60) in 2002 and therefore on 1st July 2002 the RS entered into force. The International Criminal Court was able to start its operations.

The establishment of the ICC as a result of the entry into force of the RS was certainly a milestone, both from the perspectives of the history of public international, and criminal law. The international community has decided that a permanent criminal court is needed to try the most serious international crimes: genocide, crimes against humanity, war crimes and crimes of aggression. There has been a further empowerment of the individual in public international law, and thus a certain taboo has been broken. From a criminal law perspective, it was also a revolution. Since then, the substantive legal basis for criminal liability has also become a treaty norm, and the administration of criminal justice has ceased to be a purely internal matter. Therefore the concept of national sovereignty, of which jurisdiction in criminal matters is an immanent part, was re-evaluated and it has been understood that sovereignty also means a joint responsibility for the prosecution of international crimes.

This landmark decision stemmed from the realisation that, despite the intensification of the international community, atrocities are still being committed in various regions of the world, and that it makes little sense to set up *ad hoc* tribunals in response to each new conflict. A Court has been created that operates to the highest standards²⁵ and is respected by most countries in the world,²⁶ including some of those that have not ratified the Rome Statute.

However, not everything has worked out. Despite intensive efforts, it was still not possible to reach an agreement on the definition of a crime of aggression. It took an additional 12 years to meet at the Review Conference in Kampala and decide on the

19 UNGA Res. 44/39, 1989.

20 International Law Commission, 1994, p. 18.

21 UNGA Res. 49/53, 1994.

22 UNGA Res. 50/22, 1995.

23 UNGA Res. 51/207, 1996.

24 UN Doc. A/CONF.183/9.

25 Pursuant to art. 21:3 of the RS, its provisions are to be interpreted considering generally accepted standards of protection of individual rights.

26 As of June 2025, after Ukraine's accession from January 2025, 125 countries of the world are parties to the Rome Statute.

elements of this controversial crime.²⁷ In addition, States decided to establishing a special mechanism activating and triggering jurisdiction, which is different from the case of other crimes provided for in the RS.²⁸

By creating the ICC, the legal basis for its functioning also came into existence. The Rome Statute, in only 128 articles, defines the elements of crimes under the jurisdiction of the ICC, the principles of criminal responsibility, the provisions defining the organisation of the ICC, the procedural regulations and the principles of cooperation between States and the ICC. It was formulated with admirable restraint. This applies in particular to the procedural part, which contains only the most general regulations, leaving the details to the Rules of Procedure and Evidence (hereinafter referred to as Rules)²⁹ and the Regulations of the Court (hereinafter referred to as Regulations),³⁰ as well as to practice, which was expected to develop a model of proceedings that is the combination of elements rooted in different legal cultures, common law and civil law. Also, the substantive provisions of the RS were specified in the so-called Elements of the Crime.³¹

The Elements of Crimes and the Rules were adopted by the Assembly of States Parties to the RS (hereinafter referred to as ASP) (Articles 9:1 and 51:1 of the RS respectively), with the possibility for ICC judges acting by an absolute majority to initiate amendments to these legal acts through appropriate requests to the ASP (Articles. 9:2 (b) and 51:2 (b) of the RS accordingly). Requests for amendment may also be submitted by the Prosecutor and by any of the States Parties (Articles 9:2 (a) (c) and 51:2 (a) (c) of the RS respectively). Judges are also empowered to enact provisional rules in urgent cases where the Rules do not provide for a specific situation before the Court (Article 51:3 of the RS). The adoption of the Regulations was left to the judges themselves, who also retained the power to modify them, adapting them to the challenges of practice (Article 52 of the RS).³²

Notwithstanding the above, the system of sources of law is complemented by the so-called Chambers Practice Manual.³³ It is a constantly updated by the judges' non-binding set of directives and guidelines, agreed to further enhance consistency and efficiency of proceedings.

The above system of sources of law has been supplemented by the provision, which defines their hierarchy and the rules for applying.³⁴ According to Article 21:1 of the RS the Court shall apply in the first place, the Statute, Elements of Crimes and Rules of Procedure and Evidence. However, considering the generality of the above-mentioned

27 On this point, see below para. 7.

28 On this point, see below para. 6.

29 ICC ASP, 2002, Part II.A.

30 ICC, 2016.

31 ICC ASP, 2002, Part II.B; cf. Dörmann, 2003.

32 For details see: Krefß, 2007, pp. 537 et seq.

33 ICC Chambers Practice Manual, 2024.

34 The hierarchy of applicable provisions provided for in article 21 of the RS differs somewhat from that which follows from article 38 of the ICJ Statute; Rome Statute, art. 21; cf. ICJ Statute, art. 38.

sources, the authors of the Statute provided for the application of supplementary applicable treaties and principles and rules of international law, including the established principles of the international law of armed conflicts. If judges are not able to work out the desired solution on this path either, they are allowed to reach for general principles derived from national laws of legal systems of the world, including, when appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with the Statute and with international law and international recognised norms and standards (Article 21:1 (c) of the RS).

As far as the directives of the Court's application of the law are concerned, it is necessary to point to Article 21:3 of the RS, which requires that generally accepted standards of human rights protection must be taken into account in the process of interpretation, and prohibits making any distinctions founded on the grounds of gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social wealth, birth or other status. Guided by these directives, the Court very often refers in its jurisprudence to the achievements of international human rights courts, in particular the European and Inter-American ones.

Article 21 of the RS allows judges a high degree of flexibility in shaping their practice, which is widely used by judges.³⁵ Over the period of more than 20 years of its operation, the ICC has thus managed to build a specific model of proceedings that is *a sui generis* hybrid combining elements of the world's largest legal cultures. Contrary to expectations, it has been functioning well, because in searching for a compromise, judges try to choose the most functional solutions, always ensuring that they do not contradict the principles of the Rome Statute and the generally accepted standards of human rights protection. Of course the legal background of judges is not without significance for the positions presented and often leads to sharp disputes. The most important thing however, is that they are always resolved in a constructive way.

An interesting issue here is the way in which judges treat their own previous case-law. Article 21:2 RS is not firm on this point, suggesting that the Court may apply principles and rules of laws as interpreted in its previous decisions. They are therefore not binding. However, judges generally follow their previous jurisprudence, and a change in the line of jurisprudence generally requires a written justification for it.³⁶

3. Jurisdiction of the ICC

The creation of the ICC itself was an extremely momentous event. The expected success of the new institution was linked to the scope of the jurisdiction entrusted to

35 The level of flexibility in the application of the law by judges was the subject of controversy at the Rome Intergovernmental Conference, and Article 21 is an expression of the compromise reached there. See: de Guzman in Ambos, 2022, pp. 1130–1133.

36 ICC, *Prosecutor v. Gbagbo and Blé Goudé*, AC, 2015, para. 14.

it and the mechanism that triggers this jurisdiction. The settlement of both issues was possible thanks to a delicate compromise based on the principle of non-interference worked out in Rome.³⁷

There are four different dimensions of jurisdiction:

1. Jurisdiction *materiae*
2. Jurisdiction *loci*
3. Jurisdiction *personae*
4. Jurisdiction *temporis*

The first dimension of jurisdiction is simply related to the types of crimes in cases for which the ICC has jurisdiction. This issue will be discussed in point 7. The other 3 points will be discussed below. It is worth noting that the criteria for all 4 “types” of jurisdiction do not have to be met cumulatively. Territorial and personal jurisdiction are required alternatively.³⁸

Territorial jurisdiction. In accordance with art. 12:2 (a) of the RS the Court has jurisdiction if the conduct in question occurred on the territory of the State Party to the RS or if the crime was committed on board of a vessel or aircraft registered in the State Parties. This simple rule is based on the assumption, also known to most national legal systems, that the deck of a ship or aircraft is an extension of the territory of the state (the flag principle).³⁹

The interpretation of the issue of territorial jurisdiction has raised several problems in the Court’s practice, particularly in connection with doubts as to whether the State in which the alleged crime was to be committed is a State within the meaning of international law.⁴⁰ It should be noted that the Rome Statute can only be signed or ratified by States and not by other organisations, even if they are quasi-state in nature (Article 125:1-2 of the Rome Statute). In my view therefore, the opening of the field of jurisdiction is determined by whether the instruments of ratification have been adopted by the depositary, the Secretary-General of the United Nations, in accordance with Article 123:3 of the Rome Statute. Despite this, the jurisdiction of the Court in relation to the alleged crimes committed on the territory of Palestine was in practice questioned.⁴¹

Another problem may be the way in which the term “territory” is interpreted within the meaning of Article 12:2 of the RS. In particular, the status of occupied territories raises doubts, both in a situation where a State Party occupies the territory (or part thereof) of a Non-States Party, and in a situation where the territory of a State Party is occupied by a State that is not a party to the Rome Statute.⁴²

37 Ambos, 2016, pp. 206–209.

38 ICC, Bemba Gombo, PTC III, 2008, para. 12.

39 PCIJ, *Lotus* (France v. Turkey), 1927, paras. 24 et seq.

40 Montevideo Convention, 1933, p. 19.

41 McBrien, 2023; cf. Dugard, 2013, pp. 563 et seq.

42 Vagias, 2011, p. 178; Tsilonis, 2024, pp. 45 et seq.

When interpreting the term “place where the crime was committed”, the Court consistently takes the view that the place is not only where the alleged perpetrator acted, but also where the effect of their action occurred or was to take place (cross boundary conduct). This position was decisive in recognising the Court’s jurisdiction with respect to the situation of Myanmar and Bangladesh. The criminal activity took place in a country that is not a party to the Statute (Myanmar). This action was continued in the territory of the State Party (Bangladesh), which determined that the jurisdiction could be exercised.⁴³ The latest Lithuanian referral on alleged crimes committed in Belarus (a non-State Party) is based on the same logic, i.e. the claim that crimes started in Belarus were continued in Lithuania.⁴⁴

The extension of jurisdiction to the deck of a seagoing vessel was the reason for the recognition of jurisdiction in the Comoros situation, where the alleged crimes were committed on board a ship flying the flag of the Comoros, although it was outside the territory of any State Party.⁴⁵

In addition, it should be added that the jurisdiction of the Court also extends to alleged crimes committed in the territory of a State which, despite not ratifying the Rome Statute, has nevertheless made declarations of recognition of the jurisdiction of the Court according to Article 12 (3) of the Rome Statute. This legal construction allowed the ICC Prosecutor to initiate an investigation in the situation of Ukraine, which exercised the possibility provided for in this provision.⁴⁶ The declaration provided for in Article 12:3 of the RS may not be used opportunistically, e.g. to limit jurisdiction to only certain parties to a conflict.⁴⁷

Personal jurisdiction. Article 12:2 (b) of the Rome Statute provides that the Court shall have jurisdiction over alleged crimes committed by nationals of a State Party to the Statute. This provision opens the field of jurisdiction in a situation where the alleged crime is committed outside the territory of the State Party. Thus, for example, the investigation of the situation of Palestine covers not only alleged crimes committed on the territory of Palestine, which has ratified the Statute, but also crimes committed on the territory of the State of Israel, which is not a party to the Statute, if suspicion falls on citizens of Palestine or another State Party to the Rome Statute.⁴⁸

Territorial and personal jurisdictions open the way for the prosecution of international crimes independently of each other. The jurisdiction of the Court thus extends to crimes committed in a specific territory, regardless of who may be the perpetrator.

43 ICC, Bangladesh/Myanmar, PTC III, 2019, paras. 42–62.

44 ICC, Prosecutor’s Statement, 2024.

45 ICC, Comoros, AC, 2019.

46 ICC, Uganda, 2002. The declaration provided for in art. 12:3 of the RS may also be used by the State-Party to extend the temporal scope of jurisdiction, as was the case in the situation of Uganda, in respect of which RS entered into force on 1 September 2002, but the jurisdiction of the ICC was recognised in respect of events occurring from 1 July 2002.

47 ICC, Gbagbo, PTC I, 2012, para. 59.

48 ICC, Palestine, PTC I, 2021, para. 85; The issue was also considered in connection of committing crimes under the jurisdiction of the ICC committed by British citizens in Iraq (Non-State Party). See: Schabas and Pecorella, 2022, pp. 824–825.

The nationality of the perpetrator is completely irrelevant here. On the other hand, alleged crimes committed by nationals of States Parties shall undergo the jurisdiction of the Court, regardless of whether they occurred within the area covered by territorial jurisdiction. Therefore, arguments are sometimes raised that negate the admissibility of prosecuting crimes committed by citizens of a State which is not a Party, although they may have taken place on the territory of a State Party, which are absurd.⁴⁹

When discussing the issue of personal jurisdiction, it is impossible not to mention the solution adopted in Article 26 of the RS, according to which the Court shall have no jurisdiction over any person who was under the age 18 at the time of the alleged commission of a crime.⁵⁰

Temporal jurisdiction. The issue of temporal jurisdiction is addressed primarily in Article 11 of the Rome Statute. This provision determines that crimes committed after the entry into force of the Statute (1), i.e. after 30th June 2002, fall within the scope of jurisdiction. Of course, if the State has ratified the Rome Statute with effect at a later date, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for that State (2). Nevertheless, there is nothing to prevent the State, by ratifying the Statute, from declaring an extension of jurisdiction, backdated to an earlier period, in accordance with Article 12:3 of the RS.

An interesting question of interpretation may be the very concept of “time of committing the crime”. It is generally accepted that in the case of crimes stretched over time, the entire relevant period is subject to criminal law assessment. However, the case is complicated by the specific construction of an international crime, which is most often composed of a number of causative (underlying) acts, the number of which determines the exhaustion of the (contextual) elements of a crime. This is due to the use of such elements as “widespread” or “systematic” in the crime description (Article 7:1 of the RS). The question then arises as to whether underlying acts that took place before the date of commencement of the jurisdiction can be considered in the overall assessment of the perpetrator’s conduct, for example in the assessment of the contextual elements of the crime. This issue has not yet been developed in the Court’s jurisprudence.

The jurisdiction of the Court is not limited in time “on the other hand”. This is due to the lack of a statute of limitations for international crimes. This rule, already established in international law,⁵¹ was finally confirmed in Article 29 of the RS with respect to all crimes under the jurisdiction of the Court.

The last issue that needs to be discussed in the context of temporal jurisdiction is related to the consequences of a State Party’s withdrawal from the Rome Statute. Is it permissible to continue the proceedings in such a situation? This issue has arisen in ICC case law in the context of the situations in Philippines and Burundi. Both of

49 See: i.e. Scheffer, 2003; cf. ICC, Afghanistan, AC, 2020, paras. 55 et seq.

50 Triffterer and Clark, 2022, pp. 1247 et seq.

51 UNGA Res. 2391 (XXIII), 1968.

these States withdrew from the Rome Statute system in response to the actions taken by the Prosecutor. According to Article 127 (1) of the RS, withdrawal takes effect one year after the UN Secretary General has accepted the notification of withdrawal. However, the interpretation of Article 127(2) of the RS concerning the possibility of continuing proceedings after withdrawal raises difficulties. Namely the case law is unclear, since it can be argued that the ICC may continue the proceedings if the formal investigation has been formally initiated⁵² or at least the preliminary examination had commenced before the expiry of the one-year grace period.⁵³

4. The Principle of Complementarity

The fact that the ICC has jurisdiction over a particular situation does not mean that it can be effectively exercised. This is related to the issue of the admissibility of proceedings (admissibility of the exercise of jurisdiction), the most important aspect of this admissibility being the issue of complementarity.⁵⁴ Unlike the ICTY and ICTR, the ICC does not have the primacy of jurisdiction over national courts. This principle is a novelty in international criminal law. In the Agreement on the Prosecution and Punishment of the Principal War Criminals of the European Axis, signed in London on 8th August 1945.⁵⁵ The question is left virtually open, limited to the provision that nothing in this Agreement shall prejudice the jurisdiction or authority of any court of national or occupation which already exists or may be established in any Allied territory or in Germany for the purpose of trying war criminals (Article VI).⁵⁶ Explicit and essentially analogous provisions on this issue can be found in Article 9(2) of the Statute of ICTY and Article 8(2) of the ICTR Statute. They adopt the principle that the International Court is superior to national courts. At any stage of the proceedings, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal, in accordance with this Statute and the Rules of Procedure and Evidence of the International Tribunal.⁵⁷

In the Rome Statute, the exact opposite principle has been adopted. It is enshrined in Article 1 of the RS, according to which the Court is complementary to national criminal justice systems. We also read this in the Preamble, and in the provisions of the Statute regarding the admissibility of the case.⁵⁸

52 ICC, Burundi, PTC II, 2017, para. 26.

53 ICC, Situation in Ukraine, PTC II, 2021, para. 111.

54 Another important aspect of the admissibility of proceedings is the issue of gravity of crimes. According to the assumption, the incriminated events must reach a certain minimum level of gravity in order for the proceedings to be considered acceptable. See in this regard Lattanzi in Bellelli, 2010, pp. 196–197.

55 Journal of Laws, 1947, No. 63, item 367.

56 IMT Charter, 1945.

57 Cassese, 2008, pp. 339–342.

58 Seils, 2016, p. 29; Triffterer and Bohlander, 2022, pp. 22–23; cf. Stahn and El Zeidy, 2011.

A correct reading of the Preamble makes it possible to reconstruct without difficulty the purpose of the States that agreed in Rome to open the Statute of the ICC for signature. It was assumed that the primary issue is the obligation of the States Parties to the Statute to exercise their national jurisdiction (as the Preamble reminds), and the Court is to act as a safety valve in a situation where the States are unable or unwilling to exercise their jurisdiction. This relationship means that the ICC is often referred to as the “Court of the last resort” and that the entire system of the Rome Statute aims to close the impunity gap.

This issue is clearly drawn in the context of Article 17:1 of the Statute, according to which the Court shall declare a case inadmissible if:

- ‘(a) the case is the subject of criminal proceedings in the State under whose jurisdiction the case belongs, unless the State is unwilling or unable to actually conduct criminal proceedings;
- (b) the case was being investigated in a State under its jurisdiction and that State decided not to prosecute the suspect, unless such a decision was caused by the unwillingness or inability of that State to prosecute.’⁵⁹

The capacity to conduct proceedings is broadly interpreted in the case law. The reasons for the state’s passivity, which can be both factual and legal, are irrelevant. Sometimes the decisive factor is the condition of the national justice system, leading to the inability to collect evidence or apprehend a perpetrator, or sometimes a lack of appropriate legal regulations, which makes it impossible to prosecute at national level.⁶⁰ Article 17:2 of the RS specifies situations in which it should be considered that the state does not show the will to prosecute. Of course, the most classic situation is when the state with jurisdiction does not show any activity,⁶¹ but it is also possible that the proceedings are delayed without a justified reason (Article 17:2 (b) of the SR), or that the proceedings are conducted unfairly, in a manner that is incompatible with generally accepted standards (Article 17:2 (c) of the RS). An important factor allowing for the assumption that the state remains passive is the desire to provide protection to the prosecuted person by protecting him or her from liability for crimes codified in the Statute (Article 17:2 (a) of the RS). For example, in the case of *Prosecutor v. Saif Al-Islam Gaddafi*, a Libyan court sentenced a person wanted by the ICC for crimes covered by The Hague arrest warrant to death (in the *in absentia* process), after which the Libyan authorities pardoned the convict person, freeing him from punishment.

59 This solution is complemented by a clearly formulated prohibition on the ICC from conducting proceedings in a situation where a person has already been detained on the basis of the act subject to the indictment; Rome Statute, art. 17:1 (c).

60 See: Rome Statute, art. 17:3. Regarding the implementation of the provisions of the Statute into national legal systems, see below.

61 Lack of activity is a criterion used most often in the case law when assessing the admissibility of proceedings in the context of Article 17:1 (a) of the RS; Schabas and El Zeidy in Ambos, 2022, pp. 961–965.

The Court held that this circumstance did not preclude the continuation of the proceedings, since the conviction and pardon had taken place solely to avoid proceedings before the ICC.⁶²

The most controversial is the use of the *idem* test in this context. The Court's intervention is excluded when national proceedings concern the same case. It is controversial whether "the same case" is the same event in the ontological sense, or whether it is also an event subject to a specific legal assessment. This issue appears complicated if we take into account the nature of international crimes within the ICC's jurisdiction. These crimes are of a legally complex nature and consist of a number of individual perpetrator acts, each of which may constitute a crime under national law, but only when linked in a chain by means of contextual elements do these acts become an international crime. For example, we can talk about acts (even numerous) that meet the characteristics of murder in national law, which are not yet or necessarily crimes against humanity. They become so only when they are committed through the implementation of a specific strategy of the state or some organisation and are part of a widespread or systematic attack against the civilian population (Article 7:1 (a) in conjunction with Article 7:2 (a) of the RS). Similarly, causing serious bodily injury or disorder of health is usually a crime under national law, but if it concerns members of one group and is committed *en masse* with the aim of destroying all or part of that group, it may qualify as genocide (Article 6 (b) of the RS). Therefore, the question arises as to whether in a situation where the state conducts proceedings in cases concerning such (even numerous) individual acts of perpetrators, but in terms of the classification of murder or bodily harm, the road to proceedings before the Tribunal for crimes against humanity or genocide is closed?⁶³ This question should be answered in the negative. Rather, the Court consistently requires the prosecution of international crimes as such, which means that it does not limit itself to purely ontological criteria in determining the identity of the "case".⁶⁴

Even more complicated is the issue of examining the identity of the "case" in the context of the structure of international crime. At first glance, it seems that the test of "the same act of the same person" makes sense only if the parameters of the act in question are established and its perpetrator is identified. In practice however, it does not work like this. Firstly in the case of international crimes which are complex in their very structure, there is not always an ontological identification of all the causative acts that make up the crime. Sometimes a crime is described with only examples of individual causative acts, and sometimes it is not possible to determine them at all

62 ICC, *Gaddafi*, AC, 2019, paras. 47 et seq.

63 This issue, but in terms of the scope of application of the *ne bis in idem* principle I have analysed together with Zabłocki, 2022, pp. 205–227.

64 ICC, *Philippines*, AC, 2023, paras. 211 et seq.

(e.g. in the case of discovering mass graves with bodies in a state of decomposition, making any identification impossible).⁶⁵

It should also be noted that the provisions of the Statute open the way to questioning the admissibility of a case at a relatively early stage of the proceedings. In light of Article 18 of the RS, a preliminary ruling on the admissibility of the case may be issued at a very early stage. This is the case when the Prosecutor of the ICC considers that there is a basis for initiating an investigation or that the investigation is initiated, and the State with the “original” jurisdiction demands that proceedings be waived. However, the Prosecutor, instead of complying with the request, may ask the Pre-Trial Chamber of the ICC to authorise him or her to conduct the proceedings despite the state’s objections. Of course, when considering the issue of admissibility of a case, judges refer to the criteria of admissibility of a case, as set out in Article 17 of the SR, as mentioned above. The examination of the “identity” of the case in the context of the admissibility of the proceedings takes place immediately after the initiation of the proceedings by the Prosecutor of the ICC, or even before their formal initiation, i.e. in the phase in which the potential perpetrators have not been identified at all, nor any individual acts of perpetrators on which the prosecution will be based in the future. Examination of the “identity of the case”, even if the State in its request indicates specific pending proceedings before national authorities, becomes practically impossible in the absence of a relevant level of comparison.⁶⁶

All these difficulties have led to the development of a practice whereby the Court leaves a case to the national judicial authorities only when there is no doubt that the prosecution by the ICC Prosecutor, or even merely the intention to prosecute, covers the same causative acts of the same person and that they qualify as international crimes and not as classic crimes under national law. In all other cases, the proceedings before the Court (the Prosecutor of the ICC) are continued, which does not preclude an objection to the admissibility of the case at a later stage, when the parameters of the competing proceedings have been clarified (Article 18 of the RS).

It is clear from the foregoing that in order to avoid the intervention of the Court, the States Parties should transform the crimes of the Rome Statute into their national legal orders. From a formal point of view, such a transformation is not a prerequisite for ratification of the Statute, nor does its ratification create an international legal obligation for implementation. However it is clear that if not properly implemented, the principle of complementarity in the context of crimes under national jurisdiction will simply not work. Implementation does not have to mean a literal repetition of the provisions of Articles 6-8 *bis* of the RS in national codes. However, it must be faithful to the spirit of the Statute and create a guarantee that the prosecution of the crime by national authorities will lead to the full representation of the criminal lawlessness

65 An extremely rigorous position on this issue was taken by the ICC, Bemba, AC, 2018, paras. 104, 110–111; cf. ICC, Bemba, AC, dissenting opinion of Judges Monageng and Hofmański, 2018, paras. 19–44; ICC, Ongwen, AC, 2022, paras. 281–311.

66 ICC, Venezuela, AC, 2024, paras. 93 et seq., 218 et seq., esp. paras. 243 et seq.

of the incriminated events. Of course, the extent of the necessary implementation depends on whether a given country has adopted a monistic or dualistic concept. In the first case, there is no absolute need for transformation, although in many monistic countries the transformation has been carried out.⁶⁷ It is almost certain that the lack of implementation, or incorrect implementation, may lead to the conclusion that the national authorities, for legal reasons, are not capable of actually conducting criminal proceedings within the meaning of Article 17(1)(a) of the RS.

Despite what has been stated above, there is absolutely no tendency for the Court to cover the proceedings as far as possible and exclude national jurisdiction. On the contrary, the Court has very limited possibilities to act in the face of the scale of atrocities committed every day around the world. To close the gap of impunity, as promised by the Preamble to the Statute, the Court's organs:

1. Take active steps to persuade the States Parties to implement the substantive provisions of the Statute into their national legal systems as faithfully as possible,
2. Exert pressure on States Parties to conduct proceedings before national authorities to the fullest extent possible, if they have national jurisdiction,
3. Initiate proceedings before the Court when there is no prospect of the perpetrators of international crimes being tried by national courts.

This *modus operandi* of the ICC runs in full harmony with the essence of the principle of complementarity. It is worth making the naysayers, who try to measure the effectiveness of the Tribunal by the number of pending court proceedings aware that the activation of the complementarity mechanism consumes most of the activity of the Tribunal, in particular its President and Prosecutor, who having the opportunity to meet at the highest level with the authorities of the States Parties to the Statute, spare no effort in bringing about the closure of the areas of impunity as much as possible. In this way, the so-called positive complementarity is implemented, which not only requires the exertion of pressure on national authorities, but even allows for the negotiation of the issue of covering certain areas of criminal activity by national law enforcement and judicial authorities in order to avoid the Court's intervention.⁶⁸

67 In fact, there is a strong tendency in monistic states to verbatim repeat the relevant substantive provisions in national legislation in order to be sure that an obligation under international law has been fulfilled; *Fostering European approach to accountability for genocide, crimes against humanity, war crimes and torture; Redress*, 2007, pp. 7–8.

68 Stahn and El Zeidy, 2011; Akhavan, 2016, pp. 1043 et seq. The most spectacular example of positive complementarity is the negotiations with the Colombian authorities, which led to the fact that the ICC's intervention turned out to be unnecessary.

5. Universal Jurisdiction

Considerations on the principle of complementarity would be incomplete if we did not answer the question of how the impunity gap is filled. We already know that the Court intervenes when the State which has “original” jurisdiction does not exercise it. However, the question arises as to whether the ICC’s jurisdiction is also excluded when proceedings are conducted in a state based on universal jurisdiction, which is an emanation of the principle of universal repression.

Universal jurisdiction applies only to international crimes. Whether it is in accordance with international law as such has always been a source of controversy.⁶⁹ I agree with the thesis that at present universal jurisdiction can find its source not only in the provisions of treaties,⁷⁰ but has become a customary norm of international law (*jus cogens*).⁷¹ The fact is however, that in more than half of the countries of the world universal jurisdiction is envisaged, referring to international crimes provided for in the Rome Statute.

In the above context, two issues arise directly relating to the functioning of the complementarity mechanism provided for in the Rome Statute. Indeed, the frontal question arises as to whether the universal jurisdiction exercised by the State precedes that of the Court. This issue has never been considered in the case law so far, but in view of the increasing use of universal jurisdiction by states (especially in the context of the situation in Ukraine⁷²), it may soon become very topical. I am inclined to answer this question in the affirmative. There are at least two arguments to back this up.

Firstly, the wording of Article 17:1 (a) of the SR does not preclude such an interpretation. Proceedings before the Court are inadmissible when the case is the subject of proceedings in the State to which it belongs, and it is not specified here that it is territorial, personal or any other jurisdiction. So why not a universal one?

Secondly, the philosophy of the Rome Statute assumes that the Court is to act as the Court of the last resort, closing the gap of impunity. Everything possible must

69 Fletcher, 2003, pp. 580–584; Eser, 2004, pp. 955–978.

70 See, for example, in the Geneva Conventions for the Protection of War Victims of 1949, which used the formula *aut dedere aut judicare*; Hague Convention on Unlawful Seizure of Aircraft, 1970, art. 4:1–2; Hostage-Taking Convention, 1979, art. 8; Convention against Torture, 1984, art. 5. Sometimes, to exercise universal jurisdiction, it is necessary to demonstrate some connection between the state and the case (e.g. the alleged perpetrator is present in the state), in other cases such a condition is not formulated.

71 Jeżewski, 2003, pp. 164–165.

72 To the author’s knowledge, investigations are currently underway in cases of alleged crimes committed in Ukraine, among others, before the authorities of Poland, Sweden, Lithuania, Germany, Slovakia, Canada.

therefore be done to ensure that justice is served, and the Court should intervene only when all other paths fail.⁷³

Finally, there is the question of the possibility of exercising universal jurisdiction by the Court itself. Here everything seems to be clear. The issue of endowing the Court with universal jurisdiction was discussed during the Intergovernmental Conference in Rome and this concept was ultimately rejected.⁷⁴ As always, politics and the interests of states were decisive. It was considered that endowing the ICC with universal jurisdiction would constitute an excessively far-reaching interference in the sphere of state sovereignty. To avoid this, a compromise was agreed, consisting in granting the UN Security Council the right to present the case to the Court in a situation where it also concerns crimes allegedly committed on the territory of a State that is not a party to the Statute. It is also an interference with sovereignty, but with the consent of the great ones who use the right of *veto* in the Security Council. The necessary political will was not found in 1998, and there is little indication that it is possible now. However, this does not mean that such a reform of the system cannot be postulated.

There are significant reasons behind such a postulate. If the international community is serious about closing the gap of impunity, it should at all costs erase the blank spots on the map of the world – areas where atrocities are likely to occur on a daily basis and where the exercise of any criminal jurisdiction is out of the question. The Security Council is paralysed by particular interests in conflict-ridden areas. Thus, the great powers are unable to communicate, and the societies of North Korea, Yemen and Syria suffer because there is no one to take responsibility for the crimes committed there. It is also impossible not to notice that even if it has become common practice to activate the universal jurisdiction provided for in many national legislations, it would not be entirely possible to close the gap of impunity, because it is impossible to bring heads of state, chiefs of governments and foreign ministers of states to criminal liability before the national courts of other states due to the functional immunity of international law⁷⁵ in protecting them. However, while such immunity is granted in the context of proceedings before courts of foreign states, it does not apply in the context of proceedings before an international tribunal.⁷⁶

Of course, we must be aware that endowing the ICC with universal jurisdiction would entail abandoning the limitations that are currently defined by the framework

73 Nothing seems to prevent the priority of jurisdiction to a regional (international or internationalized) criminal court over the jurisdiction of the ICC. This understanding of the complementarity mechanism was probably behind the closure of the investigation in the situation of the Central African Republic, after the establishment of the Special Criminal Court (with an international element) there. Interestingly, the statute of the Special Criminal Court provides for the ICC to take precedence over its own, but this lack of compatibility is not a practical problem when the ICC is not further active in this region of the world.

74 Bekou and Cryer, 2007, pp. 49–68; Wilmshurst, 1999, p. 127.

75 Triffterer and Bohlander, 2022, pp. 1257–1279; Kreß, 2022, pp. 2585–2671.

76 This has been recognised as a *jus cogens* norm in the ICC jurisprudence. See: ICC, Jordan Referral (Al-Bashir), AC, 2019.

of territorial and personal jurisdiction. Consequently, the ratification of the Statute by the State would cease to be a condition for the exercise of jurisdiction by the Court in respect of alleged crimes committed on its territory and by its nationals.

6. Triggering Mechanism

The mechanism for triggering ICC jurisdiction is the result of the Rome compromise. The most controversial issue in this area was related to the scope of decision-making power that should be vested in the ICC Prosecutor. The most misguided solution is certainly to grant the UN Security Council the competence to activate the jurisdiction of the ICC by means of a special resolution.⁷⁷

Before moving on to discuss the modes of activation of ICC jurisdiction, an answer should be attempted for the questions about the sources of information on the basis of which decisions provided for in the RS are made. The sources of information can vary greatly, from official information from countries, through to the reports of international organisations, to information provided by private individuals. All information provided is analysed in terms of its usefulness. The basis for the Prosecutor's decision to formally initiate the investigation is given by his or her conviction that the information collected provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed (Article 53:1 (a) of the RS).

There are three ways to initiate the investigation.

- a) A State Party or a State recognising ICC jurisdiction under Article 12:3 RS refers a suspected crime,
- b) the UN Security Council presents a situation indicating that a crime has been committed,
- c) the ICC Prosecutor him or herself, acting *ex officio*, initiates an investigation (the so-called *proprio motu* procedure).

State referral. Any State Party may refer a situation to the Prosecutor in which one or more crimes within the jurisdiction of the Court appear to have been committed, requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with commission of such crimes (Article 14:1 of the RS). As far as possible, the referral should specify the relevant circumstances and be supported by documents that are available to the referring State (Article 14:2 of the RS).

Referrals of states constitute a kind of “self-denunciation” – states themselves “reported” as a place of crime, indicating potential perpetrators. However, each time there have been specific political reasons behind this decision. Such a referral

77 See: Lee, 1999, pp. 143 et seq.; Akande, 2012, pp. 299 et seq.

is *de facto* a cede of State's jurisdiction to the ICC, despite the applicable principle of complementarity and the obligation of the State to prosecute international crimes.⁷⁸

It should be noted that the referral made by the State Party does not have to relate to events that took place on its territory. The Statute does not provide for such limitations, so it is also possible to refer a situation concerning alleged crimes committed on the Territory of another State-Party (or its citizens).

The first investigations after the ICC began the operation were initiated by the Prosecutor following referrals from the authorities of Uganda (January 2004), the Democratic Republic of the Congo (April 2004) and the Central African Republic (December 2004). In the following years, referrals were submitted by the authorities of Mali (July 2012), again of the Central African Republic – CAR II (May 2014). Subsequently, referrals were made by the authorities in Argentina, Columbia, Chile, Paraguay and Peru in relation to alleged crimes committed in Venezuela after 12th July 2014, which resulted in the opening of an investigation on 3rd November 2021 (Venezuela I), as well as by a group of 43 countries in relation to crimes committed in Ukraine after 21st November 2013, which resulted in the initiation of an investigation by the Prosecutor on 2nd March 2022.

Further notifications came from the authorities of Venezuela – Venezuela II (13th February 2020), the Democratic Republic of Congo – DRC II (23.5.2023) and Lithuania (30th September 2024). In these cases, the Prosecutor has not yet decided whether the investigation will be initiated.

The mere fact of reporting the suspicion of a committed crime does not automatically trigger the initiation of an investigation. However, the ICC Prosecutor is obliged to carry out the preliminary examination in order to determine whether there would be a reasonable basis to commence an investigation (Article 18 (1) of the RS).⁷⁹

UNSC referral. The Security Council may refer a situation to the ICC in which one or more crimes occurred within the jurisdiction of the Court whenever the situation poses a threat to peace and security. This action is based on the content of Article 39 of the UN Charter, which states that in a situation where 'the Security Council determines the existence of a threat or violation of peace, or an act of aggression, makes recommendations or decides what measures should be taken (...) to maintain or restore international peace and security'.

The mere reporting of a suspicion of committing a crime to the Tribunal is not tantamount to initiating the investigation. According to the interpretation adopted

78 Chaitidou, 2022, pp. 868–869; See: ICC, Lubanga, PTC I, 2006.

79 It is not known why the term used in art. 18:1 (a) of the RS ('a reasonable basis to commence an investigation') is different from that used in art. 53:1 (a) of the RS ('a reasonable basis to believe that crime within the jurisdiction of the Court has been or is being committed'). After all, both provisions are about initiating an investigation. See a different position in ICC jurisprudence: for example Pre-Trial II's Decision Pursuant Article 15 of the Rome Statute on the Authorisation of Investigation into the Situation in ICC, Kenya, PTC II, 2010, para. 27. Of course, a different standard is required in the case of a decision to issue an arrest warrant or summon to appear: 'reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court'; Rome Statute, art. 58:1 (a) and :7.

by the Court, it is the Prosecutor who decides whether to initiate the investigation.⁸⁰ He or she must assess whether the conditions under Article 53 of the RS are met, deciding whether there is a reasonable basis for conducting an investigation, i.e. whether the available information provides sufficient grounds to believe that crimes falling within the jurisdiction of the ICC have been committed or are being committed. In addition, the Prosecutor must assess whether the resulting case or cases would be admissible and moreover, whether the conduct of the proceedings is “in the interests of justice”, which is assessed considering the gravity of the offences and the “interests of the victims”.

Generally, whenever the UNSC or a State (-s) has referred a situation to the Court, the Prosecutor decided to initiate an investigation. This is what happened in both the Libya and Sudan situations. However, the Prosecutor refused to initiate an investigation in the situation of the *Comorian ships, Greece and Cambodia*, due to the inadmissibility of the potential case(s) in the context of the gravity of the crimes committed.⁸¹ Also, Gabon’s referral submitted in 2016 did not lead to the initiation of an investigation due to the finding that the offences referred to did not fall under the jurisdiction of the Court.⁸²

It is important to distinguish between two concepts: “situation” and “case”. The States and the UN Security Council refer the “situation”. The Statute does not define the term “situation”. It is understood in general geographical, temporal boundaries: there is a suspicion that crimes of international law have been committed in a given territory at a given time. There is no need to point to specific perpetrators or groups of perpetrators, as well as to specific crimes. However, sometimes potential perpetrators are also indicated in the referral.⁸³ On the basis of the referral, the ICC Prosecutor should determine individual “cases” in the course of further proceedings. Thus, while the “situation” referred to in Article 13 of the SR, justifying the initiation of proceedings before the Court, covers a whole range of conduct, limited to time, place and possible perpetrators, the “case” refers to a specific event constituting one of the crimes within the jurisdiction of the Court (or several crimes related to each other). Thus, even if it is the States or the UNSC that entrust the Prosecutor with investigating a specific conflict situation, the Prosecutor has the competence to select certain suspects and investigate in relation to specific parts of that situation.

80 Although art. 18 of the RS (1), which requires the Prosecutor to verify whether there is a reasonable basis to commence an investigation, refers directly only to the situations specified in art. 13 (a) and (c) of the RS, and thus does not cover the UNSC referral, the Prosecutor is not obliged to initiate an investigation in cases initiated by the UNSC if he or she considers that there is no reasonable basis to proceed; Nsereko and Ventura, 2022, p. 106. Admissibility test referral of the UNSC (see: Pre-Trial Chamber I’s Decision on Libya’s postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to Article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council; ICC, Libya (Al-Senussi), PTC I, 2013, para. 20.

81 Chaitidou, 2022, pp. 863–865; Journal of Laws, 1947, No. 63, item 367.

82 ICC, Gabon, PTC I, 2019.

83 Froville in Fernandez, Pacreau, Ubéda-Saillard, 2019, pp. 808 et seq.

Within one reported situation, the Prosecutor may distinguish many proceedings (cases). On the other hand, any limitation indicated in the referral, e.g. with respect to certain persons or specific types of crimes, is not binding on the Prosecutor.⁸⁴

Proprio motu procedure. The ICC Prosecutor may initiate proceedings *ex officio* on the basis of any information available to him or her about crimes falling within the jurisdiction of the Court. Information about crimes of international law can come from any source or person. It is the Prosecutor him or herself who decides whether a given source of information is reliable and what he or she will do with the information. Therefore, the Prosecutor has a lot of freedom to decide who will stand before the Court and for committing what crime. However, his or her decision to initiate proceedings must always be approved by the Pre-Trial Chamber (Article 15:3 of the RS).

Granting the Prosecutor such broad powers was opposed by many countries.⁸⁵ It should be remembered that he or she can take up a case concerning the territory of *de facto* most countries and any crime that he or she deems to be within the jurisdiction of the ICC. In particular, the United States opposed the granting of this competence to the ICC Prosecutor, arguing that the freedom to initiate proceedings would prevent him or her from conducting his or her case impartially, engaging his or her attention on political issues and making difficult political decisions – they feared “frivolous” and even “malicious” charges brought publicly in the international arena against states and governments by the “erratic” ICC Prosecutor. The adoption of this solution undoubtedly contributed to the refusal of the United States to ratify the Statute. Both supporters and opponents of this competence agreed on one thing: it was to be of fundamental importance to the competence of the Court itself. It was supposed to be a test of its independence.⁸⁶

Although the ICC has almost unlimited jurisdiction, it also has limited resources to exercise it. The number of perpetrators of crimes under international law is often impossible to estimate precisely. Certainly, the ICC’s resources (since there are only 18 judges) do not allow for the prosecution of all of them. Therefore, it is impossible to avoid the process of selecting situations, cases and defendants.

Different concepts of case selection can be adopted:

- prosecuting only the leaders and top officials responsible for committing crimes,
- “prosecution for example” – selecting “sample cases” from a given field of crime or from a given region where crimes are committed; persons whose conviction could lead to the identification of the guilty, the condemnation of certain actions or actions of a specific party to the conflict, and the assurance of a sense of justice among the victims, would be prosecuted.
- selecting perpetrators, if it turns out to be necessary in order to achieve a specific goal,

84 Chaitidou, 2022, p. 874.

85 See: Preparatory Committee, 1988.

86 See: Bergsmo and Zhu in Ambos, 2022, pp. 882–886.

- taking into account “the degree of agitation of the international community”,
- considering threats to security and peace in a given country.

The bigger the freedom to choose suspects, the bigger the need for transparent and consistent rules for this selection. The Rome Statute does not offer the Prosecutor sufficiently clear guidance regarding which cases to deal with. Often, the Prosecutor is criticised for using an inconsistent selection policy. Therefore in order to eliminate accusations of the arbitrary selection of defendants, the Prosecutor’s Office publishes “Strategic Plans,”⁸⁷ and “Policies”⁸⁸ in which it presents its policy of selecting cases.

The judges of the Court have so far authorised investigations in relation to seven situations: Kenya,⁸⁹ Côte d’Ivoire,⁹⁰ Georgia,⁹¹ Burundi,⁹² Afghanistan,⁹³ Bangladesh/Myanmar⁹⁴ and The Philippines.⁹⁵

Special mechanism in respect of the crime of aggression. At the Review Conference in Kampala in 2010, not only was the definition of the crime of aggression agreed, but also a special (triggering) mechanism was established to trigger the prosecution of this crime. The resistance of states against the excessively far-reaching freedom to make accusations of crimes of aggression has led to a compromise that has proven to be absolutely non-functional in practice.⁹⁶ Although being in effect since July 17th 2018, the ASP decided to activate the Court’s jurisdiction over crimes of aggression (after obtaining the amendments from Kampala 30 ratification- Article 15 *bis* :2 of the RS),⁹⁷ however to date, no case in this regard has appeared on the Court’s agenda, and the Prosecutor has not initiated any investigation.⁹⁸

Unlike cases of the other three crimes under the jurisdiction of the Court, with respect to crime of aggression, States that are not parties to the Rome Statute are excluded from the ICC’s jurisdiction over the crime of aggression, either from the side of the attacked or the aggressors (Article 15 *bis* (5) of the RS), however in the case of a UNSC referral, this rule does not apply (Article 15 *ter* of the RS).

87 ICC Prosecutor, Strategic Plan, 2023–2025.

88 ICC Prosecutor, Policy on Gender Persecution, 2022; ICC Prosecutor, Policy on Gender-Based Crimes, 2023; ICC Prosecutor, Policy on Children, 2023.

89 ICC, Kenya, PTC II, 2010. The investigation was closed on 27th November 2023.

90 ICC, Côte d’Ivoire, PTC III, 2011.

91 ICC, Georgia, PTC I, 2016.

92 ICC, Burundi, PTC II, 2017.

93 ICC, Afghanistan, AC, 2020; With this ruling, the appeal judges reversed the earlier decision of PTC II of 12th April 2019, ICC-02/17-33, which denied authorisation for an investigation.

94 ICC, Bangladesh/Myanmar, PTC I, 2019.

95 ICC, Situation in Ukraine, PTC II, 2021.

96 See: Ambos, 2010, pp. 463 et seq.; Kreß and von Holtzendorff, 2010, passim. It should be noted that the provisions of the Kampala amendments were ratified by just over 40 states, i.e. 1/3 of the States Parties to the RS.

97 ICC ASP Res. 16/5, 2017.

98 It is therefore not surprising that attempts are currently being made to reform the Kampala mechanism, which would be similar to the one in force in relation to the other three crimes under the jurisdiction of the Court. See: Kreß, Hobe and Nussberger, 2022.

As far as a State Party referral or a *proprio motu* investigation (Article 15 *bis* of the RS) is concerned, the ICC will only be able to proceed with the investigation if the Kampala Amendments have entered into effect for the aggressor, but also for a state being a victim of an act of aggression (Article 15 *bis* :4 and :5 of the RS). Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall inform the UN Secretary-General of the situation.⁹⁹ Additionally, the UN Security Council has the authority to determine whether an act of aggression has been committed by the respecting State Party.¹⁰⁰ The deadline to make such a determination is six months. If the UN Security Council fails to determine the committing of an act of aggression, the Prosecutor may still proceed with an investigation with the authorisation of the Pre-Trial Chamber.

From a legal point of view, this is a strange construction, especially in view of the fact that one of the key elements of a crime subject to the jurisdiction of the Court is to be decided not by judges, but by a strictly political body. Of course, a decision of the UNSC stating that a given act was an act of aggression is not binding on judges, because they can still decide that aggression did not take place after all (Articles 15 *bis* :9 and 15 *ter* :4 of the RS). However, the UNSC's decision stating that the act of aggression did not take place is already binding and closes the way to the prosecution of the alleged perpetrators of crime of aggression.

The procedure in the case of a UN Security Council referral (Article 15 *ter*) is different from the procedure of the other two triggering mechanisms. If the UN Security Council refers a situation to the ICC, the Prosecutor will have the authority to investigate the crime of aggression committed in any State territory and by any State's national. In other words, at a UN Security Council referral, it is irrelevant whether the victim or the aggressor is a non-State Party, whether aggression has taken place on the territory of a non-State Party, or whether aggression has been committed by a national of a non-State Party.¹⁰¹

As mentioned, the mechanism that triggers jurisdiction in cases of aggression is non-functional. Its potential change faces many difficulties. The problem with all its sharpness emerged after the full-scale aggression of the Russian Federation against Ukraine. Although Ukraine has recognised the jurisdiction of the ICC by way of a prior declarations under Article 12 (3) of the Statute,¹⁰² the jurisdiction of the Court with respect to the crime of aggression may not be exercised. Hence the discussion on the need to establish a special tribunal to investigate the crime of aggression against

99 It is assumed that the UN Secretary General will forward the information received to the UNSC, which has the power to take the decision referred to in art. 15 *bis* :6 of the RS.

100 There is a clear distinction between the concepts of "act of aggression", which is attributed to the state, and "crime of aggression", which can only be attributed to a natural person, according to art. 8 *bis* of the RS.

101 Zimmermann and Freiburg-Braun, 2022, pp. 929–932.

102 In the first declaration Ukraine has accepted ICC jurisdiction over alleged crimes committed on Ukrainian territory between November 21st 2013, and February 22nd 2014; in the second alleged crimes committed on Ukrainian territory from February 20th 2014, onwards.

Ukraine.¹⁰³ The initiative of the Council of Europe countries seems to be the most realistic in recent times.¹⁰⁴ Politically however, this step seems to be very problematic. The same countries that agreed to the compromise in Kampala are trying to circumvent it when there is aggression on a large scale, which hits their political interests.

The issue of the planned revision of the Rome Statute in the part concerning the mechanism activating jurisdictions in the field of the crime of aggression is different.¹⁰⁵ It is not known yet¹⁰⁶ how the planned change will turn out and whether there will be the political will to accept it. The direction of change is undoubtedly the right one, because there are no serious arguments against equalising the regimes of activating jurisdiction in cases of aggression and in cases of other international crimes. However, there is no doubt that the potential change will not have a retroactive effect, so the problem of aggression against Ukraine cannot be solved in this way.

7. Core Crimes Under the Rome Statute

The most serious violations of international criminal law are currently divided into four basic categories of crimes under international law:

1. Genocide
2. Crimes against humanity,
3. War crimes
4. The crime of aggression.

All these crimes are characterised by “systemic criminality”, i.e. “collective evil”. Collective evil means that such crimes are committed on an exceptional, mass scale, most often as part of the implementation of a systematic plan of acts of violence. They are also most often committed by a group of people organised to carry out a specific policy. It is the scale of crimes against international law committed and the implementation of this policy that makes them separate and different from common crimes and constitute crimes of international law.

Despite the efforts made by some countries, other treaty crimes, such as international terrorism or international drug trafficking, have not been included in the ICC’s jurisdiction.¹⁰⁷

Genocide. The origins of the concept of “genocide” should be sought in the writings of Rafał (Raphael) Lemkin,¹⁰⁸ who defined the elements of this crime for the first time and, through his personal efforts, led to the adoption of the first convention

¹⁰³ Kreß, Hobe and Nussberger, 2022.

¹⁰⁴ Council of Europe, 2024.

¹⁰⁵ ICC ASP, Special Session, 2025.

¹⁰⁶ The special session of the Assembly of State Parties to the Rome Statute is planned for July 2025.

¹⁰⁷ See: UN Diplomatic Conference on the Establishment of the ICC, 1998.

¹⁰⁸ Lemkin, 1945, pp. 39 et seq.

introducing an obligation to criminalise this crime as a crime of international law (at first it was referred to as “acts of barbarism”). By “genocide” Lemkin meant the destruction of a nation or ethnic group. This new word, invented by the author, was made up of the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing). According to Lemkin, genocide does not necessarily mean the immediate destruction of a nation. Rather, it means a coordinated plan to destroy the foundations of national groups, in order to annihilate the groups themselves. The aim of such a plan would be the disintegration of political and social institutions, culture, language, national feelings, religion and economic existence of national groups, and the destruction of personal security, freedom, health, dignity and even the lives of people belonging to such groups.

Genocide was not included in the Nuremberg judgment as such, because the focus was then on the act of Nazi aggression and violations of the laws and customs of war.¹⁰⁹

The UN Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UN General Assembly on 9th December 1948 in Paris.¹¹⁰ It entered into force on 12th January 1951 and at present there are 153 States Parties to the Convention.¹¹¹ Under the Convention, the parties to the Convention have reaffirmed that genocide, committed both in peace and in war, constitutes a crime under international law, and that they undertake to prevent and punish this crime.

Ad hoc tribunals had jurisdiction to prosecute this crime (Article 4 of the ICTY Statute and Article 2 of the ICTR Statute). Their jurisprudence undoubtedly influenced the final definition of the crime of genocide adopted in the Rome Statute.

Article 6 of the Rome Statute repeats verbatim the wording of Article II of the Genocide Convention of 1948. According to this Article, the crime of genocide means any of the following crimes committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, such as:

1. murder of group members
2. causing serious bodily injury or mental health disorder to the members of the group,
3. the deliberate creation of conditions of life for a group calculated to cause its total or partial physical degradation,
4. the use of measures that are aimed at preventing birth within the group,
5. forcibly transferring the children of group members to another group.

In addition, Article 25 (3) (e) of the RS states that a crime is committed by anyone who ‘directly and publicly incites the commission of genocide’.¹¹² Only incitement to

¹⁰⁹ Werle and Jessberger, 2020, pp. 335–336.

¹¹⁰ UNGA Res. 260 A (III), 1948.

¹¹¹ As of June 30, 2024.

¹¹² This provision is a reflection of Article II of the Genocide Convention. See: Council of Europe, 2024.

commit genocide is subject to penalisation – but not to other crimes within the scope of the Court’s jurisdiction.

The content of Article 6 of the RS is explained in the Elements of Crimes, which contains a detailed description of the way in which the elements adopted in Article 6 of the Statute are understood, both concerning the subjective side (the relationship of the perpetrator to the act) and the objective side (the act). The most important contextual elements of the crime of genocide are limited to the context of the attack, its purpose and the intention of the perpetrator.¹¹³ The perpetrator’s behaviour must take place as part of the implementation of a plan – a visible pattern of similar behaviour directed against a given group.¹¹⁴

This context must be covered by intention (*mens rea* – the subjective side must refer to both constitutive elements). Genocide is a material crime, i.e. one that can only be committed when there is not only the result of death or destruction of given people, but also when a further effect in the form of a threat to a given protected group.

The purpose of the perpetrator’s behaviour is to destroy ‘in whole or in part a national, ethnic, racial or religious group’.¹¹⁵ However, it is not sufficient for the perpetrator to aim at the annihilation of only a small part of a particular group.¹¹⁶

It is assumed that the concept of a group should be interpreted broadly, in accordance with the teleological interpretation. In the report of the UN Commission investigating the crimes committed in Darfur, it was assumed that the term “national group” should be given such a meaning that it is a group that has a different national identity or national origin. The term “racial group”, on the other hand, should be understood as a group of individuals sharing hereditary physical characteristics or distinctive features. An “ethnic group” is a group of individuals who share a common language, tradition, or culture.¹¹⁷

Genocide can only be committed with a direct, special intention, because the perpetrator must include the goal specified in the Statute with his or her intention. This means that the crime must be committed with the intention of destroying, in whole or in part, a national, ethnic, racial or religious group as such.¹¹⁸

Only one of the cases before the ICC concerns the crime of genocide: it is the proceedings against the Sudanese President, Omar Al-Bashir.¹¹⁹ Since 2010, it has been

113 In ICTY case law, it was accepted that proving a plan or policy is not a necessary element of the crime of genocide, ICTY, Jelišić, TC, 1999, para. 100.

114 Whether a contextual element is included in the definition of genocide was the subject of dispute. See: ICC, Al-Bashir, PTC I, 2009, para. 119; cf. ICC, Al-Bashir, Separate and Partly Dissenting Opinion of Judge Ušacka, 2009, para. 19; Werle and Jessberger, 2020, pp. 356–357; Kreß, 2009, p. 297.

115 The perpetrator does not have to aim at the destruction of the group as a whole. It is sufficient if his intention includes the destruction of even a small part of the group; ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2007.

116 ICTY, Krstić, TC, 2001, para. 12.

117 See: Schabas, 2022, pp. 125–126.

118 ICTY, Sikirica et al., TC, 2001, paras. 58 et seq.; ICTR, Ntakirutimana, AC, 2004, para. 364.

119 ICC, Al-Bashir, PTC I, 2009; ICC, Al-Bashir, PTC I, 2010.

at the pre-trial stage – the ICC does not conduct court proceedings in the absence of the defendant, so without ensuring his presence in the courtroom, it is not possible to hold him or her liable.

Crimes against humanity. In the so-called Moscow Declaration adopted on 1st November 1943¹²⁰ it was announced that the perpetrators of the atrocities committed against the civilian population of the territories occupied by the Axis governments would be tried. The United Nations War Crimes Commission,¹²¹ an international body composed of representatives of 17 countries, was entrusted with building the legal foundations for punishing these acts. This commission – for the first time in the history of international criminal law – constructed the concept of crimes against humanity, which was then used by the International Military Tribunal in Nuremberg.

Based on the International Agreement on the Prosecution and Punishment of the Major War Criminals of the European Axis and Character of the Military International Tribunal signed in London on 8th August 1945,¹²² the Statute of the International Military Tribunal at Nuremberg was created, which defined crimes against humanity in Article VI(c) and stipulated that they were subject to its jurisdiction. Crimes against humanity include murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial, or religious grounds in the commission of any crime falling within or in connection with the Court's competence, whether or not it was in conflict with the law of the country in which the crime was committed. Leaders, organisers, instigators, and accomplices who participated in the formation or execution of a common plan or conspiracy to commit one of the above-mentioned crimes were to be held responsible for committing such crimes.¹²³

The definition adopted in the Statute of the International Military Tribunal defined crimes against humanity in an exemplary manner. Article 3 of the Statute of the ICTR and Article 5 of the ICTY stipulate that a crime against humanity is one of the following acts committed as part of a widespread or systematic attack against civilians: murder, extermination, slavery, deportation, imprisonment, torture, rape, persecution for political, racial or religious reasons, other inhumane acts.¹²⁴

The definition of crimes against humanity can be found in Article 7 of the RS. According to this provision, it is any of the following acts, committed as part of a widespread or systematic attack directed against the civilian population, with knowledge of the attack:

120 Declaration was signed in Moscow by Franklin D. Roosevelt, US President, Winston Churchill, British Prime Minister, and Joseph Stalin, Soviet leader.

121 The United Nations War Crimes Commission, initially the United Nations Commission for the Investigation of War Crimes, was a United Nations body that aided the prosecution of war crimes committed by Nazi Germany and other Axis powers during World War II.

122 UNTS, Vol. 82, p. 280.

123 Crimes against humanity were also incoded in Article 5 9c) of the Tokyo Charter but no one was convicted of these crimes in Tokyo; Werle and Jessberger, 2020, p. 375.

124 Mattraux, 2005, pp. 148 et seq.

1. murder,
2. extermination,
3. enslavement,
4. deportation or forcible transfer of a population,
5. imprisonment or other severe deprivation of physical liberty of fundamental rules of international law,
6. torture,
7. rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity,
8. persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court
9. the enforced disappearance of persons,
10. the crime of apartheid,
11. other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

It is important that the list contained in Article 7 of the RS is not exhaustive, since any other inhuman act may also become a crime against humanity if it is committed in a given context. It is also worth noting that the RS excludes the need for a connection between the armed conflict and the crimes committed against humanity.

One of the elements of a crime against humanity is that the perpetrator commits it ‘as part of a widespread or systematic attack against the civilian population’. An attack means a mode of action consisting in the repeated commission of acts listed in Article 7 of the RS, undertaken in accordance with or in support of the State or organisational policy to commit such an attack (Article 7 (2) (a) of the RS).¹²⁵ An attack does not have to be an armed attack or a violent attack. It can cover any case of ill-treatment of civilians.

The attack must be “widespread or systematic”. These conditions do not have to be met simultaneously – it is enough to meet fulfil of them.¹²⁶ Specific premises are then analysed: the number of victims, the means and methods of attack, the status of the victims, the nature of the crimes committed during the attack, the type and degree of resistance put up by the victims, and the degree of compliance with the laws and customs of war by the attacking entities. Its consequences, the involvement

¹²⁵ It is not certain whether the requirement of “policy” constitutes an independent material element of the crime or rather a typical manifestation of crimes against humanity. Although, unlike in the ICTY and ICTR statutes, the requirement to demonstrate ‘a State or organizational policy to commit such attack’ is expressly included in the RS, such wording may simply be understood as excluding spontaneous or isolated acts of violence; ICC, Katanga, TC II, 2014, para. 1123; ICC, Bemba, TC III, 2016, para. 149.

¹²⁶ Von Hebel and Robinson, 1999, pp. 79 et seq.

of State authorities, the existence of a pattern in the crimes committed and the state or organisational policy in this area, the establishment of institutions responsible for the implementation of such an attack, and the continuity of the violence used should also be considered.

An attack is systematic (qualitative criterion¹²⁷) when violent acts are carried out as planned and have been organised in such a way that their accidental nature must be excluded. They must be carried out within a specific pattern and include repetitive behaviours in a non-random way. An attack is widespread (quantitative criterion¹²⁸) when acts of violence committed on a large scale, are of great importance, and have the potential to affect numerous victims across a vast territory. Both a systematic and a widespread attack must be carried out by an organisation – whether public or private (i.e. not just the State government) – that has the ability to implement a specific policy against the civilian population according to an adopted plan.

The attack must be conscious. This follows directly from Article 7:1 of the RS, although it is only a *superfluum* in the context of the general requirement under Article 30:1 of the RS, which states that all material elements of the crime must be committed with intent and knowledge.¹²⁹ The perpetrator must be aware of fulfilling all the above contextual elements with his or her behaviour and acting within a specific pattern, knowing that his or her behaviour fits into this plan. The perpetrator's intention and awareness must include: the intention to commit a specific causative act listed in this provision, the specific context of the action making him or her commit a crime against humanity, i.e. the fact that such an attack is ongoing and has certain characteristics (it is systematic or extensive and committed against civilians) and the fact that his or her act is part of such an attack. However, it does not have to include an awareness of the entire criminal plan, as it was organised, for example by the ruling regime – after all, a single perpetrator may not have knowledge about it because certain people keep the whole plan secret. He or she may have only a superficial knowledge of the entire scheme – provided that he is she is aware of taking part in an attack of a certain scale.

War crimes. The concept of war crimes was already used since the Middle Ages. At first, the law of international armed conflict developed as customary law, and only with the passage of time did it take the form of written law. It was not until the 20th century that this concept was defined, and acts of international law were adopted, which oblige states to criminalise these crimes. Unlike crimes against humanity and genocide, which were defined in a specific historical context, the definition of war crimes is the result of a long and complex evolution. War crimes involve violations of the laws and customs of war, so the scope of responsibility for war crimes is linked to the development of the way warfare is conducted.

127 Werle and Jessberger, 2020, p. 386.

128 Delmas-Marty, 2009, pp. 5 et seq.

129 Robinson, 1999, pp. 51 et seq.; Ambos, 2013, p. 280.

The basis for the development of international criminal law was undoubtedly international humanitarian law and the law of armed conflict. The following were of key importance for the contemporary scope of the criminalisation of war crimes:

1. The Geneva Convention of 22nd August 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field,¹³⁰ where for the first time an absolute ban on attacks on certain categories of persons was introduced.
2. The Hague Conventions of 1899¹³¹ and 1907¹³² extended the scope of applicable standards to other types of persons and objects. What is more, they enumerated the means by which it could be determined which persons' use in armed conflicts was to be prohibited. The regulations annexed to the Hague Convention of 1907 concerning the Laws and Customs of War on Land provided for a set of norms of international law relating to the ways of harming the enemy, the methods of besieging and bombing.
3. The Protocol on the Prohibition of the Use in War of Asphyxiating, Poisonous other Gases, and of Bacteriological Methods of Warfare of 17th June 1925¹³³ required national legislators to adopt adequate national law which would penalise conduct enumerated in the Convention as prohibited by international law in wartime, if national legal systems did not provide for punishment for similar acts.
4. The Briand-Kellog Pact (General Treaty for Renunciation of War as an Instrument of National Policy) of 27th August 1928¹³⁴ rejected war as a tool of national policy and an instrument for resolving international disputes.

Unfortunately, all these efforts of the international community had limited results, and during World War II war crimes could be witnessed being committed on an unprecedented scale. The response to the horrors of war was, on the one hand, the four Geneva Conventions of 1949, which aimed to strengthen the protection of victims of armed conflict and to oblige the signatory states to

130 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1864.

131 Convention (I) for the Pacific Settlement of International Disputes (Hague I), 1899.

132 Hague Convention (XII) relative to the Creation of an International Prize Court, 1907, arts. 1–57.

133 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925.

134 General Treaty for the Renunciation of War as an Instrument of National Policy, 1928.

criminalise serious violations of their provisions.¹³⁵ These conventions were subsequently supplemented by Additional Protocols.¹³⁶

On the other hand, it was necessary to build the foundations of international criminal justice in order to think about taking up the fight for the implementation of the laws of war. Through the Nuremberg and Tokyo tribunals, and then *the ad hoc* tribunals, such a foundation was created, and its crowning achievement is Article 8 of the RS. This provision, like the ICTY (Article 2) and ICTR (Article 4) regulations that preceded it, refers to the *acquis* of international law, making “grave violations of the Geneva Conventions” war crimes.

The Rome Statute refers to the best practices and case law of *ad hoc* tribunals. Article 8 of the SR contains a catalogue of war crimes, dividing them into two basic categories: those committed in international conflicts, and those committed in internal (non-international) conflicts (civil wars). In Article 8 of the RS, the term “grave breaches of the Geneva Conventions” is used only in relation to conflicts of an international nature. Regarding non-international conflicts, Article 8:2 (c) of the RS uses the phrase ‘serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949’ and “other violations”.

The catalogue of war crimes is extremely extensive; Article 8 is the longest article in the entire Statute. It covers nearly a hundred specific prohibited acts, with some of them partially overlapping.

Violations of the laws of war are within the jurisdiction of the ICC only if a condition of sufficient gravity is met – Article 8:1 The RS also notes that this jurisdiction refers “in particular” to crimes ‘committed as part of a plan or policy or as part of a large-scale commission of such crimes’. However, the very existence of a plan is not

135 These are: the First Geneva Convention, concerning the improvement of the fate of the wounded and sick in armies active on land (Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I, Federal Political Department, Bern, pp. 205–224), the Second Geneva Convention, concerning the improvement of the fate of the wounded, sick and shipwrecked armed forces at sea (Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I, Federal Political Department, Bern, pp. 225–242), the Third Geneva Convention, concerning the treatment of prisoners of war (Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I, Federal Political Department, Bern, pp. 243–296), the Fourth Geneva Convention, concerning the protection of civilians in time of war (The Geneva Conventions of 12th August 1949, International Committee of the Red Cross, Geneva, pp. 153–221).

136 Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8th June 1977 (Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Bern, Federal Department of Foreign Affairs, 1978), Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8th June 1977 (Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Bern, Federal Department of Foreign Affairs, 1978), Protocol additional to the Geneva Conventions of 12th August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8th December 2005 (Notification of the Federal Department of Foreign Affairs of Switzerland, Bern, 4th January 2006).

a condition for exercising jurisdiction, but only an indication of how to assess the seriousness (gravity) of the acts committed.¹³⁷

Every prohibited act must be related to an armed conflict. However, this “relationship” is interpreted very broadly – it is enough that the acts were committed on the territory of the belligerents. There are both international conflicts (Article 8:2 (b) of the RS) and non-international ones (Article 8:2 (c) of the RS). It is also possible to assume that the subject of the judgment is a mixed conflict.¹³⁸

Each perpetrator must be aware of the existence of the conflict and the fulfilment of the basic elements of the crime. He or she does not need to have precise knowledge of the exact nature of the conflict: whether international or internal. He or she is only supposed to be aware of the existence of the actual circumstances determining the occurrence and accompanying a given conflict situation. For example, whether the perpetrator was aware that he or she was using a type of weapon prohibited during armed conflicts and that such an armed conflict was ongoing¹³⁹ can be investigated.

Crime of aggression. The crime of aggression is the “youngest” among the crimes of international law. For many years, the right of each state to wage an aggressive war (the so-called *jus ad bellum*) was recognised. Even after the conviction emerged that attacking another state is a crime of international law, states did not agree to criminalise aggression as a crime in written law.

Pre-war attempts to define the crime of aggression did not bring any results, although the Kellogg-Briand Pact of 27th August 1928¹⁴⁰ formulated the concept of crimes against peace, which became the legal basis for punishing Nazi and Japanese criminals in the Nuremberg and Tokyo Trials.¹⁴¹

The key provision was Article 2:4 of the UN Charter adopted in 1945 according to which ‘[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or independence of any State’. This provision allows us to conclude that war is not a legal means of resolving international disputes,¹⁴² but this does not mean that a consensus has been reached on the criminalisation of the crime of aggression.¹⁴³

The question of defining this crime was an extremely difficult challenge for the international community. It was not defined for the purposes of the ICTY and the ICTR, as the jurisdiction of these Tribunals was limited to crimes committed in the context of internal conflicts. Nor was an agreement reached in Rome during the Intergovernmental Conference of 1998, at which the Rome Statute was adopted.

137 Cottier and Kolb, 2022, pp. 360–361.

138 Werle and Jessberger, 2020, pp. 462 et seq.; ICC, Lubanga, TC I, 2010, para. 540; ICC, Katanga, TC II, 2014, para. 1174.

139 Ambos, 2013, pp. 284 et seq.; Dörmann, 2000, p. 780; Werle and Jessberger, 2020, pp. 476 et seq.

140 See: Robinson, 1999, pp. 51 et seq.; Ambos, 2013, p. 280.

141 In the Nuremberg Judgment 12 from of 24 defendants charged with the crime against peace were convicted. In the Tokyo Judgment it concerned 25 defendants from of 28 charged.

142 See: ICJ, Corfu Channel (*United Kingdom v. Albania*), 1949.

143 UNGA Res. 3314 (XXIX), 1974.

However, it was assumed that this crime would become part of the ICC's jurisdiction once an agreement could be reached on its definition and legal elements (Article 5:2 of the RS).

This was only achieved during the Kampala Review Conference in 2010 when a new provision of Article 8 *bis to RS* was introduced.¹⁴⁴ According to this provision “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.¹⁴⁵

Determining whether an “act of aggression” constitutes a manifest violation of the UN Charter requires an analysis of three elements: nature, gravity and scale. All these features of an act of aggression must be serious enough to show that the violation of the Charter was “obvious”. Fulfilling only one of these elements is not enough. Therefore, cases of aggression “of lesser gravity” (e.g. minor border skirmishes) are to be excluded from the jurisdiction of the Court. According to the principles of the imputable nature of a prohibited act, in order to be able to attribute the commission of this crime to the perpetrator, the perpetrator should be aware of the factual circumstances determining that a specific use of force against another state constituted an act of aggression and moreover, by its nature, gravity or scale, manifestly violated the UN Charter.¹⁴⁶

In defining in RS the acts considered acts of aggression, States referred to UN Definition on Aggression and recognised that such an act is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state or in any other way inconsistent with the UN Charter. An act of aggression is considered to be:

- a) The invasion or attack by the armed forces of a State on the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- c) The blockade of the ports or coasts of a State by the armed forces of another State;
- d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the

144 By 15th November 2024 The Kampala Amendment on the crime of aggression ratified 46 States.

145 Hajdin, 2021, pp. 43 et seq.

146 Werle and Jessberger, 2020, pp. 599 et seq.

- conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
 - g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

8. Future Prospects

From a broader perspective, it must be said that the ICC is still at the beginning of the road, hopefully a long one. A little over 20 years of its operation have passed in just the blink of an eye. The international community has decided on an important, but also very ambitious project. Unfortunately, tense international relations pose a great threat to its implementation. It turns out that the international criminal justice system has a chance to be implemented only when there is an atmosphere of mutual trust and cooperation. This is currently lacking. It is not only about the fact that several countries, including significant players in the international arena, have boycotted the Court. This is also the result of the lack of political determination of the State-Parties to ensure an appropriate level of cooperation.¹⁴⁷

It is impossible not to see that the cooperation of the Court with States Parties, as well as with States that have not ratified the Statute, will be of key importance for the success of the ICC. As we know, the Rome Statute system is devoid of an enforcement mechanism, which has been replaced by the obligation to cooperate fully with the Court (Part 9 and 10 of the RS). It concerns all its forms, but above all about the execution of arrest warrants issued by judges.¹⁴⁸ Currently only one case is pending before the Court at trial stage.¹⁴⁹ The next two could start before the end of 2026.¹⁵⁰ But, there is nothing more in the pipeline and in the near future we may see empty courtrooms. It does not matter that the Prosecutor's Office is very active and that it is proceeding with several investigations on four continents. Even if judges issue arrest warrants for suspects, these orders are not executed. As a result, the ICC may soon transform into in an "investigative institution", and the expectations of the international

147 The last, very negative example of demonstrative non-cooperation was the refusal to arrest a person wanted by the ICC during his official visit to Mongolia; ICC, Mongolia non-cooperation, PTC II, 2024.

148 Bellelli, 1996, pp. 211-240.

149 This is the case ICC, Said Abdel Kani (CAR II).

150 There are cases ICC Rodrigo Roa Duarte (Philippines) and ICC El Hishri (Libya).

community and, above all, the victims of atrocities for justice will only bring bigger disappointments.

It was the States that established the Court. It is now up to them to decide whether they still want to have a real independent judicial institution, or whether they prefer to drown the Court in mutual disputes by pursuing their own particular and individual political interests.

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International Humanitarian Law I: History of International Humanitarian Law (From the Beginning to 1949)

Endre DOMANICZKY

ABSTRACT

The paper traces the emergence and development of humanitarian law in relation to three legal concepts (*jus ad bellum*, *jus contra bellum*, *jus in bello*), from prehistory to 1949, when the adoption of the four Geneva Conventions led to the creation of a single normative text, which is still considered by the vast majority of states as a reference and framework. In doing so, we will touch upon the ancient written texts (the so-called legal codes and literary works), which can be regarded as the forerunners of humanitarian law, and which testify that, while war is a characteristic of the human race, human communities, from the very beginning of settled life at the latest, have consciously sought to limit violence and spare those affected by war, in the interest of the safety and survival of the community. The foundations of modern law were laid in antiquity, and the Enlightenment laid the foundations for modern humanitarian law. Modern regulation was triggered by the development of mass armies and military technology, and the first normative regulation, the Lieber Code of 1863, became the basis for the so-called Geneva and Hague Law. In several waves, following the major armed conflicts (e.g. World Wars I and II), this became a unified body of law by the middle of the 20th century – the course of this process and the content of the various conventions are described in detail in this study.

KEYWORDS

war, humanitarian law, diplomacy, Geneva law, Hague law, Red Cross

Conflicts are inherent to human coexistence, and their resolution is essentially possible through *consensus* or *violence*. The two methods can be used alternatively, complementarily or in combination. Diplomacy deals with consensual conflict management in developed societies, while the use of violence is one of the tasks of soldiers. Violence – despite the fact that it has many negative characteristics and consequences – has also had a positive impact on the development of the human race. Whatever the purpose of the use of violence – for example, individual or group dominance or the acquisition of resources – in addition to defeating the enemy, the protection of one's own fighters and one's own community has always been a priority goal.

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This way, violence – through technical development – turned into armed violence relatively quickly, since with the help of tools it became possible to achieve success (victory) faster and with less damage. Violence is therefore a necessary element of human history, which cannot be eliminated, only regulated. Or rather: one can strive to limit it by applying rules. In times of violence – as the ancient Romans already established – the laws are silent.¹ Which also means that the application of humanitarian law – one of the main purposes of which is to regulate the course of armed conflict – is always periodic and contingent. It is *periodic* because the conflict period is a temporary state compared to the usual order of things. And it is *contingent* because warlords are never primarily guided by philanthropic (“humane”) goals, but rather by tactical-military and economic or energy-saving considerations. The only real limit to violence is therefore not humanitarian law, but *reciprocity* based on experience in combat. Violence can only be stopped by an equivalent level of violence. “Cruelty against barbarism” – as it reads in the famous French writer, Victor Hugo’s novel.²

With this in mind, this chapter will introduce the basic definitions of international humanitarian law and the most important stages in the historical development of humanitarian law.

1. Conceptual Background

The three key legal concepts related to humanitarian law are:

- *jus ad bellum*,
- *jus contra bellum*,
- *jus in bello*.

Let us examine their characteristics!

First of all, we can see that two elements – *jus* (law) and *bellum* (war) – are identical in all three concepts, suggesting that the area between peace and war is always legally unstable. The difference lies in the adverbs³ between the two nouns.

The *jus ad bellum* is the right to go to war, which was in fact a sovereign right of states until the beginning of the modern era (1914). The brutality of the two World Wars, including trench warfare based on resource-consuming tactics, which involved the use of chemical weapons and the destruction of buildings and objects of cultural heritage, and caused suffering to a large numbers of civilians, marked the beginning of a new era based on the limitation of violence. However, the peace treaties that ended the First World War still had a long way to go before a general ban was enshrined in the United Nations Charter.

1 The original form of the well-known saying – ‘the muses are silent among weapons’ – was ‘For among arms, the laws are silent’, at least that is how the great orator Marcus Tullius Cicero (106–43 BC) put it in a speech (‘Silent enim leges inter arma’, Cicero: Pro Milone, IV, 11.).

2 Hugo, 1900, p. 164.

3 “Ad”, “contra” and “in”.

Jus contra bellum is generally understood as a related regulation, and more specifically as a general prohibition of violence, upon which the post-World War II world order was built. In the words of Professor János Bruhács, a prominent Hungarian international law scholar, ‘the prohibition of violence is the cornerstone of modern international law, one of the most important norms of international coexistence, indeed the “quintessence” of international law’.⁴

The third concept, *jus in bello*, refers to the set of rules applicable during a period of conflict (combat or war), which partly contain provisions on the treatment of soldiers towards each other and towards the civilian population. These rules are known collectively as humanitarian law.

We have seen that war was already considered by the great legal nation of antiquity, the Romans, to be a somewhat extra-legal (“*ex-lex*”) period – this was reflected in the maxim ‘among weapons the law is silent’, but it was also alluded to in the ‘Woe to the vanquished!’,⁵ which the great Roman historian *Titus Livius* (59 BC – 17 AD) preserved for posterity in his great work,⁶ as the legal order, which ensured the normal course of things, is replaced by measures taken by the warring parties in order to win.⁷ In view of this, we have stated above that the temporal and material scope of humanitarian law is limited. However, an important characteristic of this body of law is that although its fundamental elements are of customary law origin and as such, often date back to the early period of written history (see below, references to ancient “legal codes”), its development has tried to keep pace with the development of war technology, and its regulatory areas have adapted to the changing concept of war. In other words, the development of humanitarian law – compared to technological progress – has been intermittent and slow, and often uneven in order to keep pace with conceptual changes.

4 Bruhács et al., 2023. p. 280. See also: Kende et al., 2018; Kovács, 2025.

5 The famous Roman saying (“*Vae victis!*”) captures the experience of war that the rules of war and peace are always written by the victors, as they please. For the full story of the Gallic leader Brennus’ campaign against Rome; See: Livy, 2011.

6 Livy’s great work, titled *Ab Urbe Condita...*, (“From the Founding of the City”), covering the period from the earliest legends of Rome to Augustus’ reign, consisted of 142 books (however, we currently know only 35 books from these).

7 This characteristic of war was also recognised outside of Europe. It is sufficient to refer here to the book (*The Art of War*) attributed to the Chinese master Sun Tzu, written around the 4th-3rd century BC, according to which: ‘war always follows the path of deception’; Szun-ce, 1998.

Given that the end⁸ of World War II (1945)⁹ marks the most significant milestone in the development of humanitarian law, this chapter will review the relevant changes in legislation from the beginning to that date.

2. Prehistoric times¹⁰

Violence may have dominated the prehistoric world for thousands of years. The more powerful group or groups took what they needed from the other: a conveniently located campsite, food, and the able-bodied members of the group: women and older children. At that time there was only one rule: the law of survival, and the elderly, the weak (including the sick, but also babies and nursing women), anyone who could be a problem for the group's functioning were slaughtered or abandoned, which meant a death sentence, since the group, the horde, could only survive as a community.

Initially, the number of violent conflicts may have been relatively low, due to low population density. However, the development of settled lifestyles and weapons has tended to increase the number and impact of conflicts. As there were no written sources at the time, the memory of these conflicts is preserved in archaeological remains. The oldest known remains of violent conflict were found in Africa. A site near *Jebel Sahaba* on the northern border of Sudan dates back 14,000 years, while the *Nataruk* site in Kenya records a conflict that turned into a massacre around 12,000 years ago. It is worth noting that the occurrence of violent conflicts can be inferred even in the absence of direct evidence of violence, for example through the interpretation of cave paintings thousands or tens of thousands of years old, for which attempts have been made both in Europe and Australia.

Around 10 to 8 thousand BC, a process began which, over time, led to the emergence of agriculture in several continents (Asia, Africa, America), in a piecemeal fashion. This was accompanied by the division of labour and the consolidation of social roles, and led to the appearance of larger centres and cities. These were built at defensible locations and were surrounded by walls. The protection of the towns,

8 It is a big question whether World War II really ended on September 2, 1945, as Russia and Japan officially have an armistice until today (2024). The main obstacle to a peace treaty is the ongoing dispute over some of the southern members of the Kuril Islands. Negotiations to conclude a peace treaty resumed in the 2010s, but it is questionable whether they will lead to a result in a short time (since this is not a situation that arose in 1945 due to a specific event, but rather the settlement of a conflict that lasted about a century (1855–1945), and the islands are of particular importance from a geopolitical and mining perspective).

9 It is worth noting that the names World War I and World War II are concepts based on public consensus, as in that era many people already felt that the final conclusion of the conflict that began in 1914 (the so-called Paris Peace Treaties) was in fact only a long, generation-long ceasefire, cf.: 'This is not peace, but a twenty-year truce!'), and that World War II can actually be considered a continuation of the first conflict. For this reason, I use the term "interwar period" in one of the titles of this chapter, as it is common in historical works.

10 For this period, see more: Gat, 2006; Kelly, 2000.

the population and the community's resources was provided by soldiers, who were members of the community specialised in this area.

3. Ancient Times

The beginnings of antiquity¹¹ are often associated with the advent of writing. However, this development necessitated a level of organisation within established communities that goes beyond mere cities, instead resulting in the formation of more complex entities known as city-states. Over time, city-states developed their own legal systems. These primarily governed social relations, but in many cases there were provisions on external relations and warfare, such as *the laws of Hamurabi* in Mesopotamia (circa 1750 BC) or the so-called *Manu laws* of India (circa 200 BC), which, among the responsibilities of the king, contain detailed provisions – anticipating modern legislation by about 1500 years ago – on the protection of the wounded and the prohibition of the use of poisoned arrows.

‘If an enemy threatens his country, [the king] shall confront him with courage... But he shall not be cruel in battle, nor use poisoned arrows or fire-tipped weapons; nor kill a defenceless, weak, fleeing enemy who begs for mercy, nor a sleeping man, a man who has lost his weapon, a man who is naked or just curious, nor a man whose weapon is broken or who is seriously wounded.’¹²

In addition to codes of law, literary works from early times are important sources of humanitarian law. The *Mahabharata* of India (4th century BC), the longest poem in human history,¹³ makes it the duty of the king to fight his enemies fairly.¹⁴

One of the most influential written sources of European culture, the Bible, also contains provisions of a humanitarian legal nature.¹⁵ For example, in the Old Testament, in Deuteronomy, there are specific provisions for the siege of cities, where we read:

‘When you draw near to a city to fight against it, offer terms of peace to it. And if it responds to you peaceably and it opens to you, then all the people who are

11 Or rather the beginnings of history, which could have started some time when the first permanent human settlements were founded.

12 The translation is based on the Hungarian version; Büchler, 1915, p. 93. The quoted passages are found in Book VII.

13 The epic consists of 200,000 lines of verse, roughly ten times as long as the combined text of the Iliad and the Odyssey, which originated in European culture.

14 Mahabharata, section 95.

15 First and foremost is the command ‘thou shalt not kill’ in the Bible, Ten Commandments (Exodus 20:13).

found in it shall do forced labour for you and shall serve you. But if it makes no peace with you, but makes war against you, then you shall besiege it. And when the Lord your God gives it into your hand, you shall put all its males to the sword, but the women and the little ones, the livestock, and everything else in the city, all its spoil, you shall take as plunder for yourselves. And you shall enjoy the spoil of your enemies, which the Lord your God has given you.’¹⁶

In other words, the text calls – in a very forward-looking way – for the avoidance of unnecessary bloodshed on the one hand, and the sparing of the lives of the civilian population, on the other. In another passage, however, we can also see how these humanitarian ideas were overridden by the interests of the warring parties even in ancient times! In the already quoted passage of the book of Deuteronomy, concerning the siege of cities, we read:

‘When you besiege a city for a long time, making war against it in order to take it, you shall not destroy its trees by wielding an axe against them. You may eat from them, but you shall not cut them down. Are the trees in the field human, that they should be besieged by you? Only the trees that you know are not trees for food you may destroy and cut down, that you may build siegeworks against the city that makes war with you, until it falls.’¹⁷

The text clearly encourages the sparing of fruit trees, which are important for feeding the army, but it also takes into account the long-term interests of the victor, beyond the strategic objectives, since the planting and cultivation of a single fruit tree or grove could take a long time, several decades, so the besiegers’ interest, if they wanted to enjoy it, was to spare these planted orchards.

It is important to point out that early humanitarian law prescriptions were usually embedded in religious prescriptions, primarily in order to enforce their application by divine intervention. Despite the fact that the state framework had already been consolidated in antiquity and that city-states could grow into empires under favourable conditions, religious coercion persisted throughout antiquity and for much of the Middle Ages. The realisation that states could impose, apply and enforce humanitarian rules of their own choosing only became apparent in the aftermath of the modern wars (see the Thirty Years’ War, 1618-1648) and only took firm shape thanks to the intellectual current of the Enlightenment (see below, Rousseau).

But going back to antiquity, the best-known city-state, which became one of the greatest empires in human history, was the tiny Latin city of Rome, traditionally founded in 753 BC on the Italian peninsula on the banks of the Tiber River. The founders were simple shepherds whose lives were governed by the cultivation

¹⁶ Bible, Deuteronomy 20:10–14.

¹⁷ Bible, Deuteronomy 20:19–20.

of the land, the military and religious rituals. Over the centuries, this society, built on strict and consistent rules, produced one of the greatest intellectual products of mankind, Roman law, whose influence can still be seen in the legal systems of many states. From the outset, it was of paramount importance to the Romans, with their scarce resources, that they should fight only just wars with other nations. The rules of war were enforced by a special clerical body, the *fetiales*. The idea of a just war was thus already a priority in antiquity, and the previously unrestricted right to start wars was placed under the control of the priestly body.¹⁸

Christianity, thanks to St Augustine (354-430), who knew Roman law well, embraced the idea of just war in antiquity, thus providing some control over the right to wage war.

4. Middle Ages

From the beginning, the Catholic Church has sought to influence and then regulate not only the spiritual life of individuals, but also the relations between European states. In the period of uncertainty and unrest that followed the fall of the Roman Empire (the early Middle Ages), the Church tried to control violence by various means, since peace, forgiveness and mercy were at the heart of its credo. As King St Stephen of Hungary,¹⁹ the common saint of the Roman Catholic and Orthodox Churches, noted in his beautifully moving *Admonitions* (“Intelmek”): God wants mercy, not sacrifice! The method of preventing and containing violence, which became common around the turn of the millennium (1000), was the *Pax Dei* (“Peace of God”) and the *Treuga Dei* (“Truce of God”),²⁰ which proclaimed a truce, especially in connection with church holidays. Although the initiative came from the Church, which was able to enforce the ordinance through excommunication, it was later applied by secular rulers. However, the papacy acted not only to promote peace but also to reduce cruelty. This is the reason for the provisions adopted by certain synods, for example, to reduce the use of crossbows or to treat prisoners of war more humanely.²¹ In addition to normative rules, prose literature also played a major role in the Middle Ages, setting out the duties of the ruler in the form of “mirror for princes”. Two of these are worth highlighting. Unique in the Central European region is the above-mentioned *Admonitions* of King St. Stephen, which dates from the early first half of the 11th century. In its 10th chapter, the king addresses his son:

18 For the *fetiales*, see more: Pecz, 1902, p. 760; Hamza, 1988, pp. 753–774.

19 Saint Stephen of the House of Árpád, prince and later king (r. 997–1038), first king of Hungary.

20 See more in the book by Hungarian historian Katus, 2001.

21 However, it is questionable to what extent these positive resolutions were actually enforced in practice, for example during the successive crusades. For a detailed account of the history of the Crusades; See: Runciman, 2002.

‘The king must be adorned with piety and mercy, but he must also be imbued with other virtues. For if a king is defiled by impiety and cruelty, he shall be called a tyrant, and shall claim the name of king in vain. For this reason, my beloved son, sweetness of my heart... be merciful... to all who come to you. For the practice of love leads to the highest happiness. Be merciful to all who suffer violence, always keeping in your heart the divine admonition, I want mercy, not sacrifice!’²²

The passage is clearly written to avoid war and unnecessary sacrifice and suffering.

The famous humanist Erasmus of Rotterdam’s *The Education of a Christian Prince* was written almost half a millennium later with a similar aim. Although Erasmus lived in Western Europe, this work was also used in the education of the future German-Roman Emperor (and King of Hungary and Bohemia), Ferdinand I, so it is worth quoting from it for its Central European relevance. Erasmus, in the chapter of his book entitled *The Art of Peace*, encourages the avoidance of war when he says:

‘Although the writers of antiquity divided the whole theory of state government into two sections, war and peace, the first and most important objective is the instruction of the prince in the matter of ruling wisely during times of peace, in which he should strive his utmost to preclude any future need for the science of war.’²³

Finally, it should also be mentioned that in the Middle Ages, the chivalric society in its heyday also had unwritten rules of customary law (*ius armorum*), including the protection of women and children and the humane treatment of prisoners of war. Breaking these, for example to the detriment of Richard I of England,²⁴ was considered a crime against the entire Christian community.²⁵

5. The Early Modern and Enlightenment Periods (16th–18th Centuries)

5.1. *Theoretical Underpinnings of Humanitarian Law*

Although in public discourse the dawn of the “new age” (as a historical period) is most often expected to be marked by the great discoveries, in military terms this period brought an era of great wars that spanned several continents, rather than local conflicts. Ever larger armies and ever more modern firearms caused increasing suffering

22 The translation was based on the Hungarian text Szent István király *Intelmei Imre herceghez* (*Libellus de institutione morum*).

23 Erasmus, 1963, p. 205.

24 Returning home from the Crusades, Richard, the Lionheart of England (reign: 1189–1199) was captured by Prince Leopold V of Austria in 1192. Richard was finally released only in 1194.

25 For example, Pope Celestine III excommunicated the Austrian prince for the imprisonment of the English monarch, who eventually died under banishment.

not only for soldiers but also for civilians. In the wake of prolonged, bloody wars, famine and epidemics decimated the population.

The first major war of the era, the so-called 30 Years' War (1618-1648), which was fought largely in central Europe, involved most of Europe's powers. Ostensibly encompassing a series of religious conflicts, the real aim of the war was to gain hegemony over Europe. The hostilities were renewed a few decades later (War of the Spanish Succession, 1701-1714), and now spread over several continents. The struggle for hegemony led to the strengthening of the role of the states and the creation of permanent state armies. The struggle of the states for hegemony ("primacy") led to the codification of the law of war and the regulation of peaceful coexistence and relations between states.²⁶ Two jurists, Alberico Gentili²⁷ and Hugo Grotius,²⁸ who largely continued his work, achieved lasting results in the codification of the law of war, although their work did not become known until well after their deaths, during the Enlightenment. One of the greatest figures of this intellectual movement was Jean-Jacques Rousseau (1712-1778), born in Geneva, Switzerland. In his treatise on the social contract, one of Rousseau's most important works, he argued – partly as a development of Grotius' fundamental work – that

'it is clear that this supposed right to kill the conquered is by no means deducible from the state of war. Men, from the mere fact that, while they are living in their primitive independence, they have no mutual relations stable enough to constitute either the state of peace or the state of war, cannot be naturally enemies. War is constituted by a relation between things, and not between persons; and, as the state of war cannot arise out of simple personal relations, but only out of real relations, private war, or war of man with man, can exist neither in the state of nature, where there is no constant property, nor in the social state, where everything is under the authority of the laws. [...] War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders. Finally, each State can have as an enemy only other States, and not men; for between things disparate in nature there can be no real relation. Furthermore, this principle is in conformity with the established rules of all times and the

²⁶ See more: Kissinger, 2014.

²⁷ Alberico Gentili (1552–1608) was born and educated in Italy, but his legal work was performed in England, where he was a professor at Oxford University for over twenty years. His most important work is *De Jure Belli Libri Tres* [On the Law of War in Three Books], published in 1598, which is now recognised as one of the founding works of public international law theory. Gentili is also known as the father of international law, although his work was long overshadowed by Grotius.

²⁸ The Dutch jurist Hugo Grotius (1583–1645) argued for the universal acceptance and application of natural laws binding on all nations in his major work, *De jure belli ac pacis libri tres* [On the Law of War and Peace in Three Books], published in 1625. Grotius is also often called the father of international law.

constant practice of all civilised peoples. Declarations of war are intimations less to powers than to their subjects. The foreigner, whether king, individual, or people, who robs, kills or detains the subjects, without declaring war on the prince, is not an enemy, but a brigand. Even in real war, a just prince, while laying hands, in the enemy's country, on all that belongs to the public, respects the lives and goods of individuals: he respects rights on which his own are founded. The object of the war being the destruction of the hostile State, the other side has a right to kill its defenders, while they are bearing arms; but as soon as they lay them down and surrender, they cease to be enemies or instruments of the enemy, and become once more merely men, whose life no one has any right to take.²⁹

Rousseau's theory has been considered the modern foundation of humanitarian law, since he logically deduced the need to protect the unarmed enemy, following the work of Gentili and Grotius. However, the idea is not new, if we look back to the Laws of Manu, which predate Rousseau by almost two thousand years,³⁰ but it is well known and has drawn attention to the creation of generally recognised rules for wartime. Thanks to Rousseau, Geneva can therefore be considered the birthplace of humanitarian law, even though it was only a century and a half later, in the 19th century, that these ideas were put into practice.

6. On the Threshold of the Age of Mass Warfare: Attempts to Establish Universal Humanitarian Law (19th Century)

Historians usually speak of a long 19th century, which lasted from the outbreak of the French Revolution to the end of the First World War (1789-1918). This period began with a great war, known as the French Revolution and the Napoleonic Wars (1789-1815), and ended with an even greater conflict, World War I (1914-1918). The latter, as the famous French soldier, Marshal Foch, observed, did not bring peace, but only a long armistice. But apart from these two major conflicts, peace prevailed for most of the century, only in 1848 did revolts and revolutions sweep across Europe. Most of the European wars, however, remained local, even if they had a long-lasting impact on the fate of the other participants, such as the Crimean War (1853-1856), the Franco-Italian-Austrian War (1859), the Austro-German War (1866) or the Franco-German War (1870).

Although these wars were fought over a relatively small area and during a short period of time, they were fought by professional soldiers with modern weapons.

²⁹ Rousseau, 1920, Chapter IV.

³⁰ It is also worth noting that Gentili had already discussed the creation of general regulations for prisoners of war a century and a half earlier.

In the battles, tens of thousands of men were often killed or wounded, many of them dying from lack of supplies or infection.

The first steps to help the wounded were taken by private individuals. The efforts of Susan (Zsuzsanna) Kossuth of Hungary (1817-1854) were supported by the Hungarian State in 1848, while during the Crimean War the work of the British Florence Nightingale (1820-1910) and the Russian Grand Duchess Elena Pavlovna (1806-1873) were supported by the British government and the Russian Emperor, respectively.

6.1. First Attempts to Protect Victims of War: The So-Called Geneva Law

The Red Cross movement also grew out of private initiative. A Geneva merchant, Henri Dunant (1828-1910), happened to be at the site of the decisive battle of the Franco-Italian-Austrian War, the Battle of Solferino in 1859. Here he saw the suffering of the wounded at first hand and was involved in organising their care. On his return home, he wrote a book published at his own expense in 1862 (*A Memory of Solferino*), in which he proposed the drafting of international treaties guaranteeing the neutrality and protection of those wounded in battle, as well as of doctors and field hospitals, and called for the creation of national voluntary relief organisations to help care for wounded soldiers in the event of war, without discrimination.

Dunant's idea was discussed at the Geneva Society for Public Welfare in early 1863. The sub-committee then set up within the Society soon became autonomous and began to implement Dunant's ideas under the name of International Committee for Relief of Wounded in the event of War.

In the autumn of 1863, the Committee organised an international conference at which the Great Powers of the time – the British, Russians, Germans, Austrians, French and Italians – were represented. Among the decisions taken at the conference were the establishment of national relief societies, the declaration of neutrality for the wounded, the coordination of the recruitment of volunteer nurses and the introduction of a general symbol for nurses in the field: the white armband with a red cross, which later became the symbol of the whole organisation in 1876. Hence the organisation's new name: the International Committee of the Red Cross (ICRC).

In 1864, following the Committee's decisions, the Swiss government convened an international conference in Geneva, at which the great powers of the time were almost without exception represented. The Convention adopted at the end of the conference laid down for the first time legally binding rules to ensure the neutrality and protection of hospitals, medical staff and wounded soldiers.

The main provisions of the Geneva Convention of 1864³¹ are:

- a) military hospitals are considered neutral and must therefore be protected and spared by the belligerents as long as they are occupied by patients or wounded. When military hospitals are occupied by military forces, their neutral status ceases.

31 The full title of the Convention is: Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864; Geneva Convention, 1864.

- b) hospital staff and camp chaplains are entitled to the benefit of neutrality during their stay.
- c) hospital staff and camp chaplains have the right to continue their work even if the hospital is occupied by the army. If they wish to leave, the army occupying the hospital is obliged to escort them to the enemy.
- d) in all cases, hospitals keep their equipment, and staff can only take their personal belongings.
- e) residents of the country who provide aid to the sick will remain at large, exempt from troop deployment and part of the war tax that will be imposed.
- f) wounded or sick soldiers, regardless of their nationality, should be gathered and cared for. Those who, after recovery, are found to be unfit for service should be returned to their home country. Those who promise not to take up arms again until the end of the war may also be sent home after they have recovered. Patient transports and the persons responsible for driving them are protected by absolute neutrality.
- g) hospitals, patient transports and staff should have a distinctive sign, a red cross in a white field.

Although humanitarian legislation seemed to be on the way to rapid development after the 1864 conference, it actually stalled for decades and only gained new momentum towards the end of the 19th century, thanks to the Hague Conferences. Dunant, whose ideas have saved the lives of millions of people over the past century and a half, had a difficult fate himself: he was expelled from the leadership of the Committee in the 1860s and later removed from membership. He only received redress for his exclusion decades later, when he was awarded the first Nobel Peace Prize in 1901, shared with Frédéric Passy.³²

6.1.1. An Attempt to Limit the Violence of War, to Create a Framework for War (the So-Called Hague Law)

While Europe was at peace, on another continent, the future world power, the United States of America, was in the throes of Civil War between 1861 and 1865. More than a million people³³ were killed in the conflict between a group of Northern and Southern States. It was a modern war, with prison camps, partisans, and both sides engaged in a variety of acts of warfare and sabotage. The military regulations previously in effect (the so-called Articles of War) did not contain adequate provisions to conduct such battles. Consequently, at the end of 1862, Francis Lieber (1798–1872), a distinguished professor at the Columbia University of German origin, was commissioned to review the existing military regulations, specifically the 1806 American War Laws. Within a few months, Lieber compiled a new set of regulations, which was promulgated by

32 Frédéric Passy (1822–1912) was a French economist and pacifist who was a founding member of several peace societies and the Inter-Parliamentary Union (which was founded in 1889).

33 Including those who died in battles, diseases, prison camps, as well as civilian casualties.

President Lincoln³⁴ in April 1863. Order No. 100, which he authored, became widely known as the Lieber Code.³⁵ So what started in Europe through private initiative, in America – almost simultaneously – was raised at the request of the state.

In ten chapters, Lieber outlined the course of the war and the rules for each of the participants. Above all, he also dealt in detail with the wounded, prisoners of war and civilians, ensuring their protection and neutral treatment. The main merit of the Code, however, lies in its definition of war and its main characteristics. Lieber conceived war as an inherent part of the coexistence of peoples. He believed, like the ancient Romans, that in time of war all other rules were suspended, and that it was therefore necessary, in order to avoid unnecessary violence, to establish a special set of rules which could serve as a guide for the belligerents in this period. The code first defines, *inter alia*, the concept and purpose of war. 'Public war is a state of armed hostility between sovereign nations or governments,'³⁶ says Professor Lieber, a concept which also includes his specially emphasised position that the initiation of war is a sovereign right of nations.³⁷ The purpose of war is defined by the Code as '[t]he ultimate object of all modern war is a renewed state of peace'.³⁸ To this end, it not only prohibits cruelty, the use of poisoned weapons, robbery, pillage and self-destruction,³⁹ but also criminalises them, thereby effectively creating a category of war crimes. It specifically highlights the protection of works of art,⁴⁰ paving the way for international legislation to protect cultural heritage.

Although Lieber's objective was naturally limited to establishing regulations applicable only to the United States and its wars, the content and structure of the code soon attracted significant attention abroad, particularly in Europe. Its influence is already noticeable in the Saint Petersburg Declaration of 1868. The immediate impetus for issuing the declaration was the prohibition of a new type of explosive projectile invented in 1863; therefore, this document is often referred to as the first international arms prohibition agreement. The declaration also attempted to define certain concepts, specifying the purpose of war as weakening the enemy's military forces.⁴¹ According to the Declaration, the use of weapons that cause unnecessary suffering is contrary to the laws of nature.

In 1874, an international conference was convened in Brussels (the Brussels Conference of 1874) at the suggestion of the Russian Tsar Alexander II to establish rules for land warfare, but the draft⁴² submitted was not supported by the great powers.

34 Abraham Lincoln (1809–1865), lawyer and politician, the 16th president of the United States of America (1861–1865).

35 The official name of the text issued by Abraham Lincoln is: General Orders No. 100, Instructions for the Government of the Armies of the United States in the Field.

36 Lieber Code, Point 20.

37 Ibid., Point 67.

38 Ibid., Point 29.

39 Ibid., Point 16.

40 Ibid., Point 35.

41 St. Petersburg Declaration, 1868.

42 Brussels Declaration, 1874.

However, the Geneva-based International Law Institute, founded in 1873 under the leadership of Gustave Moynier (1826-1910), president of the Red Cross and a lawyer by training, took up the draft and in 1880 published a draft of the laws of war on land (Oxford Manual, 1880), compatible with the Geneva Convention of 1864.⁴³

In fact, the Oxford Manual anticipated the harmonisation of the two strands, the Geneva Law focusing on the wounded and the Hague Law focusing on the rules of war, which was not formally achieved until 1949 with the adoption of the four Geneva Conventions (see below).

6.1.2. The Hague Peace Conferences (1899 and 1907) and the Geneva Convention Supplement (1906)

After the Brussels Conference of 1874 had failed, mainly because of the opposition of the great powers, it became clear that further progress was only possible with the support of the great powers. The Oxford Manual itself was merely a proposal for further codification, but had no binding force. Moynier's 1872 proposal for the establishment of a permanent international arbitral court to punish violations of humanitarian law also failed because of opposition from the great powers.

Codification was finally restarted at the initiative of the Russian Emperor Nicholas II, at whose invitation the first Hague Conference was held in The Hague in 1899, on the Emperor's birthday. This resulted in the adoption of three conventions and three declarations.

The conventions are as follows:

1. Convention for the Pacific Settlement of International Disputes
2. Convention with respect to the Laws and Customs of War on Land
3. Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864

The declarations are as follows:

1. Declaration concerning the Prohibition of the Discharge of Projectiles and Explosives from Balloons or by Other New Analogous Methods
2. Declaration concerning the Prohibition of the Use of Projectiles with the Sole Object to Spread Asphyxiating Poisonous Gases
3. Declaration concerning the Prohibition of the Use of Bullets which can Easily Expand or Change their Form inside the Human Body such as Bullets with a Hard Covering which does not Completely Cover the Core, or containing Indentations.

After reading these instruments, it becomes clear that the Lieber Code has had a significant influence on their text. At the same time, the great powers have sought to summarise and reflect on the results of previous codification attempts. This can be illustrated by the decisions taken to apply the Geneva Convention of 1864 to naval

⁴³ Oxford Manual, 1880.

warfare (which had been an important objective of the Red Cross since 1864), to set up a Permanent Court of International Arbitration (which, as we have seen, the President of the Red Cross had already proposed in 1872) or to extend the scope of the St. Petersburg Declaration (Declaration No. 3). The proactive approach of the participants at the conference, who, recognising the rapid development of military technology, which could only be followed by codification in retrospect, made it possible to draw up rules that would apply to future military equipment (Declaration No 1), was a step forward. Although the legal scholar who drafted it, Friedrich Martens,⁴⁴ who represented Russia at the Hague Peace Conferences, is remembered in the history of international law, the *Martens clause*,⁴⁵ which is included in the preamble to Convention II, was also drafted under the influence of the Lieber Code.

The final document of the conference pointed to the need to review the 1864 Geneva Convention and to continue the work on the creation of a war regime in the framework of a new conference in The Hague.

Accordingly, the Geneva Conference of 1906, convened by the Swiss government, supplemented and revised the text of the Geneva Convention of 1864 on the basis of practical experience.⁴⁶ This treaty was replaced by the 1929 Geneva Convention, but remained in force until 1970.

The Second Hague Peace Conference was convened in 1907 at the initiative of US President Theodore Roosevelt.⁴⁷ Thirteen conventions and one declaration were adopted. The conventions are as follows:

1. Convention for the Pacific Settlement of International Disputes
2. Convention respecting the Limitation of the Employment of Force for Recovery of Contract Debts
3. Convention relative to the Opening of Hostilities

44 Friedrich Fromhold von Martens (1845 – 1909) was a diplomat in service of the Russian Empire who represented Russia at the Hague Peace Conferences.

45 There are two slightly different versions of the Martens Clause. The text as drafted at the 1899 peace conference is as follows: ‘Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.’ Hague Convention II, 1899, preamble. The text of the 1907 peace conference is as follows: ‘Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.’ Hague Convention IV, 1907, preamble.

46 The 1864 Geneva Convention consists of 10 articles, the 1906 Geneva Convention consists of 33 articles. The 1906 Geneva Convention focused on the creation of detailed rules for the sick, wounded, prisoners of war, and medical personnel. It is worth highlighting that the signatories appointed the Permanent Court of Arbitration at The Hague, established by the decision of the 1899 Hague Conference, to interpret the treaty (Geneva Convention, Final Declaration).

47 Theodore Roosevelt (1858 – 1919) was a politician and writer, the 26th president of the United States of America (1901-1909).

4. Convention respecting the Laws and Customs of War on Land
5. Convention relative to the Rights and Duties of Neutral Powers and Persons in case of War on Land
6. Convention relative to the Legal Position of Enemy Merchant Ships at the Outbreak of Hostilities
7. Convention relative to the Conversion of Merchant Ships into War-ships
8. Convention relative to the Laying of Automatic Submarine Contact Mines
9. Convention concerning Bombardment by Naval Forces in Time of War
10. Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention
11. Convention relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War
12. Convention relative to the Establishment of an International Prize Court
13. Convention concerning the Rights and Duties of Neutral Powers in Naval War.

6.1.3. *Declaration Prohibiting the Discharge of Projectiles and Explosives From Balloons*

As can be seen from the above, although the Second Hague Conference produced a significant amount of agreements, most of it focused on the further development of earlier legislation, such as the acquis of the 1906 Geneva Convention.⁴⁸ The Conference's work to develop maritime law is also significant.⁴⁹ The only convention of the Conference that has not entered into force also relates to the law of war at sea, namely the establishment of the International Prize Court (Convention No. 12.). This forum was envisaged to settle conflicting claims relating to ships captured during the war. Preparatory work on the rules of court and the creation of a maritime law of war code continued after the Second Hague Conference.⁵⁰ The Third Hague Conference was scheduled to reconvene in 1914, with the extension of the 1899 Declaration, but the outbreak of World War I prevented this from taking place. The development of the legislation already adopted and in preparation (such as the 1913 Oxford Manual on the Rules of Naval Warfare) continued in the light of the experience of the war.

7. The Two World Wars and Their Impact on the Development of Humanitarian Law (First Half of the 20th Century)

7.1. *Attempts to Eliminate War*

The war, which started as a local conflict in 1914, soon escalated into a global confrontation. The enormous human and material cost of the war both confirmed the need to legislate at the Geneva and Hague Conferences and confirmed the old truths about

48 See for example, Convention No. 10., which deals with the implementation of the results of the 1906 Geneva Convention into the rules of naval warfare.

49 See: Conventions, No. 6–12.

50 See: London Declaration, 1909; Additional Protocol to the London Declaration, 1910.

the nature of war, in particular that “among weapons the law is silent”. The belligerent parties repeatedly violated the rules they had previously accepted, and here it is enough to refer to the use of poison gases (on the Western Front, 1915, 1917)⁵¹ or the sinking of the steamer *Lusitania* (1915). In the wake of the standing wars, all cultural monuments in the immediate vicinity of the front were often destroyed (as in many towns in *Flanders*, Belgium), which was a great incentive for later codifications aimed at protecting cultural heritage.⁵² We have seen that the great powers were aware of the rapid development of military technology, but during the war, completely new (for example, tanks and aircrafts)⁵³ or modernised (for example, submarines)⁵⁴ equipment appeared, the regulation of which also required rapid actions.

But the most important lesson of the World War was the realisation that war is unlimited. That is why the great powers realised that it was not enough to create rules applicable during the war, but that war as such should be eliminated as a form of dispute settlement. Although international law literature cites a number of treaties as precursors to this idea,⁵⁵ this recognition was essentially fuelled by the desire for peace in societies exhausted by the victims of World Wars,⁵⁶ which also had a significant impact on international politics between the two World Wars (*pacifism*). The first concrete expression of the prohibition of violence (*ius ad bellum*) – which later became the basis of the 20th-century-world-order – is found in the Treaty of Versailles of 1919. The relevant parts of this treaty are found in two places: a) the Preamble (declarative part) and b) Articles 10-17 (normative part), but these can be considered as declarations of intent rather than as binding provisions. Overall, although the new system conditioned the right to wage war, it did not exclude its possibility. The contracting parties sought to limit the right to go to war by introducing various dispute settlement forums (arbitration, other courts, the Council of the League of Nations). They undertook not to wage war until the dispute settlement forum had made a decision. However, under the treaty, the renunciation of the right to wage war was only conditional, as the parties only fully renounced the right to wage war if the condemned party accepted the decision and fully complied with it. What the treaty

51 An attempt was made to ban these at the Hague Conference, but it was not until 1925 that the so-called Geneva Protocol (on the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare) was created.

52 This issue was only resolved in a satisfactory manner with the 1954 Hague Convention and its additional protocols adopted within the framework of the UN.

53 It is worth noting that although aircraft as a war weapon really made its debut in World War I, airborne reconnaissance had a tradition going back to the French Revolution.

54 The modern use of submarines for wartime purposes dates back to the American Civil War, when the Confederate Army's submarine *Huntley* successfully sank an enemy ship.

55 One of the agreements worth highlighting is the so-called Porter Convention concluded in 1907, according to which the use of force for the recovery of claims could only be used as a last resort (i.e. if the debtor state was unwilling to submit to arbitration or rejected all agreements or did not implement the decision).

56 Cf: the famous poem of the great Hungarian poet, Mihály Babits (1883–1941), in which he exclaimed at the beginning of the third year of the World War I: ‘Oh peace! Peace! / May peace be at last! / May it be over!’ (Húsvét előtt, [Before Easter] 1916, The author’s translation).

specifically contained was a prohibition of external aggression⁵⁷ ‘directed against the territorial integrity and political independence of the Member States’.⁵⁸ The rules of the treaty, which formed the basis of the new world order,⁵⁹ were therefore from the outset “complex and self-contradictory”,⁶⁰ and some of the great powers had opted out or withdrawn from it.⁶¹

In 1925, the European powers attempted to resolve the growing climate of distrust by concluding the Locarno Treaties. The treaties aimed to guarantee Germany’s western borders (maintaining the *status quo*). The three powers involved – Belgium, France and Germany – renounced war among themselves, but this undertaking ‘did not apply to East-Central Europe, marking a new battlefield’.⁶² So, once again, the efforts to avoid war had only limited results. However, the treaties did lead to a brief period of détente in European politics (usually referred to as the “*spirit of Locarno*”), which led to the Kellogg-Briand Pact of 1928. This treaty was the first to declare a general prohibition of war and, despite the fact that it remained a declaration of principle from the outset,⁶³ due to the many reservations attached to it, had a significant influence on many subsequent international documents, including the United Nations Charter. Originally a bilateral treaty between France and the United States, it was soon joined by the vast majority of the world’s countries, and its rules became a general reference – even though they failed to prevent the increasingly serious conflicts of the 1930s. The main points of the Kellogg-Briand Pact are as follows:

‘art. 1. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.

art. 2. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.’⁶⁴

57 Treaty of Versailles, 1919, art. 10.

58 Bruhács, Kis Kelemen and Mohay, 2023, p. 279.

59 It is also worth noting why we can say that the Treaty of Versailles formed the basis of a new world order. This peace treaty not only included territorial provisions but also the charter of an international organisation, the League of Nations, whose task was to maintain international cooperation. See more: Covenant of the League of Nations, Peace Treaty, Part 1, arts. 1–26.

60 Bruhács, Kis Kelemen and Mohay, 2023, p. 278.

61 The United States did not ratify the treaty, despite President Wilson’s key role in establishing the League of Nations. Germany, which had only been admitted in 1926, withdrew in 1933. Founding member Italy withdrew in 1937. Japan, a major power in Asia, withdrew in 1933. The Soviet Union, which had only been admitted in 1934, was expelled in 1939 for attacking Finland.

62 Bruhács, Kis Kelemen and Mohay, 2023, p. 278.

63 That is why the eminent expert on international conflicts, Henry Kissinger (1923–2023), stated that the Briand-Kellogg Pact prohibited war in all cases, except for foreseeable occasions.

64 For full text, see: Covenant of the League of Nations, 1919, Vol. 94, p. 59, No. 2137; See also: Faluhelyi, 1929.

In fact, the spirit of Locarno had already faded before Hitler came to power in the early 1930s. In the three main theatres of war of the later World War II (1939-1945) – Europe, Asia and Africa – major conflicts were about to erupt, years before the war.

Pre-war conflicts in the later World War II's theatres of war		
Asia	Africa	Europe
1931–1932 Manchurian War (1931 Mukden incident)	1935–1936 Ethiopian campaign (1934 Val Val incidents)	1936 Invasion of the Rhineland
1932–1937 Invasion of northern China		1936–1939 Spanish Civil War
1937–1945 Second Japanese-Chinese War		1939 Invasion of Albania

Table 1. Pre-war conflicts in the later World War II's theatres of war.⁶⁵

In Asia, following the 1931 Mukden incident, Japan – which had in fact been seeking hegemony in the Pacific since the end of the 19th century – occupied the Chinese part of Manchuria. This event was perhaps the first in a series of events that eventually led to the outbreak of World War II in 1939. But the Mukden incident is also noteworthy because, although the great powers ultimately pursued a policy of reconciliation until the autumn of 1939 and refrained from applying the more severe sanctions provided for in the Covenant,⁶⁶ they already strongly condemned Japan's intervention. The League of Nations refused to recognise the invasion of Manchuria, citing the Kellogg-Briand Treaty among other things.⁶⁷ Shortly afterwards, the United States adopted a similar position, declaring that it would not recognise any change resulting from the use of armed force (Stimson Doctrine). These formulas became the reference point in subsequent conflicts and were incorporated as self-evident principles in the UN Charter in 1945 – in the Preamble⁶⁸ and in its normative part,⁶⁹ as well.

It can be seen from the above that the international efforts to improve the legal framework that supports the elimination of wars have finally been successful after a quarter of a century (and two World Wars). The idea of the elimination of violence

65 Author's own table.

66 The Covenant of the League of Nations which was part of the Treaty of Versailles of 1919. Cf. fn. 59.

67 Cf.: League of Nations resolution of March 11, 1932; United States Department of State, 1931–1941, Doc. 158.

68 As the UN Charter Preamble says '... For these ends to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims...'

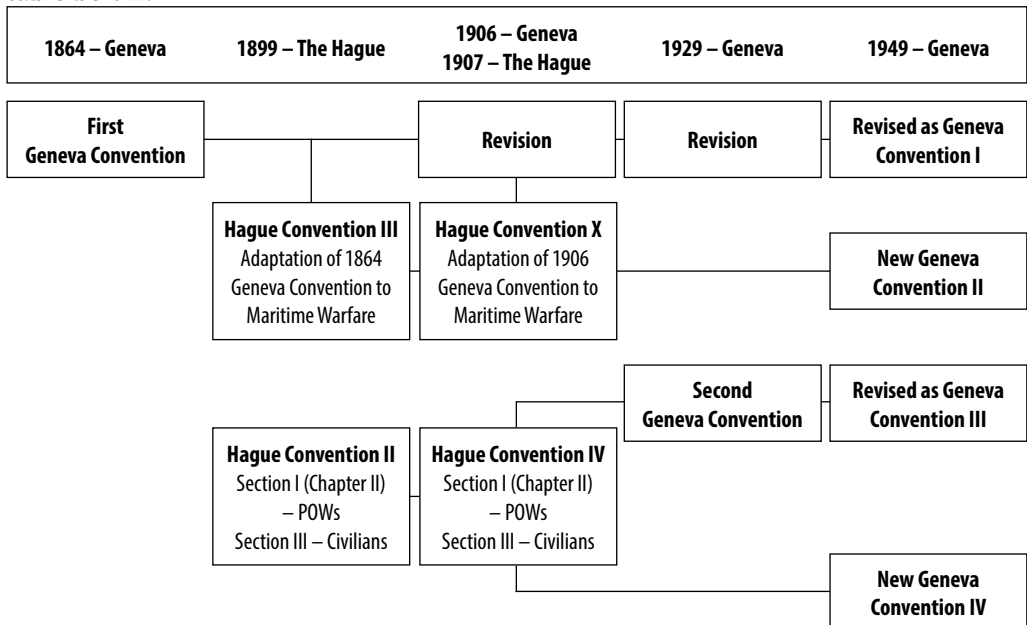
69 Later, the UN Charter also establishes the prohibition of violence as a norm (art. 2 (4) of the UN Charter): 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.

and force became a normative rule and, with its inclusion in the UN Charter, a fundamental principle, and thus one of the most important rules of modern international law.⁷⁰ But it is still questionable whether these international efforts have been able to eliminate wars and violence in practice.

7.1.1. *The development of humanitarian law in the Interwar period*

The experience of the First World War confirmed the theoretical assumption of the Hague Peace Conferences that the development of military technology is always one step ahead of normative regulation. However, technical progress not only influenced the conduct of hostilities but also facilitated, for example, the rescue of the sick and wounded. The regulation of air medical teams movement was necessary, similar to how hospital ships were regulated earlier at the Hague Conference.

On the other hand, the World War also confirmed the assumption – already evident from Dunant's book – that the humanitarian and the warfare law (i.e. Geneva and Hague law) are so closely intertwined that they can only be developed simultaneously. This joint treatment also follows from the Lieber Code, which is the basic body of rules of humanitarian law, containing a mixture of provisions on belligerents and the conduct of war. The development of the Geneva and Hague law is illustrated in the table below:



70 It is also worth noting that 'the primary responsibility for the maintenance of international peace and security' currently lies with the UN Security Council; UN Charter, Chapter V, arts. 24–25.

Table 2. When Geneva and Hague law converge (Source: Wikipedia)

The most important date in the development of humanitarian law during this period was 1929, when another Geneva Conference decided on the development of the Geneva acquis (Geneva Conference 1929).

Two conventions were adopted here:

1. The Convention on the Wounded and Sick⁷¹ is the third version of the Geneva Conventions of 1864 and 1906, improved in the light of the experience of the First World War. An important innovation was the drafting of regulations on the protection of medical aircraft and the use of the distinctive emblem in peacetime. It also recognised the use of other emblems in addition to the Red Cross.⁷² Finally, it is worth mentioning that the provisions of the Convention concerning the repatriation of seriously wounded and seriously ill prisoners were transferred to a separate convention (the Convention on Prisoners of War).
2. The Convention relative to the Treatment of Prisoners of War is an improved version of the 1899 and 1907 Hague Conventions in the light of the experience of the First World War,⁷³ but it does not replace, only complements, the earlier Conventions. As early as 1921, the need arose for a separate convention dealing only with the treatment of prisoners of war. Among the more important innovations of the convention were the codification of the prohibition of reprisals and collective punishment, the formation of provisions on the organisation of prisoners' work and the appointment of their representatives.

However, experience between the two World Wars has shown that the warring parties also regularly violate agreements on the conduct of the war and on prisoners of war, the wounded and the civilian population. Suffice it to mention the use of poison gases in Ethiopia or atrocities against civilians in the Spanish Civil War.⁷⁴ World War II surpassed all previous conflicts in size and brutality.⁷⁵

All of this led to the recodification of the Geneva Conventions after the end of World War II. The four conventions adopted at the Geneva Conference in 1949 with the amendments adopted in 1977 transformed humanitarian law from a theoretical

71 The full title is: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.

72 These include the Red crescent, the Red lion and the sun, which were already in use at that time. The Red crystal was added to the emblems in 2005.

73 The two conventions concerned are The Hague No. 2., 1899; and The Hague No. 4., 1907.

74 The brutality of the Spanish Civil War was captured in one of the novels by the famous American writer Ernest Hemingway (For Whom the Bell Tolls).

75 This also proves one of Henry Dunant's statements: 'the terrible weapons of destruction that peoples now possess will shorten wars, but it is also certain that they will only make battles more murderous'. (The English translation was made from the Hungarian edition of Dunant's book; Dunant, 1978, p. 44.

model and *soft law* into a set of normative standards ratified by the vast majority of countries over the course of a century.

The 1949 Geneva Conventions are as follows:

1. The Convention on the Wounded and Sick in Armed Forces in the Field, which replaced the 1929 Geneva Convention.
2. The Convention Relating to Wounded, Sick and Shipwrecked Members of Armed Forces in Naval Warfare,⁷⁶ which is a development of the Hague Conventions (The Hague No. 3. (1899) and The Hague No. 10. (1907))
3. The Convention relative to the Treatment of Prisoners of War, which replaced the 1929 Geneva Convention.
4. The Convention relative to the Protection of Civilian Persons in Time of War, which is a development of the Hague Conventions (The Hague No. 2. (1899) and The Hague No. 4. (1907)).

The 1949 Geneva Conventions will be discussed in detail in the next chapter.

8. Summary

In this chapter, we have sought to describe the development of humanitarian law from its beginnings until 1949, when the adoption of the four Geneva Conventions created a single normative text that is still considered by the vast majority of states as a reference and framework. Throughout our long journey through time, we have observed that wars have accompanied human history from the beginning. However, conflicts arising from human nature were recognised by human communities relatively early on, even in prehistoric times. This is due, among other things, to the development of diplomacy as a conflict management mechanism, but already in ancient times, written rules appeared in several cultures that aimed to limit the outbreak of armed violence, the course of war, and the protection of the innocent and the wounded. (see for example: Bible, Laws of Manu). For a long time, these norms were dressed up in religious cloaks and, until the modern era, when sovereign states emerged after the Peace of Westphalia in 1648, they were enforced primarily through religious sanctions (see, for example, the concept of just war, the peace of God, the knightly code of honour). The emergence of sovereign states led to the impersonalisation of armed conflicts. From then on, armies of states fought each other, and the wounded soldier fell out of the war machine and became a fellow human being in need of protection. It was also during this period that the first general rules of the law of war and peace were drawn up (the works of Gentili and Grotius), which would only become common knowledge in the Age of Enlightenment.

76 Its full title is: Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

This theoretical background made it possible to create the world's first code of war law, which simultaneously contained provisions for the conduct of war and its participants, as well as for the wounded, sick and prisoners of war. The American Lieber Code of 1863 can be considered the ancestor of all modern legislation and from the outset had a major influence on European legislators, who began to draft various international rules at the various conferences held in Geneva and The Hague in the second half of the 19th century. Although the initiative was taken by a private individual, Henry Dunant of Switzerland, there had already been attempts to organise the care of the wounded (see in particular the work of Florence Nightingale in the Crimean War). After the Battle of Solferino, fought with modern weapons and mass armies, Dunant sensed that 'the terrible weapons of destruction that peoples now possess will shorten wars, but it is also certain that they will only make battles more murderous'.

This suspicion was confirmed by the tens of millions of military and civilian casualties of the First and Second World Wars. The participants at the Geneva and Hague Conferences had already realised in the second half of the 19th century that the rapid development of military technology meant that normative regulation was always one step behind technology. The wars of the first half of the 20th century, including the various conflicts between the two world wars, confirmed this assumption. So did the ancient Chinese wisdom that 'war always follows the path of deception', since the warring parties were willing to set aside existing rules without any problem if their interests so required. Thus, for example, poisonous gases were used in spite of the ban in World War I and later in the campaign in Ethiopia. And the lofty words of the *St Petersburg Declaration*, which were subsequently reaffirmed on several occasions, did not prevent the use of expanding bullets in Ethiopia, for example.

The unprecedented devastation caused by the First World War strengthened society's desire for peace. This led to attempts to eliminate war as a means of conflict resolution. Although this aspiration was ostensibly realised in 1929 with the Kellogg-Briand Pact, it was not until after the Second World War that this rule was made a fundamental principle of the new world order, with its inclusion in the *UN Charter*. But even so, war itself was not eliminated, only limited. The rules adopted for the protection of the wounded, prisoners of war and civilians underwent a major development in the aftermath of the First World War, leading to the Geneva Conventions of 1929. However, in World War II, more people than ever before were wounded, taken prisoners of war or suffered the horrors of war as civilians. This enormous suffering provided the final impetus to complete the codification of humanitarian law. This was done in 1949 with the foundation of the four Geneva Conventions, which were subsequently supplemented several times (see Geneva Additional Protocols).

Finally, it is also worth noting that the clarification of the situation of refugees fleeing the horrors of World War II is a new area of Geneva law, refugee law,⁷⁷ but the relevant legislation was already enacted under the auspices of the UN.

77 See: Convention relating to the Status of Refugees, 1951, and its 1967 Protocol.

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International Humanitarian Law II: The Principles of International Humanitarian Law

Rebecca Lilla HASSANOVÁ

ABSTRACT

The following chapter analyses the legal status and practical function of the core principles of international humanitarian law within the broader system of international law. It explains how these principles operate both as gap-filling and interpretative tools and as norms rooted in customary law as well as in treaty provisions. The chapter primarily examines the four foundational principles of the system: military necessity, humanity, distinction, and proportionality tracing their historical development, main elements and limitations. The text highlights how they structure targeting decisions, protect civilians and persons hors de combat, and guide legal assessment where treaty rules are ambiguous or incomplete. Their flexible character ensures their continued applicability as guiding norms, particularly in modern forms of warfare.

KEYWORDS

international humanitarian law, principle of military necessity, principle of humanity, principle of distinction, principle of proportionality

1. Introduction: The Legal Status of Principles of International Humanitarian Law

International humanitarian law (IHL) is the branch of international law that regulates the conduct of armed conflicts. The previous chapter presented the body of law, which is centred on key international agreements, including the Hague Regulations of 1899, the Geneva Conventions of 1949, and the Additional Protocols of 1977. As all civilizations deemed it necessary to develop some set of rules for minimising violence, customary law was the first to develop. This IHL customary law was not completely replaced by treaty law. As treaties bind only the parties, customary law keeps its influential position.¹ Alongside the foundational documents, numerous other sources

1 Hanckaerts and Doswald-Beck, 2012, p. 10.

Rebecca Lilla Hassanová (2026) 'International Humanitarian Law II: The Principles of International Humanitarian Law' in Béres, N. (ed.) *International Criminal Law, Humanitarian Law and Refugee Law from the Perspective of Human Rights Law*. Miskolc–Budapest: Central European Academic Publishing, pp. 175–207. https://doi.org/10.71009/2026.nb.ichr_6

contribute to the framework of humanitarian law. These, besides customary international law, include specialised conventions addressing specific issues and weapons types, decisions from international tribunals, writings from leading scholars, statements from organisations, such as the United Nations General Assembly, as well as the principles of international humanitarian law, which will be analysed below.²

The principles of international humanitarian law, including their position in the system of international law, are to be analysed from two opposing perspectives. On the one hand, their character has to be derived from the classical theory of general principles of law, understood as one of the main sources of international law. On the other hand, these principles are to be also distinguished from the cited general principles of law, referred to in Article 38 of the Statute of the International Court of Justice. The first perspective presents the similarities of the IHL principles, having the same function as the general principles of law. The other perspective observes them as part of customary international law, which have been codified later into the treaty form.³

Generally, principles, including IHL principles, represent the integration instruments of the structure, as they bridge actual or potential legal gaps, known under the term *lacunae*. In international law, legal principles have been many times the subject of heavy scholarly debates grounded on the various interpretations ascribed to the term and the theoretical issues they present.⁴ Scholars understand principles in the axiological and material sense as values that are vital in the theory of law. In any case, principles can also be reflected in a concrete form in the individual provisions. In the relevant provisions, they create various deeper and more specific values. Accordingly, given their deeper and more abstract nature, principles have a longer duration than the provisions in which they are reflected. It is often justified by their content, which is also moral and ethical. However, if such principles have existed over several centuries and within several legal systems, they seem to gain strong prestige and authority and become almost undeniable and irrefutable. That is, some principles seem to achieve legitimacy in themselves. Existence, validity, and power are at the same time tools for their general recognition and standardisation.⁵

Legal principles are rules of a relatively high degree of universality which are explicitly or implicitly or as a “*communis opinio doctorum*” immanent to a given law, branch of law, or legal institute.⁶ The principles provide a basis for further law-making and a guide to the interpretation of an individual more specific provision. Their origin can be generally derived from natural law, and they enjoy major abstraction. Arguably, legal principles represent a general rule of conduct reflected in normative provisions in a more specific form. They express the general objectives and moral values of the given law. Meanwhile, they regularly harmonise specific normative

2 Rogers, 2004, pp. 2–3.

3 Darcy, 2014, p.140.

4 See: Kohen and Schramm, 2013.

5 Jonas, 1985, p. 143.

6 Boguszak, 2003, p. 241.

orders and prohibitions as far as possible. We may observe that they abstractly articulate the aim or goal of numerous provisions.⁷

There are different understandings of the concept of “general principles” in international law. Several general principles of international law can be useful in supplementing and implementing IHL. Just to mention some, the principle of good faith or the concept of common heritage of mankind. These general principles of law promote inter-systemic cohesion by bridging the gap between international law and national legal systems. This function of principles is linked to the nature of principles, as they represent the fundamental values of the international community, which inspire the international legal order. Thus, they bridge the gaps and harmonise differences in law.⁸ On the other hand, the principles of IHL are not based on or derived from the national legal systems. Rather, they are independently established as the foundational elements of humanitarian law itself.

IHL expert, Jean Pictet wrote, that behind the rules in IHL treaties, there are a number of principles which inspire the entire substance of the documents that are expressly stated in the Conventions, clearly implied or derived from customary law.⁹ The theory, including study materials, in the matter is generally inconsistent. Some of the scholars create their own specific scope of “principles of IHL” and some even avoid to deal with notions of principles of IHL. Nevertheless, most of the esteemed scholars distinguish the four fundamental principles of IHL, claiming these to be the basic principles of the pertinent field of law. These basic principles of IHL are viewed as a part of customary international law. Moreover, numerous scholars (including the author) even claim that these principles are part of peremptory norms. However, without a doubt these principles have been codified or incorporated into the most influential treaty rules of humanitarian law.¹⁰ As the United Kingdom Manual of the Law of Armed Conflict stipulates ‘despite the codification of much customary law into treaty form during the last one hundred years, four fundamental principles still underlie the law of armed conflict’.¹¹

The relics of the great principles of customary law shine in each rule of the IHL. All provisions stem from the unchanging four principles: military necessity, humanity, distinction and proportionality. The position of these principles can be considered as specific, as they clearly transform moral values into a legal form. The development of IHL is closely linked to its fundamental principles. Yet, there are still gaps, where

7 Vršanský, 2021, p. 109.

8 Linderfalk, 2019, p. 101.

9 Pictet, 1985, pp. 59–60.

10 E.g. art. 48 of the Additional Protocol I to the Geneva Conventions, sets the obligation to distinguish between the civilian population and combatants and between civilian objects and military objective at all times; art. 51 of the Protocol prohibits attacks that are excessive in relation to the concrete and direct military advantage anticipated; art. 53 of the Fourth Geneva Convention establishes protection of civilian property with the exception where such destruction is deemed to be absolutely necessary in order to achieve the military operation.

11 Operational Law Handbook, International and Operational Law Department, United States Army Judge Advocate General's Legal Center and School, 2012, p. 14.

treaty law remains silent. We know that there were lawyers who were ahead of their time and assumed early on that these gaps would be forever present on the battlefield. The brilliance of some omens that the codification would never be fully comprehensive to address all possible circumstances in practice. Here come to the textual fore the principles which are capable of addressing issues in an ever-changing world.¹²

2. The Principle of Military Necessity

No principle is more central to IHL nor more misunderstood, than that of military necessity. The views regarding this principle vary. The principle has manifested itself in two ways: as a justification for deviations from normative standards and as a component of the written law regulating conduct of combatants. Historical views represent somehow the worst perspective of its interpretation. In this sense, military necessity has been used both to rationalise egregious abuses during armed conflicts and also to enforce impractical and hazardous restrictions on combatants.¹³ The first aspect will be addressed briefly, as the legal understanding of military necessity as a rationale for violating IHL is well established. In terms of the latter, military necessity serves both as a specific element and a broad foundational principle. While direct mentions of military necessity in IHL are limited, the principle is woven throughout the entire legal framework by supporting individual rules. In this crucial role, military necessity works in balance with the principle of humanity, which aims to minimise suffering and destruction associated with warfare.

2.1. *Short Historical Overview*

The foundations of modern humanitarian law trace back to the 19th century. A pivotal early milestone was Dunant's 1862 publication, *Memories of Solferino*, which inspired the Geneva Conventions.¹⁴ Another significant document from that period addressing humanitarian law, especially the concept of military necessity, is the Lieber Code, created by scholar Francis Lieber. The Code is the origin of what has come to be known as Hague Law, called so because the principal treaties which dealt with the subject were concluded at The Hague. Hague Law is the law of armed conflict written from the standpoint of the soldier, in the sense that it takes the form of a statement of the rights and duties of the military in a conflict.¹⁵ This document established principles of human morality based on empirical realities, resulting in a binding directive that sought to humanise warfare, issued by President Abraham Lincoln. Its most lasting

12 Schmitt and Heintschel von Heinegg, 2012, p. 15.

13 Schmitt, 2010, p. 796.

14 See: Dunant, 1959.

15 Greenwood, 1999, p. 116.

contribution was formally establishing military necessity as a foundational principle of warfare, still central to armed conflict today.¹⁶

However, even the Code establishing the principle for the first time specifies in its Article 16, that the principle of military necessity does not permit acts of cruelty, revenge, torture for extracting confessions, the use of poison, wanton and unrestricted environmental devastation, or harm to the enemy beyond combat itself. The article further emphasises that military necessity must not hinder efforts to restore peace. It reminds combatants that, even in war, they remain human beings who must uphold ethical behaviour within the bounds of military necessity.¹⁷

The international community gradually recognised and accepted this principle, particularly after the 1868 St. Petersburg Declaration, which asserted,

‘[t]he progress of civilization should have the effect of alleviating as much as possible the calamities of war. The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.’¹⁸

The declaration emphasises that humanity demands restraint and that military necessity should not justify indiscriminate destruction. It also asserts that states should aim solely to weaken the enemy’s military strength, without unnecessary harm. The Declaration bears in mind that war is fought to be won. Nevertheless, the dictum is linked to the premise that the right of parties to choose means and methods of conduct during the fight is not unlimited.¹⁹

Both of these documents are considered to be a landmark in the development of the laws of armed conflict, defined military necessity as a belligerent’s right to fight in a way that weakens the enemy as swiftly as possible. It did not mean unlimited use of military power. However, this principle was later misused in conflicts, evolving into what was perceived as an unrestricted right. This misinterpretation led to the so-called *Kriegsraison* doctrine, adopted by German forces in World War II.²⁰ Soldiers misused the principle of military necessity to justify actions that violated numerous treaties and customs, mistakenly considering these acts lawful. In reality, international criminal tribunals established after the war held them accountable for this arbitrary conduct, reinforcing that actions justified by military necessity are lawful only when they respect specific obligations set by binding conventions and customary law.²¹

16 General Orders No. 100. Instructions for the Government of Armies of the United States in the Field. “Lieber Code”, 1863.

17 Ibid., art. 16.

18 Declaration of renunciation of the use of explosive projectiles, in time of war up to 400 grams in weight, opened for signature on November 29, 1968. “St. Petersburg Declaration”.

19 See: Renault, 1915.

20 Kalshoven, 1971, p. 366.

21 Cheng, 1953, p. 71.

2.2. Character of the Principle (Main Elements and Limitations)

In the current understanding, military necessity has a three-fold relevance in regulating armed conflicts. First, it prohibits actions not essential to achieving military objectives. Second, it permits exceptions to certain legal provisions only for justified military objectives. Third, it is a component of the proportionality rule, balancing military success and humanitarian protection.²² This principle helps differentiate between actions deemed materially essential and thus generally permissible, and those deemed materially unnecessary and thus impermissible. While actions considered essential for a legitimate military objective might be allowed despite their moral implications, materially unnecessary actions may still be safe enough to remain permissible. Nevertheless, military necessity in the material sense significantly affects how a concrete provision of IHL is interpreted. It is frequently declared that military necessity and humanitarian considerations form the two fundamental normative grounds on which the current IHL developed.²³

When norms of IHL are being drafted, the creators cannot be oblivious to the exigencies of war impelling each belligerent state to take the steps necessary for engaging the enemy and defeating it. This principle is the reason that activates the measures to gain military advantage over the enemy during an armed conflict.²⁴ For countries like the United States, Russia, and other military powers, it justifies regulated violence under laws and customs of war, authorising measures to weaken enemy forces or compel their surrender swiftly. It allows property destruction when justified by military objectives but prohibits indiscriminate destruction of enemy territory.²⁵ Commanders, as decision-makers, are granted a significant degree of discretion. However, this doctrine does not relieve commanders from the obligation to observe the laws of war; rather, it gives flexibility within the bounds of military necessity to determine necessary measures and their potential impacts.²⁶ The boundaries set that there must be a reasonable connection between the measures taken and the aim of ultimate victory.²⁷

The limitations of the principle of military necessity rely heavily on evaluating the feasibility of a particular operation, the significance of the military target, and the potential scale and nature of the damage the mission may cause. All these factors should be assessed based on the specific conditions during the operation's planning phase, considering the commander's sincere intent. If a commander, based on available information, genuinely believed that a chosen course of action was necessary to achieve a military objective, this belief should not be judged in hindsight. Thus, it is irrelevant whether the military objective was ultimately achieved. In active conflict, the emphasis on immediate knowledge and the good faith behind the decision-making

22 Rogers, 2012, p. 9.

23 Dinstein, 1982, p. 105.

24 Dinstein, 2022, p. 9.

25 United States Rules of Land Warfare, 1940, FM 27-10, paras. 22–25.

26 Hyde, 1922, sec. 655.

27 Johanssen, 2019, p. 32.

is crucial. The commander may have to adjust the operation, redefine objectives, or identify other feasible actions while considering possible collateral damage and the proportionality of actions, often under stressful, time-sensitive conditions.²⁸

Some authorities suggest that decisions also influenced by proportionality should be viewed from the standpoint of a reasonable commander or an adequately informed combatant. As noted by the president of the Israeli Supreme Court, international courts often examine whether a reasonable commander could have made a specific decision under similar circumstances.²⁹ Judicial reviews focus on whether the action taken was one that a reasonable commander might have chosen, rather than deciding on the ideal course of action. Nonetheless, the military necessity has to be observed from the needs of the belligerent states. It cannot be analysed from the perspective of an individual soldier whatever his rank.³⁰

According to the U.S. Air Force Military Manual, four key elements shape the application of military necessity: force must be regulated, must be necessary and used promptly to achieve the stated objective, must be proportional to the pursued objective, and cannot be prohibited.³¹ These elements restrict a combat's destructive effects to what is required for a military goal or mission and influence combat methods, independent of other international law restrictions. This framework ensures that the type and degree of force used against individuals not protected from direct attack remain appropriate to achieve a legitimate military goal in the given context. Thus, any force must be essential to achieving the objective, with military considerations guiding assessments and necessary actions. Military necessity hence does not justify a subjective violation of positive rules.³²

These requirements help prevent arbitrary applications of military necessity. Commanders are obligated to evaluate each mission in terms of military necessity, not as a means of revenge. Even without strict IHL norms, the principle is inherently limited; for instance, certain prohibited actions do not meet military necessity requirements. The current constraints on this principle are mainly codified in the Geneva Conventions, particularly Additional Protocols I and II of 1977. Protocol I applies to international armed conflicts and cases of self-determination, while Protocol II addresses national armed conflicts, such as civil wars. Although Protocol II is shorter, it is sometimes broader in specific protections, including civilian protections in non-international conflicts, such as stipulating warnings. Overall, Protocol II is more succinct but, in some areas, more precise and advanced than Protocol I. It imposes several specific restrictions on military necessity, particularly in non-international conflicts, making it more restrictive in some aspects.³³

28 Hayashi, 2010, p. 96.

29 See: Barak, 2007.

30 Dinstein, 2022, p. 10.

31 United States of America, International Law - the Conduct of Armed Conflict and Air Operations. Department of the Air Force pamphlet. No. 110-31, 1976, pp. 1-6.

32 American Military Tribunal, Nuremberg, Hostage case, 1948, paras. 1253-4.

33 Protocol II additional to the Geneva Conventions, 1977, art. 11.

A good example of the limitation included in military necessity represents the rules related to the treatment of prisoners of war. Under Article 13 of the GC III prisoners of war in custody have to be treated humanely, including their evacuation to camps situated in an area far away from the battlefield. As a rule, this will be done by assigning an escort to carry out the process of evacuation, while ensuring that prisoners will not be able to escape.³⁴ However, what happens when enemy combatants are captured by small raiding groups, which have no possibility to provide guards for evacuation. The evacuation of prisoners would definitively endanger the successful achievement of their mission. Nevertheless, even if the military necessity would arguably require the most effective solution of shooting these prisoners, humanitarian law and humanitarian considerations still forbid these actions. Even in cases of extreme necessity, the protection is absolute.³⁵

A crucial aspect of applying the principle of military necessity is the nature of the military objective, which must hold clear military and strategic importance when planning an attack. While the significance of an objective may sometimes become more apparent after an action begins, the initial plan must still align with the principle of military necessity. A military objective should have strategic, operational, or tactical value within the context of the operation, and these aspects should be explicitly defined. Additionally, attacks must demonstrate that they are not driven by personal revenge, as such motives are a severe breach of humanitarian law.

However, selecting an inappropriate military objective does not necessarily render an action illegal; it may simply prevent the principle of military necessity from being applied. Acts of destruction or seizure of enemy property that serve no genuine military purpose cannot be justified under military necessity, as the Hague Conventions explicitly forbid the destruction or seizure of enemy property without a valid military reason. Therefore, the principle cannot be used as an exception in these cases.³⁶

The Hague Convention underscores military necessity as an exception in Article 26, which states that a commander planning an aerial bombardment must warn authorities to allow for civilian evacuation and prevent unnecessary civilian casualties. The only condition under which a commander may forgo this warning is if military necessity explicitly demands it. Here, one primary aim is to minimise risks to attacking aircraft while still achieving the military objective. Subjective elements, such as the supervision by an officer or the absence of friendly civilian populations at risk, are also relevant. Ensuring that operations are conducted primarily for military purposes is essential, as otherwise, a belligerent party could misuse military necessity to justify geopolitical, demographic, ideological, or economic goals as legitimate military aims.³⁷

34 Geneva Convention (III), 1949, arts. 13–19.

35 Greenwood, 1999, p. 38.

36 Hague Convention IV, 1907, art. 23(g).

37 Stone, 1954, pp. 622–623.

In some cases, an initially appropriate and materially relevant course of action may unexpectedly result in disproportionate damage. If such damage becomes apparent during the attack, the principle of military necessity must give way, requiring the combatant to either modify the operation, abandon it, or take corrective actions to minimise harm.³⁸ Commanders must diligently gather information and thoughtfully assess it with their best abilities and in good faith to apply the principle of military necessity responsibly. The unpredictable nature of combat often demands flexibility in assessing evidence, necessitating that a combatant make quick, well-considered decisions based on anticipated outcomes. Additionally, the principle involves a combatant's awareness, formal capability, and moral integrity, highlighting the importance of their ethical values in applying military necessity appropriately.³⁹

A military objective is a critical factor in evaluating the boundaries of military necessity. Some scholars, including H. Meyrowitz, argue that the concept of a military objective is no longer sufficient for assessing military necessity, as it may lead to excessive destruction. The scope of war objectives often expands on one or both sides during combat, potentially allowing for indefinite devastation. As combat develops, parties adjust their tactics and objectives; however, the indiscriminate application of military necessity to any target may lead to arbitrary destruction without yielding genuine military advantage. To achieve a balance, belligerents should consider both their political aims and legal duties.⁴⁰

Generally, the requirements of legal actions which fulfil the principle of military necessity are the following:

- Actions primarily executed for a specific military objective
- Actions necessary to reach a military aim
- Actions which constitute an advantage
- The military target complies with IHL
- The method of implementation complies with IHL

The principle does not apply to measures which are taken for no purpose. If an area was devastated purposelessly, the taken measures were not necessary. Additionally, the necessity does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill.⁴¹ Any unnecessary measures applied to citizens, such as evacuation for the sake of evacuation, cannot justify any military

38 Gehring, 1980, p. 55.

39 Hayashi, 2010, p. 63.

40 Carnahan, 1998, p. 227.

41 United States Military Tribunal at Nuremberg, 1948, The Hostages Trial (United States of America v. Wilhelm List et al.), Case No. 47, Judgment of 19 February 1948, para. 757, pp. 1253-1254.

necessity.⁴² Moreover, international courts have raised questions even regarding destruction of the environment or cultural heritage used as tactics during combat.⁴³

As society and law evolve, humanitarian law and principles such as military necessity are shaped by various modern sources, including “soft law” from sources like official state declarations. Although non-binding in the strict sense, such declarations can indirectly influence the law’s development. Public statements from states on humanitarian considerations may be seen as diplomatic, but they still impact the legal framework to some extent.⁴⁴ International organisations and their binding legislation exert additional, often direct, pressure on states regarding humanitarian law, creating minimum requirements that can eventually become part of customary law.⁴⁵ However, special regional customary law in these cases applies only within limited contexts, and a shared legal practice (*opinio juris*) between concerned states is essential to establish the existence and scope of such regional laws.⁴⁶

Humanitarian considerations are continuously evolving, but modern IHL maintains the need to define a normative boundary between military necessity and humanitarian protection in any conflict. Military necessity remains crucial in shaping new rules, adapting existing rules, and reinforcing the Martens Clause, a principle that underpins essential conduct rules in hostilities. Key examples include prohibitions on unnecessary suffering and destruction, the principle of distinction, the definition of military objectives, and protections for civilians and civilian property.⁴⁷

Some scholars argue that military necessity is outdated and does not meaningfully constrain commanders, applying only when no other humanitarian law norm governs a situation. According to this view, the principle fills gaps where neither established customary law, nor other norms apply. General legal principles can bridge these gaps, especially when proportionality is difficult to define, resulting in varied interpretations among scholars. The principle also binds states even if they have not formally agreed to it, as ratifying conventions implies acceptance of all provisions.⁴⁸

This viewpoint is contentious. If valid, it would mean that military necessity has little influence beyond the Hague Conventions, Geneva Conventions, their protocols, and other key humanitarian treaties. Yet, these treaties contain precise, wide-ranging rules, arguably rendering military necessity almost irrelevant in recent years. The principle and its limitations are essential to the nature of conflict; without military necessity, conflict itself would lose its rationale. General principles of law, due to

42 International Criminal Tribunal for the former Yugoslavia, 2001, Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Judgment of 2 August 2001, paras. 524-527.

43 See: Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), 2013, I.C.J. Rep. 2013; Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America), 1996, I.C.J. Judgment.

44 Henckaerts, 2007, p. 477.

45 See: Benvenisti, 2012.

46 Draft conclusions of the International Law Commission on the identification of customary international law with comments; International Law Commission, 2018, Conclusion 16, p. 154.

47 Hague Convention II on the Laws and Customs of War on Earth, 1899, para. 235.

48 Oppenheim, 1908, p. 12.

their flexibility, may sometimes be more applicable than specific rules, as their broad nature makes them adaptable and reflective of foundational moral values not always captured by written laws.⁴⁹

States are generally reluctant to give up anything that could give them a military advantage. Hence, there is a constant search for a common ground where such measures are applied, which give some kind of protection for the victims of war. Although we have to be honest that practically the results are often disappointing, every little effort helps. Even from the critical standpoint it is obvious, that even minor limitations on the battlefield and tiny humanitarian advantages are worth pursuing.⁵⁰

Overall, the principle of military necessity is restricted by the principle of humanity. Humanitarian law, with proportionality as a crucial element, aims to balance these principles, harmonising the rights of combatants and non-combatants. The essence of military necessity can be viewed as a framework for planning attacks, justifying certain actions, permitting exceptions in extraordinary cases, and an integral component of proportionality in balancing rights in armed conflict.

3. The Principle of Humanity

Humanity implies a moral force. The term “humanity” is generally perceived as a moral high ground. Every person belongs to one human species, regardless of their differences. The principle of humanity enhances the complete scope of international protection of human rights in one simple notion. Various branches of law, including international humanitarian law, international human rights law, and asylum law, incorporate the principle of humanity within their specific provisions. This principle also informs the interactions between public authorities and individuals under national or international jurisdiction, underscoring the importance of humane treatment across different contexts. Additionally, the principle is reflected in the laws governing international organisations, particularly within the United Nations framework. Due to its universal nature, the principle of humanity can be seen as both a sector-specific and a general principle of law.⁵¹

The principle of humanity represents one of the fundamental and binding principles of IHL. Thus, it potentially has a broad scope of application. It can act as an interpretative rule to interpret other provisions included in international treaties, as all rules of IHL must be interpreted in light of the principle of humanity. Additionally, the principle may have a complementary or even replacing function.

In legal theory, the pursuit of just and good objectives is fundamental, representing the human values at the heart of law. The principle of humanity thus embodies the core foundations of law and stands as a general legal principle that should be

49 Hassanová, 2023, p. 70.

50 Jocnick and Normand, 1994, p. 64.

51 See: Coupland, 2001, p. 969.

universally applied. The inherent content of humanity reinforces the argument that the principle of humanity should be recognised as a general principle of law.

3.1. Short Historical Overview

The treaty and customary IHL evolve to accurately reflect the changing nature of armed conflicts and the values held by those involved. Fortunately, since the 19th century, it has advanced steadily on route towards humanity. It may be observed even in the shift regarding the name of the field, from the law of war, through the term law of armed conflict to the most known international humanitarian law, incorporating the notion of humanity into its headings. The trend is clear, humanity has become the leading notion when attempting to regulate conduct during wars.⁵²

The notion “laws of humanity” were first referred to in the Preamble of the St. Petersburg Declaration of 1868, and in what is now known as the Martens Clause:

‘Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience.’

Together with the rule prohibiting weapons of a nature that causes superfluous injury or unnecessary suffering, the clause named after its creator Friedrich Martens, being part of the Preamble of the Hague Conventions, is the lasting legacy of this instrument. In the years since its formulation, the Martens Clause has been invoked in important courts such as the Nuremberg Criminal Tribunal, the International Court of Justice, as well as in human rights bodies. The clause appears repeatedly, albeit many times in an altered form, in many treaties dealing with humanitarian law, such as the Geneva Conventions (GC) and the Preamble to the Convention on the Prohibition of Restrictions on the Use of Certain Conventional Weapons. The Martens Clause was also paraphrased in Resolution XXIII of the 1968 Tehran Conference on Human Rights and is cited or otherwise referenced in several national military manuals, including those of the United States, the United Kingdom, and Germany. For more than a century, this legacy of Friedrich Martens remains relevant and valid.⁵³

The clause represents the core source of the principle of humanity. The clause and its modern interpretations emphasise that customary international law remains applicable in armed conflict, even when relevant treaty law is absent. However, the wording in Additional Protocol II does not explicitly affirm this principle. The clause can also be understood to require that individuals who lack formal legal protection be treated in accordance with the principles of humanity and the dictates of public

⁵² Schmitt, 2010, p. 806.

⁵³ Hague Convention II, 1899; Hague Convention IV, 1907.

conscience, assuming that these dictates align with humane principles. In summary, it is derived from the usages established among civilized nations, laws of humanity and dictates of public conscience. Hence, its purpose is to textually present the continuity and necessity of customary law on the battlefield spiced with the moral value of humanity.⁵⁴

3.2. Character of the Principle (Main Elements and Limitations)

Humanity is a sentiment or attitude of someone who shows himself to be human.⁵⁵ The principle of humanity is understood as a counterweight to the principle of military necessity. It puts a brake on missions which would be otherwise justified by the principle of military necessity. The principle of humanity is reflected in various treaty provisions, particularly those mandating humane treatment of prisoners of war, civilians, and others no longer participating in hostilities. It also aligns with the overarching goal of minimising the effects of armed conflict and restricting the use of excessive force. Nonetheless, the exact scope of the principle beyond specific rules remains continuously unclear.⁵⁶

In 1956 Jean Pictet wrote that the principle of humanity stands out on its own in the doctrine of the Red Cross, and all other principles hang from it.⁵⁷ Thus the principle has a broad scope of application, extending to various contexts, including both armed conflict and peacetime, and governing interactions between public authorities and all individuals under a state's jurisdiction. Its impact is particularly profound in situations involving vulnerable or marginalised individuals, as evidenced by treaty provisions that uphold even international human rights protections.⁵⁸

Notably, the UN Charter reflects the principle of humanity through its provisions addressing humanitarian concerns and promoting respect for human rights.⁵⁹ It mandates the General Assembly to initiate investigations and make recommendations to support the realisation of human rights. The Charter also emphasises the need to foster conditions of stability by encouraging universal recognition of human rights and fundamental freedoms, regardless of race, sex, language, or religion, as a basis for peaceful and friendly international relations.⁶⁰ The principle is further embedded in other UN instruments, forming a foundation for the international protection of individuals. It operates across various legal fields, including IHL, international human rights law, and international refugee law, which reinforce its application

54 Darcy, 2014, p. 155.

55 Pictet, 1966, p. 459.

56 Lauterpacht, 1948, p. 351.

57 Pictet, 1956, pp. 14–31.

58 Migrant Workers Convention, 1990, art. 17:1; Convention on the Rights of the Child, 1989, art. 37:b.

59 Charter of the United Nations, 1945, art. 1. para. 3.

60 Ibid., art. 55(c); Azud, 1986, p. 138.

through overlapping provisions. Judicial assessments of the principle often address issues arising from one or more of these fields, reflecting its multifaceted nature.⁶¹

While the principle of humanity is often primarily associated with IHL, where it plays a crucial role, particularly in the protection of civilians and those hors de combat, its relevance extends beyond this domain. For example, the humane treatment of both civilians and combatants is the cornerstone of the Geneva Conventions, such as the 1949 treaties addressing the condition of the wounded and sick in armed forces.⁶²

The principle also draws on enduring concepts of natural law and human conscience, which are enshrined in both treaty and customary international law. It underscores the need to treat individuals humanely in all circumstances, forming part of the legal framework for the international protection of human rights. Its application spans global institutions, such as the UN, and regional organisations, such as the Council of Europe, and it serves as a bridge between IHL and international human rights law, ensuring universal relevance and enforcement.⁶³

The case law of modern international courts affirms the existence and binding nature of the principle of humanity as a fundamental principle of international law. The courts often invoke the principle in situations of ambiguity or when other legal sources are lacking. The International Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case highlighted the importance of humanity and common sense in advocating for the application of the Hague Rules to non-international armed conflicts.⁶⁴ The ICTY invoked the principle of humanity in the *Martić* case as well as a basis for prohibiting attacks on civilian populations and as a general principle limiting the means and methods of warfare.⁶⁵ According to the Trial Chamber, these norms derive from “elementary considerations of humanity,” which underpin the entire framework of international humanitarian law applicable to all conflicts.⁶⁶ The ICTY has also addressed the principle of humanity in its later judgements. In the *Mucić* case, the tribunal emphasised that both IHL and international human rights law share a common objective: the protection of human dignity.⁶⁷ The tribunal further defined inhuman treatment as either intentional or unintentional conduct, including omissions that result in significant mental or physical suffering or harm. Such actions, it held, constitute a severe violation of human dignity.⁶⁸ Nevertheless, the most far-reaching use of the principle of humanity occurred through the Martens Clause, in the ICTY’s analysis of belligerent reprisals in *Kupreškić*. Although customary international law

61 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, para. 106.

62 Henckaerts and Doswald-Beck, 2005, p. 23.

63 Commission for Human Rights, General Comment. No. 31. 2004, para. 11.

64 Interlocutory Appeal on Jurisdiction, para. 119.

65 *Prosecutor v. Milan Martić*, 2006.

66 Trial Chamber Rule 61, para. 13.

67 *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo*, 2001, para. 149.

68 *Ibid.*, para. 543.

required that reprisals conform in all cases to the laws of humanity and morality, this requirement was not explicitly mentioned in the *Kupreškić* judgement. Nonetheless, the Trial Chamber observed that, while the principles of humanity and public conscience have not been elevated to the rank of independent sources of international law, the Martens Clause still mandates their application. It requires these principles to be consulted whenever a rule of international humanitarian law lacks sufficient rigor or clarity, ensuring that the rule's interpretation aligns with these fundamental principles.⁶⁹

The principle of humanity has also been frequently cited by the International Criminal Tribunal for Rwanda (ICTR). For instance, in the case of *J.-P. Akayesu*, the tribunal recognised that the concept of crimes against humanity had already been established during the Nuremberg Trials (1945–1946).⁷⁰ Furthermore, the tribunal explicitly refers to a precedent, which can be traced back to 1915, when the governments of Russia, Great Britain, and France jointly condemned the mass killings of Armenians in Turkey as ‘crimes against humanity and civilization’, holding the Turkish government and its agents responsible.⁷¹ In the *Furundžija* case, the Trial Chamber recognised the principle of respect for human dignity as the very *raison d’être* of international humanitarian law. Additionally, the Martens Clause was cited as evidence of the customary nature of the prohibition against torture. The ICTR extended the principle of humanity to non-international armed conflicts through the application of Common Article 3.⁷²

Furthermore, in the case of *J. Kambanda*, the International Criminal Court highlighted that genocide has consistently resulted in enormous suffering throughout history, identifying humanity itself as a victim of such atrocities.⁷³ The idea of humanity as a victim, as well as the condemnation of such crimes, has deep historical roots and is inherently tied to the principle of humanity. Additionally, the tribunal frequently underscored the significance of the Martens Clause in its judgements, reaffirming its role in shaping the application of humanitarian principles.

In all these cases, the court engaged with the concept of the principle of humanity, though its interpretation in case law is often inconsistent. This principle can be understood as the foundation for the prohibition of inhuman treatment, as articulated in Article 3, common to the four GCs of 1949. Additionally, it can extend to encompass humanity as a whole in matters of universal, shared, and direct concern. The principle

69 *Prosecutor v. Kupreškić et al.*, 2000, para. 525.

70 *Prosecutor v. Jean-Paul Akayesu*, 1998, para. 565. ‘Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal character. In fact, the concept of crimes against humanity had been recognized long before Nuremberg’.

71 Clark, 1990, p. 177.

72 *Prosecutor v. Anto Furundžija*, 1998, paras. 137, 183.

73 *Prosecutor v. Jean Kambanda*, 1998, para. 15. ‘But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity’.

can also serve to enhance the specific quality and value of humanity itself. Whatever the exact interpretation of the principle is, it can be without a doubt applied to numerous specific situations. However, the strongest connection may be seen in specific vulnerable positions, such as the protection of persons *hors de combat* or prisoners of war.⁷⁴ The two specific situations will be shortly discussed below.

3.2.1. *Hors De Combat and Principle of Humanity*

The so-called persons out of combat are those combatants who, due to their injury or sickness cannot pose a further threat to the enemy soldiers or military objectives. As this position causes a highly vulnerable position IHL provided a protection through the means of treaty law via GCs for the Amelioration of the Condition of the Wounded and Sick in Armed Forces. Nevertheless, the principle of humanity can pose as a vaguer, but hence flexible help when the treaty is silent.

The conditions for a person to qualify as *hors de combat* are explicitly outlined in Article 3 of the GC. These conditions require the individual to lay down their weapons, cease any hostile actions on the battlefield, and clearly demonstrate an intention to surrender to the enemy. Once these criteria are met, they must be treated humanely and without discrimination. Assistance may also be provided by a party to the conflict, the Red Cross, or another humanitarian organisation. Such individuals must be removed from the battlefield and given appropriate care, while being protected from further attacks or harm. This is in line with the principle of humanity also enshrined in specific provisions. Since they no longer take part in hostilities and seek to be rescued, they no longer constitute legitimate military targets. This classification also applies to individuals who are unconscious or in poor health and unable to express their intent to surrender. However, if such a person regains health, they must refrain from engaging in hostilities or attacks. Therefore, *hors de combat* includes those who actively surrender as well as the sick or wounded who express a desire to surrender. A combatant who continues fighting despite being injured, however, does not fall into this category.⁷⁵

This principle also extends to situations governed by treaty law, including the Hague Conventions, the GC, and various military manuals from different states. Traditionally, surrender is indicated through gestures like laying down weapons, raising hands, or displaying a white flag, among other clear signs. However, during combat, a combatant may not always have the opportunity to display their intention to surrender. For example, a combatant forced to eject from a damaged aircraft must be given the chance to surrender and cannot be attacked while descending by parachute. Upon landing, they must clearly indicate their intention not to fight.

⁷⁴ Hassanová, 2023, p. 104.

⁷⁵ The first Additional Protocol no. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts, 1977, art. 41, para. 1.

If they attempt to escape, destroy sensitive materials, or attack the enemy after landing, they lose protection.⁷⁶

3.2.2. Prisoners of War and the Principle of Humanity

When a combatant participates in hostilities but later surrenders to the enemy, they are classified as *hors de combat* and are entitled to prisoner-of-war (POW) status. Prisoners of war are held captive in order to prevent their continued participation in hostilities and not as punishment for their prior involvement. The protection of POWs, including their removal from the battlefield, proper treatment, provision of food, guarantees of safety and basic hygiene is also governed by the principle of humanity.⁷⁷

POWs must be protected from violence, insults, and any form of inhumane treatment. Repression or discrimination against POWs is strictly prohibited, regardless of their age, gender, or other characteristics, and their honour must always be respected. The GC also outlines rules for the treatment of POWs after the cessation of hostilities, ensuring they are neither abused nor punished once peaceful relations are restored. Importantly, POWs must be released immediately after the end of the conflict.⁷⁸

However, the practical implementation of these protections can be challenging due to the harsh and unpredictable conditions of armed conflict. Nevertheless, the obligation to ensure the safety and well-being of POWs must always take precedence over military interests. Regardless of the time, personnel, or financial resources required, POWs are entitled to humane treatment and adequate living conditions. This treatment of POWs may pose extraordinary challenges but the treaty provision and customary law reaffirms that the principle of humanity takes precedence over military necessity when dealing with POWs.⁷⁹

4. The Principle of Distinction

Armed conflicts often happen on highly populated territories and may even effect large proportions of the civilian population. The conflict hence poses a challenge in terms of differentiation between those who are involved in conflict and those who are not. This is especially the case where members of the belligerent forces live and operate freely within their communities. A common vision of the IHL is that civilians and combatants have to be clearly distinguished and as a consequence treated according to their position. As combatants may cause threat, they do not enjoy protection from external attacks. Moreover, the obligation of distinction applies to objects, where the rule sets that civilian objects cannot be directly attacked as military objects.⁸⁰

⁷⁶ Oeter, 2008, p. 178.

⁷⁷ Protocol I additional to the Geneva Conventions, 1977, art. 40.

⁷⁸ Geneva Convention relating to the Treatment of Prisoners of War. (III.), 1949, art. 118.

⁷⁹ Oppenheim, 1952, p. 367.

⁸⁰ Hayashi, 2021, p. 86.

The principle of distinction imposes on the belligerent parties an obligation to distinguish between combatants and civilians and between military objects and civilian objects. Logically, the main aim is to ensure the respect towards civilians and their needs. The methods and means chosen by the military are hence not unlimited.⁸¹

4.1. Short Historical Overview

The principles and rules of humanitarian law would be rendered meaningless without a clear distinction between armed forces and civilians, i.e. combatants and non-combatants. This distinction is central to key conventions and declarations, such as the St. Petersburg Declaration, which emphasises the need to protect individuals not participating in hostilities. Oppenheim, in his 1940 work, also highlighted the importance of distinguishing combatants from civilians, asserting that private individuals, who are not part of the armed forces are not actively engaged in fighting and, therefore, should not be targeted. He further noted the ethical and legal advancements that led to the creation of such protective rules. Historically, however, wars often involved entire populations, including women, children, and the sick as well, blurring the proper distinction.⁸²

The distinction between combatants and civilians lies at the heart of humanitarian law and was enshrined in numerous conventions. As mentioned above it can be implicitly derived from the St. Petersburg Declaration of 1868 (Section 83) and the Hague Conventions (Article 25), as well as explicitly outlined in the Additional Protocol to the Geneva Conventions (Article 48). It is further incorporated into the Convention on Certain Conventional Weapons⁸³ and the Ottawa Convention on the Prohibition of Anti-Personnel Landmines.⁸⁴ The rules concerning indiscriminate or imprecise attacks (discussed below) were part of early legal frameworks, such as the opinions of the Imperial Defence Committee in 1919 and the Hague Aviation Rules of 1923. These documents addressed bombing methods, emphasising that attacks should not endanger civilians. Although these documents provide significant guidance on the issue, they are not legally binding instruments. Nevertheless, they reflect the evolving norms prohibiting actions without distinction.⁸⁵

4.2. Character of the Principle (Main Elements and Limitations)

The principle of distinction is considered as a cornerstone of international legal regulation dealing with conduct in combat operations. It is normatively embedded in the Article 48 of the AP I under an apt title Basic rule. Nevertheless, it was for long part of customary law. Additionally, the principle may be derived from several

81 Hague Regulations, 1907, art. 33.

82 Oppenheim, 1940, p. 168.

83 Protocol II to the Convention on Certain Conventional Weapons, 1980, art. 3, para. 2.

84 Ottawa Convention on the Prohibition of Anti-Personnel Landmines, 1997, Preamble.

85 Hanke, 1993, p. 24.

provisions of IHL stipulating the protection of civilians and the objects necessary for their livelihood.⁸⁶

The principle of distinction is intrinsically tied to the concept of a combatant. Today, a combatant is defined as a member of the armed forces taking part in the armed conflict, excluding medical and religious personnel.⁸⁷ Combatants actively participate in battles and may be considered as legitimate military objectives. Targeting civilians is prohibited. Nevertheless, those civilians, who directly engage in hostilities lose their protection. Indirect contributors, such as factory workers producing weapons or drivers transporting supplies, are not considered combatants, even though their work supports the war effort. While the facilities they operate in may be lawful military targets, any harm to civilians within them must adhere to the principle of proportionality (further analysed below). For example, attacking a civilian driver transporting military supplies in a vehicle is lawful under humanitarian law, but targeting the same individual outside the vehicle would constitute a grave violation of IHL.⁸⁸

Combatants typically serve as soldiers in the armed forces of a state involved in an armed conflict, operating within a hierarchical system where orders are given and obeyed based on rank. This structure prioritises military discipline, often overriding individual autonomy. While this approach may appear inconsistent with human rights norms, it is a legitimate aspect of military operations. However, challenges arise when orders conflict with IHL, such as prohibitions on targeting civilians or violating principles like humanity. In such cases, lower-ranking combatants may face dilemmas, which are equally present in the scholarly world.⁸⁹ According to Article 33 of the Rome Statute of the International Criminal Court (ICC), individuals can be held accountable for unlawful acts, even if carried out under orders, underscoring the limits of obedience in the face of legal and ethical obligations. On the other hand, Article 28 sets the responsibility of commanders for the acts of their subordinates.⁹⁰

The principle is strongly linked to the notion of a military objective, as it is essential for determining whether the target of an attack qualifies as a legitimate military object. According to the obligation the only legal targets are those of military nature. This can only be accomplished through proper planning and directed attacks. Thus, a commander conducting an attack must be fully informed about the details of the military objective, including the presence of civilian populations nearby or cultural monuments that could be affected. Additionally, it is important to distinguish between

⁸⁶ Kalshoven and Zegveld, 2012, pp. 45–46.

⁸⁷ The first Additional Protocol No. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts. 1977. Section II. art. 43: ‘Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by art. 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.’

⁸⁸ Parks, 1990, p. 134.

⁸⁹ See: Gaeta, 1999.

⁹⁰ Rome Statute, 1998, arts. 28, 33.

indiscriminate attacks, which violate the principle of distinction and are prohibited, and attacks carried out absolutely blindly. Planned attacks must also adhere to the principle of proportionality; if an attack is expected to cause excessive civilian casualties or damage to cultural landmarks relative to the anticipated military advantage, it is unlawful. Similarly, indiscriminate attacks that result in substantial and unjustifiable harm are categorically forbidden.⁹¹

The principle demands a distinction. However, what happens when there is no detailed planning in military operations? Indiscriminate attacks, as outlined in the Geneva Protocol, highlights challenges stemming from ambiguities in the structure of Article 51, which addresses this issue. While the first and second paragraphs emphasise the principle of distinction, the third paragraph introduces the principle of proportionality in a way that creates potential confusion. This lack of clarity in defining indiscriminate attacks appears to arise from theoretical ambiguities embedded within the Convention itself.⁹² Indiscriminate attacks are always prohibited, even if they satisfy the principle of proportionality (i.e. when the military advantage gained significantly outweighs civilian losses). However, some experts argue that the principle of proportionality must always be considered, suggesting that if it is not violated, the attack may not necessarily be deemed indiscriminate. Although Article 51 does not explicitly permit such attacks under the principle of proportionality, some interpretations suggest that this possibility could be partially inferred from its fourth paragraph.⁹³

Protocol I of the GC adopted a positive definition of a military object, stating that any object that does not meet the required criteria must be considered as a civilian object. A military object must meet two criteria:

- ‘(a) by its nature, location and purpose or use it makes an effective contribution to the military actions of the adversary.
- (b) its total or partial destruction, occupation or neutralisation in the circumstances provides a clear military advantage.’⁹⁴

The relatively broad generality of this provision can, however, be seen as a disadvantage. Generality inevitably also entails uncertainty and opens up room for various interpretations, including deliberate misinterpretations. A commander would

91 See: Rule 12. Definition of Indiscriminate Attacks; Cassese, 2008.

92 Rauch, 1982, p. 68.

93 The first Additional Protocol No. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts. 1977. art. 51. para. 4.: ‘Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.’

94 Additional Protocol I to the Geneva Conventions of 12 August 1949, 1977, art. 52.

certainly prefer a more specific definition. The ICRC have presented several draft definitions of the term military objective, which included the dispositive list of concrete examples. However, it was proven that this approach is generally impractical, as during an armed conflict there are special unexpected situations. Reality has hence led to a more universal definition.⁹⁵

There exist two main categories of military objects. The first are those which fulfil the requirements of being military by nature and, the second are those that assume the status of military objective. The first category includes objects such as: enemy combatants, weapons and ammunition, military equipment and all military material. In case of enemy combatants, they represent a clear-cut military object even when they do not perform some kind of military operation. The logic behind this is obvious, as it is principally easier to attack a relaxed or even sleeping combatant than one actively present on the battlefield. The same stands for ammunitions and military equipment, which is not directly used during combat. The stockpiled weapons are definitely an easy target, which can have a significant advantage for the enemy when destroyed. The second category of objects are those, whose status can change according to the situations on the battlefield. Fights often take place in villages and cities near civilian objects. When these objects are not being used by civilians and are used by the military, their status can change instantly. E.g. civilian houses without civilians but used for housing combatants, lose their status of civilian protection. Similarly, the civilian who takes up arms and starts to attack, loses the protection. Thus, the principle of distinction has to be applied according to the actual circumstances at hand.⁹⁶

As mentioned briefly in the previous paragraph, if a combatant adheres to the rules of humanitarian law and clearly distinguishes themselves from civilians through their appearance and behaviour, applying the principle of distinction becomes straightforward. However, challenges arise with volunteers who plan or carry out attacks without formally joining the armed forces. Such individuals often form groups, and if a group has a commander issuing orders and actively engages in hostilities, its members may be classified as combatants — except for mercenaries, who are not granted protection under international law. Activities beyond the command structure or involving mercenary groups are prohibited, and the party they support is obligated to prevent their actions. If an independent, politically influential, and organised group emerges, it may become a legitimate party to the conflict and hence lose protection. We may observe the principle indirectly in Article 13 of the AP II to the GC, which declares that civilians enjoy protection from attacks unless they take direct part in hostilities, thus, making a distinction between those who are active fighters and those who are not. In non-international armed conflicts, the legality of direct participation in hostilities is however determined by national law.⁹⁷

95 Mencer, 1983, p. 122.

96 Fuchs, 2007, p. 58.

97 Additional Protocol I to the Geneva Conventions, 1977, art. 13, para. 3; art. 47, para. 2.

The significance of the principle of distinction in defining combatants has been reinforced through landmark cases in international courts. For instance, the *Kasseman* case before an Israeli military court affirmed the principle as a fundamental rule of IHL, emphasising the necessity of distinguishing civilians from those actively engaged in hostilities.⁹⁸ Similarly, in the *Legality of the Use of Threat* case, numerous states referenced this principle in their submissions. The International Court of Justice (ICJ), in its advisory opinion, recognised the principle of distinction as one of the cardinal rules of IHL and an essential component of customary international law.⁹⁹

5. The Principle of Proportionality

Finally, yet not less importantly, one of the basic principles is the principle of proportionality. Even though seemingly rather theoretical, this principle has a tremendous influence in practice.¹⁰⁰ The military, during the decision-making process, has to take the limitations of their actions seriously, influenced heavily by proportionality. The explicit wording of the principle is relatively new, however already understood as a cornerstone of IHL.

From the previous paragraphs it follows that the principle has a strong connection both with the principle of military necessity and the principle of humanity. Combatants are obliged to ensure that their targets are military objectives, meaning they should only be combatants or military assets. Therefore, their strategies must take into account the potential side effects of their actions. Several weapons do not guarantee absolute certainty regarding planning; however, those attacks that may cause excessive incidental harm to civilians are prohibited. Here comes the principle of proportionality, which defines the excessive harm in relation to the specific and direct military advantage anticipated.¹⁰¹

5.1. Short Historical Overview

From a historical perspective, we may observe some of the already mentioned historical declarations of IHL. The first, i.e. the Lieber Code of 1863, mentions proportionality twice, although indirectly. In its Article 15 it enhances the rules via the prism of the principle of military necessity, when it declares that: ‘Military necessity allows all direct destruction of life or limb of armed enemies, and of other persons

98 *Kasseman Case*, 1969, Military Court, Israel, para. 271.

99 Here the ICJ affirmed, that while there’s no explicit prohibition, nuclear weapons must comply with this principle, and their use would likely violate the law unless in an extreme self-defence scenario where the state’s survival is at stake; *Legality of the threat of nuclear weapons*, ICJ advisory opinion, 1996, no. 679, para. 434.

100 Beard, 2009, p. 427.

101 Additional Protocol I to the Geneva Conventions, 1977, arts. 51–57.

whose destruction is incidentally unavoidable in the armed contests of the war.¹⁰² Even though the provision sets no basis for the general protection of civilians, one can assume that any avoidable destruction of others than combatants is not allowed. Furthermore, the Code in its Article 22 explicitly limits the harm that could be caused to civilians, if not necessary.¹⁰³ While the Code did not establish a true proportionality principle, an initial observation could be made.

The St. Petersburg Declaration drafted later can be considered as another weak step towards the establishment of the principle. The Declaration sets a need to fix the technical limits at which the necessities of war ought to yield to the requirements of humanity.¹⁰⁴ Nonetheless, the document had not thought about the issue of incidental damage, it established the need to create a balance between the military aim and humanity.¹⁰⁵ Several scholars claim that a significant step forward in relation to the principle were the Hague Regulations signed in 1907, where Article 23 declared that the destruction or seizure of property is limited and has to be proportional to the necessities of war.¹⁰⁶ The non-binding Rules of Air Warfare after the First World War included a further interpretation of the principle, when it stated that some military actions may be legitimate when they are important “enough”.¹⁰⁷

The principle, as observed above, was not well-established before the Second World War. Nonetheless, concerns were raised at conferences that there was no clear-cut and binding definition of proportionality. The strategy during the World War was not taking into account this rule, thus collateral and unnecessary damage to civilians or civilian objects was a regular price to pay.¹⁰⁸ Attacks were generally not directed towards civilians, nevertheless a vast amount of them were injured or killed as immense casualties. The heinous crimes committed during the Second World War influenced the debates at conferences, leading to a more comprehensive protection of civilians being incorporated into the IHL. These steps resulted in the creation of military manuals referring to proportionality but most importantly in the creation of the Additional Protocol I (AP I) to the GC, which explicitly referred to the principle of proportionality as an obligatory rule.¹⁰⁹

5.2. Character of the Principle (Main Elements and Limitations)

The principle of proportionality can be understood as a balance existing between two conflicting interests, presented by the principle of military necessity and the

102 General Orders No. 100 (Lieber Code), 1863, art. 15.

103 Ibid., art. 22.

104 Declaration of renunciation of the use of explosive projectiles, in time of war up to 400 grams in weight, opened for signature on November 29, 1868, “St. Petersburg Declaration”.

105 See: Schmitt, 2010.

106 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907, art. 23(g); See: Kalshoven, 1992.

107 Hague Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, 1923, art. 24; Cohen and Zlotogorski, 2021, p. 25.

108 Fenrick, 1982, p. 127.

109 Additional Protocol I to the Geneva Conventions, 1977, arts. 51–57.

principle of humanity. The principle creates the balance between the two principles horizontally, rather than vertically. Hence, the attacker needs to think ahead when planning a military strategy, including the weighing of the foreseeable incidental damage caused to the civilian population. The principle, stemming from IHL treaty and customary law, represents that although every strategy in an armed conflict has an aim, the success cannot be the only aspect taken into account. Those actions which demand unreasonable costs has to be limited. If an action anticipates excessive damage to protected subjects or objects, it may not be performed.¹¹⁰

As anticipated, the IHL takes into account that in an armed conflict there will be civilian victims as well as damages caused to civilian property. Nevertheless, these losses have to be reasonably proportionate to the planned advantage. As the modern warfare pushes the scope of battlefield to literally anywhere, the decision-makers of the military operations have to essentially keep in mind the proportionality in every operation. Needless to say, this duty of the commanders is anything but simple. It includes accurate knowledge of the battlefield area, gained only through the gathering of actual information. These precautions of attack may lead to the execution, but also to the cancellation or suspension of the planned operation. However, the law continues to be realistic, when it does not demand impossible feats, as the decision regarding the attack has to be made on the basis of the currently available information.¹¹¹ To establish whether the decision-making commander held ultimate responsibility for a proportionality violation, a court evaluates various factors. These factors would encompass the commander's rank in the chain of command relative to the officer who committed the violation, the characteristics of the military units under the commander's control (e.g., stable or mobile), the commander's movement in relation to those units, the size of the commander's staff and the scope of its responsibilities, as well as the nature of the combat situation.¹¹²

Distinction has to be made between attacks planned against a legitimate aim and attacks aimed primarily at civilians. Proportionality is just a complementary aspect in this regard and is thus does not enable derogation from prohibitions against protected subjects. The distinction between the two categories of acts is fundamental, although can be complicated. For example, partisan fighters can be hard to distinguish from civilians. Nevertheless, even if it is almost impossible to isolate combatants from non-combatants in some situations, uncertain actions against mixed groups would be considered illegal.

Generally, proportionality can be understood as the third sub-test of a legal military action. Even though the specific provisions regarding proportionality in IHL do not incorporate the three sub-tests, these sub-tests are represented through other particular provisions of IHL and its fundamental principles. The prohibition against all attacks on civilians and civilian objects can be interpreted as reflecting

110 See: Shany and Cohen, 2007.

111 Gasser, 1993, p. 551.

112 See: Goldenberg, 1971.

the suitability test, which necessitates a rational link between the means (the attack) and the aim (the intended military advantage). Additionally, the ban on direct attacks on civilians can be seen as exemplifying the second sub-test, as it aims to minimise civilian suffering, provided there is an alternative that results in less harm. Thus, it embodies an aspect of the least harmful means test.¹¹³

The term military advantage has been used in the chapter several times. However, it undoubtedly has a special place in the appropriate understanding of the principle of proportionality. The notion can be understood in two ways; either as a whole or on case-by-case basis. The case-by-case interpretation focuses on the specific tactical objective of each individual action, while the cumulative interpretation looks at how that action contributes to the belligerent's broader strategic goals. The result of the analysis questioning the legality and proportionality of the operation may rest upon the different understandings of the military advantage.¹¹⁴

A significant influential aspect of the lawful conduct and assessment of proportionality is the controllability of the weapon. When assessing a weapon's controllability, it is important to consider not only the immediate destruction caused by its use but also the longer-term impacts, such as environmental harm caused either to natural resources or agricultural land. Such damage is often more challenging to justify under proportionality than immediate destruction, as it has a less imminent and more remote relationship with the military advantage initially aimed for. Additionally, the unique military advantages that a weapon or technique may offer influence the proportionality assessment substantially. If a specific weapon or technique serves as a particularly effective method for achieving a certain military advantage, this could offset, in terms of proportionality evaluation, the greater potential civilian harm resulting from its usage. Therefore, it has been suggested that the principle of proportionality might even allow the use of weapons like napalm, despite the extensive civilian damage observed from its use in Vietnam and elsewhere.¹¹⁵ The aforementioned factors prompt the question of whether any weapon or warfare technique is intrinsically in violation of the proportionality principle. Nuclear weapons are the most conspicuous examples of such a classification. While a proportionality argument could potentially be made to justify the use of a tactical nuclear weapon against a significant military target situated far from civilian populations, the fallout from such an attack could still result in substantial civilian harm. Furthermore, a nuclear weapon may not necessarily demonstrate significantly greater effectiveness than conventional weapons when it comes to destroying a remote military base or target. Therefore, even if nuclear weapons are not inherently disproportionate, they would only meet the proportionality requirement in the most exceptional situations.¹¹⁶ Here, it is necessary to mention that the ICJ stipulated that generally the usage of

113 Shany, 2009, pp. 56–57.

114 Brown, 1976, p. 141.

115 Farer, 1971, p. 22.

116 Brown, 1975, p. 143.

nuclear weapons is not illegal if performed for self-defence, which is always under the conditions of necessity and proportionality.¹¹⁷

Formally, there is no explicit provision on proportionality in non-international conflicts. The Additional Protocol II only prohibits indiscriminate attacks which are directed toward civilian population. Nevertheless, the application of customary international law is based on universal principles and state practices, whereas no state has ever declared that these principles do not apply to non-international armed conflicts. Yet, the interpretation of these applications may regularly vary.¹¹⁸

Recently, increasing attention has been paid to the new modern technologies used in armed conflicts. As the current warfare introduces several new modern technological means and methods, the principle of proportionality may come as extremely handy when applied to situations which are not covered by IHL treaty or even customary provisions. Nevertheless, applying proportionality to cyberattacks can be difficult. Cyberattacks have a vast amount of immediate effects but still can cause a tremendous amount of damage observed only later. The destruction, data corruption, system damage or damage to infrastructure all have to be taken into account when considering whether cyberattacks are proportionate or not.¹¹⁹ Nonetheless, modern technology can be an aid for keeping up with the demands of the IHL. Robots, autonomous systems or drones can help gather information which is more current and actual, hence providing the combatants with real-time information. The technological development may thus help when proportionality limits the planning of an operation.¹²⁰

6. Conclusion

The specificity of humanitarian law is that it applies moral principles i.e. values that are generally included in human rights law, within the context of armed conflict, which fundamentally opposes the goals of protecting human rights. The special interaction between humanitarian law and human rights law is seen by Pictet as well, who claims that humanitarian law comprises two branches of law: the law of war and human rights.¹²¹

This interdependent relationship influences the direction and pace of IHL's evolution, as well as its application on the battlefield. Over time, the systematic development of treaty law by states creates a balance within the legal system, since states must

117 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ, 1996.

118 Henckaerts and Doswald-Beck, 2005, p. 48; See: Prosecutor v. Thomas Lubanga Dyilo, ICC, Judgment, 14 March 2012, No. ICC-01/04-01/06; Prosecutor v. Bosco Ntaganda, ICC, Judgment, 8 July 2019, No. ICC-01/04-02/06; Prosecutor v. Stanislav Galić, ICTY, Judgment, 5 December 2003, No. IT-98-29.

119 Hassanová, 2023, p. 135.

120 Pomés, 2017, p. 217.

121 See: Pictet, 1966.

consider both military and humanitarian interests. However, external pressures have gradually shifted the focus toward humanitarian considerations. While this trend might signify a form of “progress”, it also poses a risk to the fragile balance necessary for the continued effectiveness of IHL within a state-centric legal framework.

The principles of humanitarian law play a crucial role in driving significant advancements in the realm of human rights. While human rights were historically disconnected from humanitarian law, they are, in practice, inherently intertwined. A shift in the scope of application, influenced by references to the principle of military necessity, was initially confirmed by changes in the status of the state as a subject of international law. This transformation in the conventional understanding of state sovereignty began with the Nuremberg Charter, which established jurisdiction over crimes against humanity, regardless of their compliance with the national laws of the country where they occurred. The International Criminal Court has also highlighted that humanitarian law serves as a *lex specialis* compared to human rights law during armed conflicts. Human rights laws are intended for times of peace, whereas humanitarian law applies specifically during periods of armed conflict, effectively displacing more general laws as per the specialty rule. As a result, human rights laws are frequently suspended in times of conflict.¹²²

Military law enforcement operations in peacetime share many similarities with hostilities during armed conflicts. The fundamental principles of distinction and humanity apply in both scenarios. This also holds true for various other overarching principles, such as proportionality. The differences in the application of these principles within the contexts of law enforcement and conflict management are primarily interpretative in nature, meaning they do not diminish their overall applicability.

In any armed conflict, individuals are injured or killed, and property is often damaged or destroyed. To mitigate such suffering, humanitarian law has established explicit rules. These rules translate fundamental principles into clear provisions applicable to conflict situations. For these treaties and conventions to be effective, they must acknowledge the existence of armed conflicts and aim to maximise protection for civilians who are not directly involved. One way the conventions balance humanitarian needs with the practical realities of war is by recognising the possibility of incidental damage to civilian property and injury to civilians, even when military operations are aimed at legitimate military targets. A key example is the prohibition of excessive incidental harm to civilians and critical infrastructure, such as historic buildings. This prohibition implicitly acknowledges the occasional necessity of incidental losses, provided they are not excessive.¹²³

Because general principles of law are recognised as a formal source of law only within the international sphere, their application is generally confined to international case law, international organisations, and their affiliated bodies, such as the UN Special Rapporteurs. This application is a deficiency and a more widespread

¹²² Parks, 2010, p. 797.

¹²³ Fenrick, 1982, p. 92.

application of general principles at the practical level would certainly bring moral clarity into practice. Moreover, the flexibility of the principles would allow for a more prompt response to the necessities of emergent situations.¹²⁴

Concepts such as military necessity, humanity, and proportionality are not fixed; they evolve as state practice clarifies the applicable law. As state practice contributes to the development of related case law and its application in combat situations, these aspects of IHL improve alongside advancements in international criminal justice. As a result, this evolution affects even the interpretation of the concept of armed conflict.¹²⁵

Some scholars argue that certain principles have become obsolete. Specifically, these claims include that the principle of military necessity has become somewhat outdated and does not impose meaningful limitations on commanders. These scholars contend that this principle is relevant only in the absence of a norm of humanitarian law that governs the situation, and can thus only be invoked in contexts of ambiguous customary law or legal gaps. Indeed, with ongoing technological advancements, significant gaps still exist within humanitarian law, indicating that the principle has potential for future evolution. However, if the principle were applied solely when no explicit rule exists, it would have limited relevance in contemporary law. The principle of military necessity has, on the contrary, a special importance in IHL. The principle is inherently linked to the nature of armed conflict; it automatically applies when a conflict arises, as its absence would negate the very existence of the conflict. Therefore, in every armed conflict scenario, this principle takes precedence over other humanitarian law principles. Nevertheless, combatants are not free to attack without restrictions; these limits are guided by the interpretation of military necessity. A combatant's actions align with this principle if they yield a military advantage and primarily target a specific military objective in accordance with humanitarian law.¹²⁶

The advancement and interpretation of humanitarian law and war crimes involves balancing military and humanitarian considerations. Combatants may prioritise military aspects over humanitarian concerns. Conversely, those who have not experienced conflict may overlook or undervalue military necessity when making statements regarding humanitarian law and war crimes. There is no doubt that the principles are one of the most important sources of law in the field of IHL. They apply to issues of civilians as well as non-combatants. The existence and binding force of these principles as general principles of IHL is also confirmed by the case law of current international courts. In cases of uncertainty or lack of sources (or *lacunae*), international courts frequently refer to principles. Therefore, they undoubtedly recognise their existence and importance.

124 Hassanová, 2023, p. 48.

125 Cullen, 2015, p. 776.

126 Hassanová, 2023, p. 142.

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International Humanitarian Law III: The 1949 Geneva Conventions and Their Additional Protocols I-III

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ABSTRACT

This chapter examines the 1949 Geneva Conventions and their Additional Protocols as the legal framework of modern international humanitarian law (IHL). Adopted in the aftermath of the Second World War, the Geneva Conventions universalized minimum standards of humane treatment during armed conflict and expanded protection for wounded combatants, prisoners of war, and civilians. The chapter situates the Conventions and their Additional Protocols within their historical and political context, and by doing so, it highlights also the influence of earlier humanitarian instruments.

A central focus of the chapter is the distinction between international and non-international armed conflicts and the legal rationale for preferring the functional concept of “armed conflict” over the politically charged term “war.” Particular attention is given to Common Article 3 of the Geneva Conventions, which establishes a minimum, non-derogable humanitarian baseline applicable to all armed conflicts and has attained customary international law status. The chapter further analyses the material scope of protection under each of the four Geneva Conventions and assesses the principal innovations introduced by Additional Protocols I and II, including the principles of distinction, proportionality, and civilian protection, as well as the regulation of means and methods of warfare. Additional Protocol III and the emblem regime are also addressed.

Finally, the chapter explores the relationship between the Geneva Conventions and international human rights law and the relationship between the Geneva Conventions and international criminal law with a focus on the concept of grave breaches and their transformation into prosecutable war crimes under the Rome Statute of the International Criminal Court. By linking humanitarian obligations with individual criminal responsibility, the chapter demonstrates how the Geneva framework continues to shape accountability mechanisms and remains central to the protection of human dignity in contemporary armed conflicts.

KEYWORDS

Geneva Conventions and their Additional Protocols, international humanitarian law, armed conflict, war crimes and international criminal law

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1. Introduction

This chapter examines the normative basis of modern international humanitarian law: the four Geneva Conventions of 12 August 1949 and their Additional Protocols – Additional Protocol I and Additional Protocol II of 1977 and Additional Protocol III of 2005. These treaties have universalised the minimum standards of humane treatment during armed conflicts, irrespective of reciprocity or formal declarations of war and they have operationalised basic principles of international humanitarian law through detailed obligations on the conduct of hostilities and protection of persons and objects. Although these instruments differentiate between international and non-international armed conflicts, the Conventions' common Article 3 establishes a minimum, non-derogable humanitarian baseline that has since achieved customary status.

The chapter consists of four subchapters. First, it analyses the adoption of the Geneva Conventions and their Additional Protocols in their historical and political context. Second, it clarifies the notion and classification of armed conflict and explains why contemporary practice favours the functional term “armed conflict” over the politically loaded “war.” Third, it sets out the material scope of protection under each Geneva Convention and the main innovations of Additional Protocols I and II as well as the emblem regime under AP III. Finally, it examines the relationship between the Geneva framework and international criminal law, focusing on how the Rome Statute translates grave breaches of the Geneva Conventions into prosecutable war crimes.

2. The Adoption of the 1949 Geneva Conventions and Its Additional Protocols in a Historical and Political Context

The 1949 Geneva Conventions¹ were adopted in the aftermath of World War II, a conflict that exposed unprecedented levels of civilian suffering, mass destruction, and war crimes, highlighting the need for stronger international humanitarian law.² These conventions were a significant expansion and revision of earlier treaties, not to forget to mention especially the 1864 Geneva Convention, the first international treaty in the area of international humanitarian law, and the subsequent 1906 and 1929 versions of the Geneva Conventions, which primarily addressed the protection of wounded soldiers.³

1 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) relative to the Treatment of Prisoners of War; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War.

2 Pictet, 1958, pp. 3 et seq.

3 Bugnion, 2003, p. 313.

The horrors of World War II, including events like the Holocaust and the atomic bombings of Hiroshima and Nagasaki, called attention to the inadequacy of existing legal protection especially for civilians, prisoners of war (POWs), and also for the wounded during armed conflicts. This inadequacy is considered a material source of international humanitarian law.⁴ The formal source is embodied in the 1949 Geneva Conventions that were adopted on August 12, 1949. These Geneva conventions consist of four treaties: the First Convention for the wounded and sick in the field, the Second one for naval warfare, the Third one for POWs, and the Fourth one for the protection of civilians. It was exactly the last treaty, the Fourth Geneva Convention that was a landmark in the development of international humanitarian law because it considerably extended humanitarian protections to civilians, a group that was severely impacted during World War II.⁵

The conventions were negotiated and adopted under the auspices of the International Committee of the Red Cross (ICRC), which played a very important role in drafting and promoting the adoption of the treaties.⁶ There were 63 states participating in the diplomatic conference in Geneva during which they demonstrated a shared commitment to reinforce humanitarian norms after the atrocities of the World War II.⁷ The Geneva Conventions became a cornerstone of modern international humanitarian law (IHL), a legal framework that regulates the conduct of armed conflicts and protects individuals who are not or are no longer taking part in hostilities, belonging to the principle treaties within this branch of international law.⁸

The principle of humanitarian protection, rooted in earlier legal norms, was significantly strengthened by the Geneva conventions, particularly concerning POW treatment, non-combatants, and medical personnel.⁹ Moreover, the atmosphere of the Nuremberg Trials and the emerging focus on individual responsibility for war crimes reinforced the need for clear, universally applicable laws.¹⁰ Therefore the Geneva conventions also included this approach and introduced the concept of grave breaches, obligating states to criminalise and prosecute serious violations of humanitarian law, such as torture, unlawful deportation, and wilful killing.¹¹ Although the Cold War had already begun, the Geneva Conventions were adopted despite the significant political tensions between the Western and Eastern blocs, since they reflected the universal nature of humanitarian concerns.¹²

As it has already been pointed out, there had previously been efforts to regulate the conduct of hostilities based on principles of neutrality, impartiality, and

4 Ondřej et al., 2010, p. 108.

5 Sassòli, 2024, p. 8.

6 Bugnion, 2003, pp. 313–314.

7 Kolb and Hyde, 2008, pp. 39–40; International Committee of the Red Cross (ICRC), 1949, Final Act of the Diplomatic Conference of Geneva of 1949.

8 Dinstein, 2010, pp. 14–15.

9 Meron, 2000, p. 38.

10 Cassese, 2008, pp. 27–31.

11 Henckaerts and Doswald-Beck, 2005, pp. 574 et seq.

12 van Dijk, 2019, pp. 209 et seq.; Schindler, 1999, p. 715.

humanity.¹³ Moreover, despite important steps forward, several issues remained unaddressed at the Geneva Conventions. Therefore, the Additional Protocols of 1977 were adopted to address the growing complexities of modern warfare, particularly the increasing number of non-international armed conflicts.¹⁴ Protocol I expanded protections for civilians and combatants in international armed conflicts, emphasising the principle of distinction between military and civilian targets.¹⁵ Protocol II was even more crucial because it developed humanitarian protections for victims of non-international armed conflicts, such as civil wars, which had become more frequent in the post-colonial era.¹⁶ The Additional Protocols also incorporated advancements in weaponry and tactics, such as restrictions on the use of indiscriminate weapons and effective advance warning prior to attacks.¹⁷

The legal obligations adopted within the Geneva Conventions are binding on states, regardless of whether they are party to the conflict or whether reciprocity exists.¹⁸ The universality of the 1949 Geneva Conventions has gradually been achieved, with nearly every state in the world becoming a party to the treaties over time.¹⁹ Moreover, in addition to treaty-based obligations, the Geneva Conventions contributed to the development of customary international humanitarian law, which applies universally.²⁰ Violations of the Geneva Conventions, such as during the Vietnam War, led to increased scrutiny and reaffirmation of their importance in regulating modern conflicts.²¹ The Geneva Conventions and their Additional Protocols have also been invoked in the case-law of international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) or the International Criminal Court (ICC), to hold individuals accountable for violations.²²

3. The Notion of Armed Conflict, International and Non-International, Respectively

With regard to international humanitarian law, it is important to note that it applies during all armed conflicts, whether international, which take place between two or more states, or non-international, which take place essentially on the territory of a single state. This division of conflicts is crucial for the reason that a different set of norms of international humanitarian law is applied in international conflicts if

13 Geneva Conventions, 1929.

14 Sandoz, Swinarski and Zimmermann, 1987, p. xxix.

15 Henckaerts and Doswald-Beck, 2005, pp. 3–4, 8, 12, 14, 18, 20.

16 Kolb and Hyde, 2008, pp. 96, 275.

17 Dinstein, 2010, p. 144.

18 Sassòli, 2024, p. 81.

19 Compare with other IHL treaties in Henckaerts and Doswald-Beck, 2005, p. xlv.

20 Henckaerts and Doswald-Beck, 2005, p. xxviii.

21 Schindler, 1999, p. 718.

22 Meron, 2000, pp. 91 et seq.

compared to those in non-international conflicts. Given the rich history of international conflicts, the legal norms governing these conflicts are much more elaborated and more detailed than those governing non-international conflicts. Non-international armed conflicts were for a long period of time regulated mostly by national law, as international law only began to deal with them after World War II. International humanitarian law, which is applied during international armed conflicts, has several hundred treaty provisions. Non-international armed conflicts are regulated by 19 treaty articles. This disparity is significant both quantitatively and qualitatively. It is related to the fact that international humanitarian law applied during non-international armed conflicts is binding on all belligerents, but the content of the treaty regulation itself is decided upon only by states as the primary subjects of international law. This, understandably, leads, on the one hand, to the fact that non-state actors do not feel bound by such a legal arrangement. On the other hand, states do not want to bind themselves to what other parties to a conflict would not respect either, all the more so since treaties in the area of international humanitarian law are not conditioned by mutual compliance, reciprocity. Moreover, the fact that one party to a conflict fails to comply with the norms of international humanitarian law does not exempt the other party to the conflict from implementing those norms.²³

The determination of the type of armed conflict is therefore important in terms of the applicability of the various norms of international humanitarian law. The Geneva Conventions of 1949 are applicable during international armed conflicts according to their common Article 2. The only exception is their common Article 3, which provides for minimum protection during non-international armed conflicts. In addition, Additional Protocol II of 1977 also applies to non-international armed conflicts under certain conditions, and Additional Protocol I to international ones. However, real situations are not so easily definable; drawing the line between international and non-international conflicts can be a complicated task.²⁴

While there is no overall treaty definition of an armed conflict as such, according to the generally accepted definition of armed conflict in the ICTY decision, the existence of an armed conflict is determined by whether armed violence was used and also by the temporal aspect of the conflict.²⁵ In addition to the long-term perspective, other circumstances have to be taken into account when engaging the armed forces of multiple states. Where two states are a common party to a conflict in which the opposing side is an armed opposition group to a state or states, the conflict is a non-international armed conflict. However, if the States Party to Additional Protocol I were a national liberation movement, it would be an international armed conflict and this Protocol, and the Geneva Conventions of 1949 would apply. This legal classification is related to Article 1(4) of Additional Protocol I, which states that international

23 See: art. 1 of the 1949 Geneva Conventions; See also *Prosecutor v. Kupreškić et al.*, 2000, paras. 511, 517 et seq.

24 Dinstein, 2010, pp. 26 et seq.

25 *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70.

armed conflicts include armed conflicts in which peoples struggle against colonial rule and foreign occupation and against racist regimes in order to exercise their right to self-determination.

The qualification of non-international armed conflicts and the determination of the legal norms that are applicable during their duration are even more complicated. As referred to above, this is related to the historical development of their legal regulation at the international level. Classical public international law, which international humanitarian law is part of, is the law governing relations between states. Since the Peace of Westphalia in 1648, given the sovereign equality of all states, they have been obliged to refrain from acting in a way that might interfere in the internal affairs of another State. This changed partially with the Second World War, which gave rise to a change in the understanding of the concept of ‘internal affairs of a State’.²⁶ A consequence, in the field of international humanitarian law is the adoption of the foundations of the law of non-international armed conflicts. As already stated, the Geneva Conventions of 1949 dealt with non-international armed conflicts in only one article, Common Article 3. This is an article which, in short, contains the basics of humanitarian action that should be considered during any conflict. For this reason, it is also referred to as a “Convention in miniature” within the Geneva Conventions.²⁷

International humanitarian law does not specify who is to determine whether a conflict is a non-international armed conflict. This is one of the peculiarities of international law as such; it lacks a central decision-making body. However, in its decision, the ICTY cited the intensity of the conflict and its organisation as qualifiers to help determine whether Common Article 3 of the Geneva Conventions is applicable.²⁸ This Article 3 of the 1949 Geneva Conventions thus applies in the case of a conflict involving organised elements both on the part of the state and on the part of or between anti-government belligerent groups, and not involving short-term and sporadic acts of violence.

According to the wording of Article 1 of Additional Protocol II, this Protocol develops and supplements Common Article 3 of the Geneva Conventions. The fact remains, however, that this Protocol applies only to those armed conflicts that occur between armed forces and dissident armed forces, not between different armed groups. Another limitation is the control of part of the territory of a state, which allows armed groups to conduct sustained and coordinated military operations. Common Article 3 of the Geneva Conventions also requires organisation but does not stipulate the need to control territory.²⁹ However, a positive aspect of Additional Protocol II is its explicit definition of internal disturbances and tensions, such as riots, isolated and sporadic

26 See e.g. Simma, 2012, pp. 269 et seq.

27 Pictet, 1958, p. 34; See also *Prosecutor v. Kayishema and Ruzindama*, 2001, para. 165.

28 *Prosecutor v. Tadić*, 1997, para. 562.

29 The International Court of Justice applies so-called effective control in relation to the level of control (see, for example, its decision in the case of *Military and Paramilitary Activities in and Against Nicaragua*), the International Criminal Tribunal for the former Yugoslavia applies so-called overall control (see, for example, its decision in the case of *Tadić*).

acts of violence and other acts of a similar nature that are not considered to be armed conflicts.³⁰

Of course, the above division of armed conflicts into international and non-international is usually a theoretical framework. In real situations, conflicts may overlap, or there may be an international conflict even though it has the characteristics of a non-international conflict, and *vice versa*.³¹ Moreover, a conflict similar to the one that took place during the disintegration of Yugoslavia, where the different types of conflicts seemed to be intertwined, may happen again. This conflict has been described by the ICTY as a mixed one.³² Nevertheless, it is important to establish which rules of international humanitarian law apply in any case, so that the rights and obligations of both states and individuals are as clearly defined as possible during a particular armed conflict.

4. The Rationale of Avoiding the Term “War”

The avoidance of the term “war” within international law comes from its historical ambiguity and the complexities surrounding the formal declaration of hostilities, which could lead to legal uncertainties in conflict classification.³³ Historically, under the Hague Conventions of 1899 and 1907, the term “war” required formal declarations for legal recognition,³⁴ but many conflicts occurred without such declarations, complicating the application of international law.³⁵ The more neutral term “armed conflict” in the 1949 Geneva Conventions and the 1977 Additional Protocols reflects the need for a broader and more functional legal framework to address hostilities regardless of formal declarations.

The term “war” has political and emotional connotations, which states often try to avoid for strategic reasons, such as avoiding domestic consequences, maintaining diplomatic relations, or sometimes even limiting their accountability.³⁶ By using the term “armed conflict”, international humanitarian law is called to ensure that basic humanitarian protection applies to hostilities based on factual circumstances, rather than on formal political or legal recognition or reciprocity.³⁷ The use of the term “armed conflict” helps to avoid manipulation by states that might refuse to label their involvement as “war” to evade obligations under international law, such as protections for prisoners of war or civilians.³⁸ This is especially remarkable in relation to the

30 See: art. 1 of the AP II.

31 See: e.g. Solis, 2010, pp. 154 et seq.

32 *Tadić*, 1995, para. 77.

33 Dinstein, 2010, p. 28.

34 Roberts and Guelff, 2000, p. 67.

35 Pictet, 1958, pp. 18 et seq.

36 Kolb and Hyde, 2008, pp. 9 et seq.; Clapham, 2021, pp. 1–40.

37 Henckaerts and Doswald-Beck, 2005, p. 498.

38 Ondřej et al., 2010, p. 38.

armed conflict in Ukraine, where a state whose armed forces have illegally crossed national borders has decided to label the war a special military operation.³⁹

The adoption of the term “armed conflict” in the Geneva Conventions also reflects a broader recognition of non-international armed conflicts, such as civil wars or insurgencies, which historically fell outside the legal scope of the term “war”.⁴⁰ As it has been pointed out, the distinction between international armed conflicts and non-international armed conflicts allows IHL to be applied within different forms of warfare, which is important especially within asymmetrical conflicts.⁴¹ Furthermore, modern conflicts, particularly those that involve terrorist groups or hybrid warfare, challenge a formalist approach, and therefore promote the more inclusive term of “armed conflict”.⁴²

Avoidance of the term “war” has also been analysed by focusing on the functions of the international humanitarian law. Some legal scholars argue that the refrainment from using the term “war” is associated with the principle of humanitarian universality that helps the application of humanitarian legal norms regardless of the political or legal characterisations of the conflict.⁴³ Moreover, blurring between international and non-international armed conflicts has also been aimed at.⁴⁴ The ICTY emphasised in the *Tadić* case that IHL applies to any armed conflict.⁴⁵ Moreover, as it has been indicated, the rationale is considered to be rooted in the legal principle of objectivity which focuses on the facts on the ground rather than the subjective intent or declarations of parties involved.⁴⁶ Furthermore, scholars highlight that constant use of the term “armed conflict” supports the growing body of customary international law, which applies to all types of conflicts without reliance on legal formalities.⁴⁷ There is also an influence from contemporary concerns regarding human rights violations and individual responsibility, ensuring that humanitarian protection is provided to all victims of violence in armed conflicts.⁴⁸ Avoiding the term “war” can thus underscore the protective function of IHL, focusing on the humanitarian consequences of violence rather than the political or legal status of the conflict itself.⁴⁹

39 See e.g. the speech of the Russian President, 2022, Speech of 24 February 2022.

40 Bothe, Partsch and Solf, 2013, pp. 1–2.

41 Dinstein, 2010, p. 28.

42 Kolb and Hyde, 2008, p. 16.

43 Ondřej et al., 2010, pp. 7–10; Crowe and Weston-Scheuber, 2013, pp. 2 et seq.

44 Meron, 2000, pp. 29–33.

45 *Tadić*, 1995, para. 119.

46 Sandoz, Swinarski and Zimmermann, 1987, pp. 1319 et seq.

47 Henckaerts and Doswald-Beck, 2005, pp. xxxi et seq.

48 Meron, 2000, pp. 33 et seq.

49 Solis, 2010, p. 22.

5. The Scope of the 1949 Geneva Conventions and Its Additional Protocols

As it has been pointed out, the 1949 Geneva Conventions, although not being the first international treaties regulating armed conflicts, are currently considered to form the cornerstone of modern international humanitarian law, establishing rules for the humane treatment of individuals during armed conflict, namely those who are not (no longer) active participants in armed conflicts.⁵⁰

The First Geneva Convention focuses on the wounded and sick in the field, ensuring medical care and humane treatment for those who are *hors de combat*.⁵¹ It builds upon the previous Geneva Conventions that were adopted in 1864, 1906 and 1929. It contains 64 articles, to point out at least a few of them: it provides protection not only for the wounded and sick, but also for medical and religious personnel, medical units and medical transports, it mandates the neutrality of medical units, prohibiting attacks on hospitals, ambulances, and medical personnel providing aid to the wounded.⁵² If they fall into the hands of the enemy, they may continue to pursue their duties, while medical supplies that have fallen into the hands of the enemy remain reserved for the wounded and sick and may not be destroyed. This protection shall cease if the protected personnel is used for committing acts harmful to the enemy, but only after a due warning has been given for refraining from such acts and this warning has remained unheeded.⁵³

The Second Geneva Convention adapts the protection under the First Geneva Convention to naval warfare, extending safeguards to the wounded, sick, and shipwrecked members of armed forces, it being understood that the term “shipwreck” means shipwreck from any cause and includes forced landings at sea by or from aircraft. Article 12 of the Second Geneva Convention stipulates that shipwrecked soldiers must be “rescued and cared for” without discrimination. Special provisions apply to hospital ships intended to assist the wounded, sick and shipwrecked, including their treatment by transport. The parties to the conflict have the right to inspect and search hospital ships and may place neutral observers on them to guarantee respect for the Second Geneva Convention. As with land-based medical units, the protection of hospital ships ceases if they are found to have been used to commit acts harmful to the enemy. A similar regime applies to medical aircraft, which are aircraft used for the transport of the wounded, sick and shipwrecked and for the transport of ambulance personnel. These aircraft cannot be attacked either and must be respected as long as they operate within the areas, altitudes and directions agreed upon between the parties to the conflict. If an ambulance aircraft is forced to make an emergency

50 Pictet, 1958, p. 14.

51 Clapham, 2015, pp. 789 et seq.

52 Geneva Convention I, 1949, art. 19.

53 Geneva Convention I, 1949, art. 21.

landing and falls into the hands of the enemy, the wounded, sick and shipwrecked on board as well as the crew shall be considered prisoners of war.

Both the First and Second Convention emphasise the protection of the Red Cross, Red Crescent, and other humanitarian emblems, ensuring their neutrality in conflict zones.⁵⁴

The Third Geneva Convention addresses the treatment of prisoners of war. Article 4 of the Third Convention defines POWs, including members of armed forces, militias, and volunteer corps under certain conditions, namely a condition of organised command, a fixed distinctive sign recognisable at a distance (there are limited exceptions to this among countries who observe the 1977 Additional Protocol I), open arms carrying, conduct of their operations in accordance with the laws and customs of war. POWs must be treated humanely, just to mention Article 13 that particularly prohibits acts of violence or intimidation and insults and public curiosity. It also prohibits medical experiments on POWs, responding to the horrific abuses committed during World War II. Moreover, Article 17 prohibits coercion of POWs to obtain information and guarantees their right to provide only their name, rank, date of birth, and serial number. Furthermore, the Third Convention guarantees POWs adequate food, shelter, medical care, and communication with their families.⁵⁵

The Fourth Geneva Convention represents the most significant evolution in IHL by addressing the protection of civilians during armed conflicts, especially in occupied territories.⁵⁶ Article 27 states that civilians must at all times be humanely cared for and protected against all acts of violence. More specifically, the Fourth Convention prohibits collective punishment, reprisals, hostage-taking, and forced labour against civilians in occupied territories.⁵⁷ Article 49 bans the forcible transfer or deportation of population from occupied territories, a provision widely referred to in subsequent conflicts. The Fourth Geneva Convention obliges occupying powers to ensure public order, health, and food supply for the civilian population.⁵⁸

The Geneva Conventions emphasise the principle of distinction applicable to individuals and objects as well: combatants must distinguish between military objectives and civilians during hostilities.⁵⁹ On the other hand, the principle of non-discrimination is another important principle applicable during armed conflicts, any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria is prohibited.⁶⁰ The conventions also reinforce the principle

54 Geneva Convention I and II, 1949, art. 38.

55 Geneva Convention III, 1949, arts. 25–30.

56 Pictet, 1958, pp. 199 et seq.

57 Geneva Convention IV, 1949, arts. 33–40.

58 Geneva Convention IV, 1949, art. 55.

59 Sassòli, 2024, pp. 22 et seq.

60 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 12(2); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 12(2); Geneva Convention relative to the Treatment of Prisoners of War, art. 16; Geneva Convention relative to the Protection of Civilian Persons in Time of War, arts. 13 and 27(3), 1949.

of proportionality, requiring military actions to avoid excessive harm to civilians relative to the anticipated military advantage.⁶¹

As it has already been pointed out, the Geneva Conventions were established to regulate international armed conflicts. However, their Common Article 3 was groundbreaking when adopted, as it extends minimum humanitarian protection to individuals involved in non-international armed conflicts, which was revolutionary at the time when the Geneva Conventions were adopted.⁶² Common Article 3 prohibits violence to life, torture, humiliating treatment, and the taking of hostages, establishing a “minimum humanitarian standard” applicable to all conflicts, therefore it is considered to be a convention in miniature as such. Furthermore, the universality of Common Article 3 was also reaffirmed in the *Tadić* case before the ICTY, which recognised even its customary legal status.⁶³

The conventions place obligations on all parties to the conflict, they thrive to ensure that their humanitarian principles are widely applicable.⁶⁴ Being classical international treaties, they allow denunciation, with a separate provision on denunciation, but the Martens Clause is included to ensure that even if specific treaty provisions do not apply, “the laws of humanity and the dictates of public conscience” remain binding.⁶⁵

Unlike e.g. international human rights law, there is no specific control mechanism established for the Geneva Conventions. However, the International Committee of the Red Cross (ICRC) serves as the guardian of the Geneva Conventions, ensuring compliance and providing humanitarian aid during conflicts.⁶⁶ Moreover, the conventions introduced the concept of protecting powers, neutral states or other organisations that supervise the application of IHL. They also formalised the role of National Red Cross and Red Crescent Societies, which act as auxiliaries to the ICRC during conflict.⁶⁷

Although international humanitarian law is applicable during armed conflicts, there are several obligations adopted within the Geneva Conventions that have established obligations for the States Parties outside an armed conflict, as well. States Parties to the Geneva Conventions are obligated to educate their military personnel and civilian populations on IHL principles.⁶⁸ Furthermore, states are obligated to

61 Dinstein, 2010, p. 129. For a detailed analysis of the IHL principles see a separate chapter of this publication.

62 Ondřej et al., 2010, p. 169.

63 *Tadić*, 1995, paras. 89 et seq.

64 Hassanová, 2023, p. 84.

65 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 63; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 62; Geneva Convention relative to the Treatment of Prisoners of War, art. 142; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, art. 158.

66 Bugnion, 2003, pp. 317 et seq.

67 Bugnion, 2003, pp. 363 et seq., 475, 508.

68 Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, art. 83.

disseminate the conventions' text and principles widely, ensuring awareness and adherence during peacetime and conflict.

By protecting POWs, civilians, and the wounded, the Geneva Conventions humanise war and thrive to balance military necessity with humanitarian imperatives. Moreover, they protect religious and cultural property in conflict zones, promoting broader principles of international law.

Although the 1949 Geneva Conventions are rather lengthy, international treaties, political considerations at the time of their adoption have left some of the related issues unregulated and some other issues have been reconsidered during subsequent times. The three Additional Protocols to the 1949 Geneva Conventions were therefore adopted to address new challenges in armed conflict and to enhance protections provided under international humanitarian law, also by merging the Hague⁶⁹ and Geneva law⁷⁰ together.⁷¹

Adopted in 1977, Additional Protocol I (AP I) expanded the legal framework for international armed conflicts, addressing modern methods and means of warfare.⁷² Article 1 paragraph 4 of AP I extended its scope to include armed conflicts involving peoples struggles against “colonial domination, alien occupation, and racist regimes”, reflecting the post-colonial struggles of the time. Additional Protocol II (AP II), also adopted in 1977, addressed non-international armed conflicts, building on Common Article 3 of the Geneva Conventions. Separation of the Additional Protocols confirmed the division of the legal framework for international and non-international armed conflicts. Article 1 paragraph 1 of AP II defines its scope as applying to conflicts between state forces and organised armed groups controlling territory, thus setting stricter conditions than Common Article 3.

AP I envisages the principle of distinction, obligating parties to distinguish between civilians and combatants and between civilian objects and military targets.⁷³ The prohibition of indiscriminate attacks in Article 51 paragraph 4 of AP I reinforced the protection of civilians by banning attacks not directed at specific military objectives. AP I codifies the principle of proportionality under Article 51(5)(b), requiring that potential civilian harm must not be excessive in relation to the anticipated military advantage. In Article 54, AP I prohibits the starvation of civilians as a method of warfare, including attacks on objects indispensable to survival, such as food, water, and crops.

AP I also addresses environmental concerns in warfare, with Article 35(3) prohibiting ‘methods of warfare intended to cause widespread, long-term, and severe damage to the natural environment’. Additionally, the protection of cultural objects and places of worship was reinforced in AP I, which prohibited their use for military

69 Regulation of means and methods of warfare.

70 Regulation of the protection of so-called protected persons, victims of war.

71 Kolb and Hyde, 2008, p. 40.

72 Sandoz, Swinarski and Zimmermann, 1987, p. xxxiv.

73 Protocol I, 1977, art. 48.

purposes and intentional attacks against them.⁷⁴ Moreover, reflecting technological development, Article 36 of AP I obligates states to review new weapons to ensure they comply with IHL principles, marking a key advancement in regulating the use of technology in warfare.⁷⁵

The protection of medical personnel and facilities was strengthened in AP I, ensuring their neutrality and prohibiting attacks on medical units.⁷⁶ AP I introduced provisions for the treatment of the wounded, sick, and shipwrecked, ensuring they receive medical care and protection.⁷⁷ AP I incorporated rules for journalists, stating that ‘journalists engaged in dangerous professional missions’ are to be treated as civilians.⁷⁸ AP I reinforced the protection of refugees and stateless persons, expanding obligations under the Fourth Geneva Convention (Article 73, Geneva Protocol I, 1977). Moreover, AP II introduced measures to protect children during conflicts, prohibiting their recruitment and use in hostilities.⁷⁹ Finally, to present at least some of the AP I articles, Article 75 of AP I guarantees fundamental protections for all individuals in the power of a party to the conflict, establishing safeguards against summary executions and unfair trials.

As for AP II, it expanded protections for civilians in non-international armed conflicts, prohibiting e. g. acts of violence, collective punishments, and slavery under Article 4. Article 5 of AP II established minimum guarantees especially for those who have been deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained: it requires humane treatment and prohibits extrajudicial executions and torture since it outrages upon personal dignity. Moreover, Article 13 of AP II reinforced the principle of civilian immunity, prohibiting direct attacks on civilians and civilian objects. AP II also forbids “acts of terrorism” against civilians by the wording of Article 4(2)(d), reflecting concerns about brutal tactics during internal conflicts. Finally, within AP, there is no reference to combatants but rather to persons taking part in hostilities.

Additional Protocol III (AP III), adopted in 2005, differs from the previous Additional Protocols that regulate material aspects of armed conflicts. It introduced the Red Crystal as an additional emblem to the Red Cross and Red Crescent, addressing neutrality concerns. The Red Crystal emblem under AP III is supposed to enhance the universal reach of humanitarian relief.⁸⁰ AP III was thus adopted to accommodate states and organisations that could not use the existing Red Cross or Red Crescent emblems due to cultural or political reasons.⁸¹

74 Additional Protocol I, 1977, art. 53.

75 Sandoz, Swinarski and Zimmermann, 1987, pp. 421 et seq.

76 Additional Protocol I, 1977, art. 12.

77 Geneva Protocol I, 1977, art. 10.

78 Ibid., art. 79.

79 Geneva Protocol II, 1977, art. 4:3.

80 See: Preamble, Additional Protocol III, 2005.

81 International Committee of the Red Cross (ICRC), 2005, Commentary on Additional Protocol III to the Geneva Conventions.

AP I and AP II reflect the growing importance of human rights law within IHL, as evidenced by their prohibitions on torture, arbitrary executions, and collective punishments.⁸² The two 1977 protocols recognise that ‘civilians are the principal victims of armed conflict’ and aim to mitigate the devastating impact of warfare on non-combatants.⁸³ Together, the Additional Protocols adapt the 1949 Geneva Conventions to modern realities, strengthen legal protection for both civilians and combatants in both international and internal conflicts.

5.1. The Relationship Between the 1949 Geneva Conventions and International Human Rights Law

The Geneva Conventions of 1949 and their Additional Protocols that form a basis of international humanitarian law and international human rights law share a common objective, namely the protection of human dignity and individual security. However, they achieve this common goal through distinct methods and frameworks. IHL governs conduct during armed conflicts to mitigate human suffering by regulating warfare and protecting civilians, non-combatants and prisoners of war.⁸⁴ International human rights law, on the other hand, applies both in peacetime and wartime and establishes universal standards for the protection of fundamental rights. Their interplay becomes relevant during armed conflicts, when both systems are applicable.

As a consequence of several questions originating from this interplay, it was finally the International Court of Justice (ICJ) that has consistently affirmed that international human rights law remains applicable during armed conflict,⁸⁵ except where states lawfully derogate under relevant treaties.⁸⁶ Nevertheless, even then, certain rights, such as the prohibition of torture, are non-derogable.⁸⁷ In its advisory opinions on Nuclear Weapons⁸⁸ and the Construction of a Wall,⁸⁹ and in the Armed Activities in the Congo judgement,⁹⁰ the ICJ emphasised that both analysed legal areas are applicable during armed conflicts. The ICJ has identified three possibilities of the interplay between international humanitarian law and international human rights law. First, certain rights fall exclusively within the scope of humanitarian law, such

82 See e.g. Additional Protocol I, 1977, art. 38.

83 Sandoz, Swinarski and Zimmermann, 1987, p. xxix.

84 See e.g. Henckaerts and Doswald-Beck, 2005, p. 3. For more information about the principle of distinction see also Additional Protocol I, art. 48.

85 International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, para. 106.

86 See e.g. ECHR, art. 15.

87 ECHR, art. 15.

88 International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996.

89 International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004.

90 International Court of Justice, Democratic Republic of the Congo v. Uganda, Judgment, I.C.J. Reports 2005, p. 168, at para. 216.

as the specific status of prisoners or war. Second, some rights are governed only by human rights law, e. g. the right to vote. Third, there are rights that are protected under both regimes, nevertheless, the ICJ characterised humanitarian law as *lex specialis* in relation to human rights law.⁹¹

A very good example of the interplay between international humanitarian law and international human rights law is presented within the jurisprudence of the European Court of Human Rights (ECtHR) that was established by the European Convention on Human Rights and Fundamental Treaties (ECHR). According to the Vienna Convention on the Law of Treaties, interpretation of human rights treaties is provided in light of any relevant rules of international law that enables dynamic interplay between these two areas of international law.⁹² The European Court of Human Rights has reflected this in its evolving jurisprudence. In earlier cases, such as *Loizidou v. Turkey*,⁹³ the ECtHR applied only the European Convention on Human Rights and avoided reference to IHL. Later, in *Varnava v. Turkey*,⁹⁴ it explicitly invoked the Geneva Conventions.

A landmark in integrating both regimes came in *Hassan v. United Kingdom* that dealt with detention during the Iraq conflict. The ECHR held that the right to liberty and security protected by the ECHR could be interpreted consistently with the provisions of the Geneva Conventions, even without a formal derogation under Article 15 of the ECHR. This reflected an interpretive approach that interlinks the ECHR with IHL norms to avoid fragmentation and ensures meaningful protection.

More recent inter-state cases, such as *Georgia v. Russia (II)* further illustrate the ECHR's attempt to bring together procedural complexities with substantive protection.⁹⁵ The court has recognised that chaos during active hostilities limits the reach of Article 1 of the ECHR dealing with jurisdiction, however, it has decided upon positive procedural obligations on states to investigate deaths and detentions arising during armed conflicts. This decision has reflected the practical interplay between IHL's operational rules on e.g. distinction, proportionality, and precaution and insistence of the international human rights law on the responsibility of states.

To sum up this interplay, it is interesting to point out that although historically distinct, since one emerged from the law of armed conflicts and the other one from post-World War II commitments to individual rights, today international humanitarian law and international human rights law are deeply interlinked. Contextual application of both frameworks aims to ensure that human dignity is upheld, even in the chaos of war.

Nevertheless, it is not only international human rights law that interplays with international humanitarian law. Specific interplay is visible between international

91 International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, para. 106.

92 Vienna Convention on the Law of Treaties, art. 31 para. 3 (c).

93 *Loizidou v. Turkey*, 1996.

94 *Varnava and others v. Turkey*, 2009.

95 *Georgia v. Russia (II)*, 2021.

humanitarian law and international criminal law. This interplay is perfectly detectable within the legal framework of prosecuting war crimes, which is addressed in the following subchapter.

5.2. *The Relationship Between the 1949 Geneva Conventions and the Rome Statute*

The 1949 Geneva Conventions and the Rome Statute of the International Criminal Court (ICC) share a foundational relationship in the codification and enforcement of international humanitarian law, particularly concerning war crimes and the protection of civilians and combatants during armed conflicts.⁹⁶ Humanitarian organisations, mainly the ICRC, play an essential role in monitoring compliance with the Geneva Conventions and providing assistance in conflicts. Nevertheless, there is a distinction between international humanitarian law and international criminal law that lies in the fact that the Geneva Conventions regulate substantive legal norms for the protection of victims of armed conflicts, while the Rome Statute provides a mechanism for prosecuting individuals responsible for grave breaches of these principles.⁹⁷

Grave breaches of the Geneva Conventions, such as torture, wilful killing, and unlawful deportation, require states to prosecute perpetrators under universal jurisdiction or to hand them over for trial to another High Contracting Party concerned.⁹⁸ Nevertheless, states do not often fulfil this obligation. The Geneva Conventions impose obligations primarily on states, on the other hand, the Rome Statute extends accountability to individuals, representing a significant step in the evolution of international (humanitarian) law enforcement.⁹⁹ The relationship between the Geneva Conventions and the Rome Statute reinforces a comprehensive legal framework for addressing war crimes, ensuring that grave breaches are not only prohibited but also effectively prosecuted to uphold justice and accountability in armed conflict.¹⁰⁰

For more concrete interplay between the Geneva Conventions, i.e. the cornerstone of international humanitarian law and international criminal law, it is very important to understand the development that took place before the adoption of the Rome Statute and to point out that the earliest records of the laws and customs governing warfare can be traced back to ancient times.¹⁰¹ Gradually, this set of standards evolved and became more specific through national codes,¹⁰² until finally, thanks to one man in particular, Henri Dunant, it was also adapted to the international level.¹⁰³ Since then, international humanitarian law, or the international law of armed conflicts, has been

96 Sassòli, 2024, pp. 481 et seq.

97 Henckaerts and Doswald-Beck, 2005, pp. 551 et seq.

98 Geneva Convention IV, 1949, art. 146.

99 Meron, 2000, p. 177.

100 Sassòli, 2024, pp. 481 et seq.

101 Cryer et al., 2010, p. 267.

102 For example the Lieber Code.

103 On the role of Henri Dunant and his experience of the soldiers' suffering after the Battle of Solferino in 1859 see e.g. Ondřej et al., 2010, pp. 96 et seq.

developing, which is fundamental to the concept of war crimes, while the *sine qua non* condition for their definition is the existence of an armed conflict and the link to it. On the other hand, however, it was not until after the Second World War that the international criminal responsibility of individuals for committing war crimes was really imposed: it happened so during Nuremberg Tribunals.

Since international treaties regulating the means and methods of warfare had already been adopted at the end of the 19th century and especially at the beginning of the 20th century, there was no concern about the conflict with the principle of *nullum crimen sine lege* when the Charter of the Nuremberg Tribunal was drafted. Thus, during the Nuremberg trials of the Nazi officials, some of them were prosecuted for war crimes pursuant to Article 6(b) of the Nuremberg Charter, according to which war crimes are considered to be:

‘violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.’

In its Judgement, the Tribunal stated that the crimes in question are crimes arising from the so-called Hague Law, i.e. the regulation of the means and methods of warfare, namely Articles 46, 50, 52 and 56 of the 1907 Hague Convention and Articles 2, 3, 4, 46 and 51 of the 1929 Geneva Convention, the violation of which is punishable at the international level.¹⁰⁴

Despite such a clearly defined notion of war crimes, it was problematic for states to use the notion of war crimes after the World War II within the 1949 Geneva Conventions, which govern the protection of victims of war, the so-called Geneva law.¹⁰⁵ Instead of the concept of war crimes, the Geneva Conventions introduced the concept of grave breaches, and it was not until 1977, in Additional Protocol I to the Geneva Conventions, that states adopted an explicit provision considering grave breaches to be war crimes.¹⁰⁶

The concept of war crime has been understood differently in terms of the development of the doctrine of international law.¹⁰⁷ On the one hand, the existence of armed conflict has always been inherent. On the other hand, the other elements depended

104 International Military Tribunal, United States of America, French Republic, United Kingdom of Great Britain and Northern Ireland and Union of Soviet Socialist Republics v. Goering and others, 1 October 1946, p. 253.

105 The Nuremberg Charter was based on the so-called Hague Law, which regulates the ways and means of waging wars; the Geneva Conventions regulate the so-called Geneva Law, i.e. the protection of the victims of wars. See also Schabas, 2011, p. 123.

106 Additional Protocol I, 1977, art. 85:5.

107 See also Solis, 2010, pp. 301 et seq.

on whether the term war crime was understood to mean only a grave breach of the Geneva Conventions of 1949 or any violation of international humanitarian law. However, the latter concept has not found resonance in the conduct of states, and currently only selected, serious violations of international humanitarian law are considered war crimes.¹⁰⁸ These undoubtedly include serious violations of the Geneva Conventions, a list of which is contained in the individual Geneva Conventions of 1949. In each of these Conventions, grave breaches include intentional killing, torture or inhumane treatment and intentional infliction of great suffering or serious injury. In addition, each Geneva Convention contains other grave breaches that correspond to the focus of the Convention concerned. Thus, not every violation of international humanitarian law is a grave breach. For example, the prohibition against prisoners of war wearing their own insignia or decorations, which constitutes a violation of international humanitarian law, does not result in individual criminal responsibility, but rather “only” in state responsibility for an internationally wrongful act.

The articles themselves, which introduce the concept of grave breaches, state that there are simple violations of international humanitarian law that are not serious. At the same time, however, they lay down the obligation on each High Contracting Party to take the necessary measures to suppress all acts contrary to the provisions of the Convention, even if they are not grave breaches.¹⁰⁹ In this context, it is worth noting that serious violations of the 1949 Geneva Conventions are not subject to statute of limitations; as referred to above, they may be prosecuted at any time by any States Party to those Conventions on the basis of the universal jurisdiction provided for in those Conventions.¹¹⁰ Although there is no statute-limitation provision in the Conventions themselves, it has been reaffirmed in 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and in the 1977 Additional Protocol I.

The first prosecution of grave breaches of the Geneva Conventions took place in relation to the conflicts in the former Yugoslavia. The treatment of the concept of war crimes in the ICTY Statute reflected developments that had been made in the field of international humanitarian law. Since the Nuremberg Charter, not only have the aforementioned Geneva Conventions been adopted, but so have their Additional Protocols and other international treaties regulating the use or prohibition of the use of specific weapons or means of warfare. Gradually, therefore, there has been a kind of split in this area, which has highlighted the distinction between customary

108 Cassese, 2008, pp. 84–85.

109 Compare art. 49, Geneva Convention I., art. 59, Geneva Convention II, art. 129, Geneva Convention III, and art. 146, Geneva Convention IV, 1949.

110 See e.g. Geneva Convention I, 1949, art. 49.

international humanitarian law and the international humanitarian law of treaties.¹¹¹ The ICTY Statute thus regulates war crimes in its Articles 2 and 3, distinguishing between treaty and customary international humanitarian law. Article 2 of the ICTY Statute is based on grave breaches of the 1949 Geneva Conventions and as the ICTY's jurisdiction *ratione materiae*, it regulates the investigation and prosecution of wilful killing, torture or inhuman treatment, including biological experimentation, widespread destruction and appropriation of property unjustified by military necessity and carried out unlawfully and arbitrarily, the unlawful deportation or transfer or unlawful restraint of a civilian, and other grave breaches. Article 3 of the ICTY Statute adds to these crimes 'violations of the laws and customs of war', including the use of poisoned weapons or other weapons intended to cause unnecessary suffering, the arbitrary destruction of towns or villages or devastation not justified by military necessity, the attack or bombardment by any means of undefended towns, villages, dwellings or buildings, and pillaging.

According to Common Article 3 of the 1949 Geneva Conventions, in the event of a non-international armed conflict, each party to the conflict will, at the minimum, govern itself by treating persons *hors de combat* humanely and without discrimination. This positive obligation is concretised in a negative manner, i.e. it prohibits specified conduct, namely:

- 'a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b) taking of hostages;
- c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.'

Moreover, human conduct is regulated in a positive way as well, in Article 3 (2) of the Geneva Conventions, according to which the wounded and sick will be collected and cared for.

As expressed by the International Court of Justice in the *Nicaragua* case, Common Article 3 constitutes the minimum benchmark of the rules of international

111 This distinction, stricter than in other areas of international law, was sought to be reversed by the International Committee of the Red Cross study on customary international humanitarian law. The study focuses on national legislation and the practice of national armed forces and identifies a set of principles and rules which, according to the study, already form part of customary international humanitarian law. For further information, see the ICRC study materials available online, International Committee of the Red Cross, Customary International Humanitarian Law.

humanitarian law for both types of conflicts.¹¹² In the case of non-international armed conflicts, it should be remembered that no other article of the Geneva Conventions applies, except for Article 3. This means, among other things, that, for example, prisoner-of-war status cannot be granted during such conflicts. However, the question of whether it is possible to commit war crimes and serious violations of the Geneva Conventions during a non-international armed conflict is currently answered differently. Since the 1949 Geneva Conventions apply only during international armed conflicts, the very notion of grave breaches of the Geneva Conventions would not be possible to be established in non-international armed conflicts. This was also the initial position of the ICTY.¹¹³ However, a few years later, the Appeals Chamber of the same judicial body held that to maintain a legal distinction between two legal regimes and their legal consequences in relation to similar acts because of differences in the nature of the conflict would ignore the very purpose of the Geneva Conventions.¹¹⁴ Theodor Meron, then President of the ICTY, commented that there was no moral justification and indeed no compelling legal reason to treat perpetrators of horrors in internal conflicts more leniently than those who perpetrated those horrors in international armed conflicts.¹¹⁵

Article 8 of the Rome Statute is based on the experience and decisions of the *ad hoc* tribunals, in particular the ICTY.¹¹⁶ Despite its complexity, however, even Article 8 of the Rome Statute does not bridge the divide between war crimes according to whether they were committed during an international or non-international armed conflict and whether they are governed by customary international law or international treaty law. The above is also interesting because the reasoning explaining the extension of the applicability of war crimes under Article 3 of the ICTY Statute (laws and customs of war, i.e. customary international humanitarian law) to non-international armed conflicts was already adopted by the ICTY Appeals Chamber in the *Tadić* case and is fully accepted nowadays. In that decision, the Chamber stated that for this applicability, the war crimes must satisfy the elements of a crime in relation to international humanitarian law, the rule in question must be of a customary or applicable treaty nature, the violation must be of a serious nature,¹¹⁷ i.e. the rule must be one that protects important values, its violation must entail serious consequences for the victim, and the violation refers to individual criminal liability, whether under customary or treaty law.¹¹⁸ Some of the most common war crimes, such as deliberate attacks against

112 International Court of Justice, *Military and Paramilitary Activities in and Against Nicaragua*, Advisory Opinion, para. 218.

113 *Tadić*, 1995, para. 84.

114 *Prosecutor v. Delalić et al.*, ICTY, 2001, para. 172.

115 Compare Meron, 1995, p. 561.

116 La Haye, 2008, p. 112.

117 See also Henckaerts and Doswald-Beck, 2005, p. 569.

118 *Tadić*, 1995, para. 95.

civilians or looting of private property, violate basic rules of international humanitarian law linked to the distinction between military and civilian objectives.¹¹⁹

Article 8 of the Rome Statute divides war crimes into four categories according to the way war crimes have been progressively regulated under the influence of historical development. The first category includes grave breaches of the 1949 Geneva Conventions; the second group consists of other grave breaches of the laws and customs applicable during international armed conflict,¹²⁰ the third category covers serious violations of Common Article 3 of the 1949 Geneva Conventions, and the fourth category lists other serious violations of the laws and customs applicable in non-international armed conflicts.¹²¹ Such a distinction is not practical in the sense that, for example, where an offender is charged with an attack on protected property during an armed conflict, he or she may be prosecuted for:

- a) the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; [Article 8(2)(a)(IV) of the Rome Statute],
- b) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated [Article 8(2)(b)(IV) of the Rome Statute],
- c) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war [Article 8(2)(b)(XIII) of the Rome Statute].

It would therefore be more pragmatic to categorise war crimes according to the value they aim to destroy (e. g. the protection of civilian life or civilian property). Moreover, several provisions of Article 8 of the Rome Statute require proof of the same *actus reus* and *mens rea*, irrespective of the nature of the conflict, i.e. it makes no difference whether the conduct is in the context of an international or non-international conflict.¹²² The factual result is also the frequent repetition or duplication of the same elements of war crimes, such as the war crime of attacking civilians, which is referred to both in Article 8(2)(b)(I) of the Rome Statute (customary law in international armed conflict) and in Article 8(2)(e)(I) of the Rome Statute (customary law in non-international armed conflict). The only difference, even when comparing relevant provisions

119 International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion delivered on 8 July 1996, ICJ Reports, 1996, paras. 95, 79.

120 These war crimes are primarily based on the 1907 Hague Convention on Land Warfare, the 1977 Additional Protocol I to the Geneva Conventions, the Hague Declaration IV on cluster missiles and the 1925 Geneva Protocol, which prohibits the use of biological and chemical weapons.

121 The wording of this group of war crimes stems mainly from the 1907 Hague Conventions and the 1977 Additional Protocol II to the Geneva Conventions.

122 Cassese, 2011, p. 121.

of the more detailed document *Elements of Crimes*,¹²³ is that in the former case the crime must be committed during an international armed conflict and in the latter case during a non-international armed conflict.

However, there is a politico-legal rationale for this wording of Article 8 of the Rome Statute. This justification relates to the fact that, despite its breadth, Article 8 of the Rome Statute does not cover all serious violations of international humanitarian law. During the 1998 Rome Conference, when the Statute was adopted, the negotiations on war crimes were influenced by two requirements: first, the norm in question had to be customary in nature, since, apart from the Geneva Conventions of 1949, other treaty arrangements on international humanitarian law had not been universally ratified. Second, the violation of the norm in question had to give rise to individual criminal responsibility under customary international law.¹²⁴ As a number of states have not ratified Additional Protocol I to the Geneva Conventions and do not recognise it as a customary law norm, some serious violations of international humanitarian law have not been included in draft Article 8 of the Rome Statute, and some have been added only after the wording of the relevant treaty provisions has been modified.¹²⁵ The Rome Statute thus lacks some war crimes related to the protection of victims of war¹²⁶ and some of those dealing with the use of prohibited ways and means of waging armed conflict.¹²⁷ However, as a result of the 1998 Rome Conference negotiations, Article 8(2)(b)(XX) of the Rome Statute allows for the addition of prohibited weapons to the list.

On the other hand, the listing of certain war crimes in relation to the protection of the victims of war could be used to investigate and prosecute those war crimes that give rise to criminal responsibility of an individual for the use of prohibited ways and means of war but are not listed in Article 8 of the Statute. In such a case, attacking civilians with biological or chemical weapons would also be prosecutable before the ICC, albeit “only” as part of the war crime of attacking civilians, and not under the use of biological or chemical weapons.

123 International Criminal Court (ICC), 2011, *Elements of Crimes*.

124 Lee, 1999, p. 104.

125 International Committee of the Red Cross (ICRC), *War Crimes under the Rome Statute of the International Criminal Court and Their Source in International Humanitarian Law: Comparative Table*.

126 For example, conducting an attack that does not distinguish between civilians and combatants, even though the International Court of Justice has already stated in its judgement, in addition to the prohibition of attacking civilians, the prohibition of the use of weapons that are incapable of distinguishing between civilians and combatants as a fundamental rule of international humanitarian law. For more details, see: *Use or Threat of Use of Nuclear Weapons*, para. 78.

127 As there was no consensus among states on the inclusion of a ban on the use of nuclear weapons, several states refused to include other types of weapons of mass destruction, such as biological and chemical weapons. Therefore, in relation to weapons of mass destruction, the Rome Statute only included weapons that were undoubtedly prohibited by customary law, such as poisoned weapons. See also von Hebel and Robinson in Lee, 1999, pp. 113-116. A slight change followed only during the Review Conference in Kampala.

When comparing the provisions governing war crimes during an international armed conflict and those war crimes occurring during a non-international armed conflict, it is clear from a quantitative point of view that the latter group lists approximately half as many war crimes. Although some of the elements of war crimes committed during an international armed conflict are formulated in a way that would not be applicable to war crimes committed during a non-international armed conflict, there are some missing elements whose application would not be a problem. In this regard, there is a clear conflict between the position of some states that these norms prohibiting the conduct in question do not yet meet the characteristics of customary law and the 1995 ICTY decision that customary norms prohibiting the use of certain weapons are equally applicable to international and non-international armed conflicts.¹²⁸ The best example is probably the prohibition of the deliberate starvation of civilians, which is a war crime under the Rome Statute in an international armed conflict for all States Parties, but it is not the case for non-international armed conflicts when a States Party has not accepted an amendment of the Rome Statute adopted in 2019.¹²⁹

Building upon the ICTY case-law, the Rome Statute expands accountability by criminalising violations of the Geneva Conventions not only in international armed conflicts but also in non-international armed conflicts,¹³⁰ further building on Common Article 3. Under Article 8 of the Rome Statute, war crimes include “grave breaches” of the Geneva Conventions, such as wilful killing, torture, inhumane treatment, and unlawful deportation (Rome Statute, 1998; Geneva Conventions, 1949). The Rome Statute’s enumeration of war crimes in international armed conflicts thus directly reflects the protections enshrined in the First to Fourth Geneva Conventions, particularly regarding the wounded, prisoners of war, and civilians. For instance, the Rome Statute prohibits targeting medical units and personnel under Article 8(2)(b)(IX), which is consistent with the Geneva Conventions’ rules on protecting the wounded and sick in armed conflicts.¹³¹ Another example is about criminalising torture: the Geneva Conventions prohibit torture,¹³² and the Rome Statute recognises torture as both a war crime and a crime against humanity.¹³³

The Rome Statute also reflects the criminalisation of the violation of IHL principles what is confirmed e.g. by the inclusion of “attacks on civilians” and the deliberate targeting of protected persons or objects in Article 8 of the Rome Statute that aligns with the Geneva Conventions’ principles of distinction and proportionality.

128 What is inhumane and therefore prohibited in international armed conflicts cannot be other than inhumane and unacceptable in a non-international armed conflicts. Compare *Tadić* 1995, para. 119.

129 See: The Amendment to article 8 of the Rome Statute of the International Criminal Court (Intentionally Using Starvation of Civilians as a Method of Warfare), 2019.

130 See: Rome Statute, art. 8:2 (c).

131 Geneva Convention I, 1949, art. 19.

132 Arts. 3, 12, 17.

133 Rome Statute of the International Criminal Court, 1998, art. 7:1 (f); art. 8:2 (a)(II).

Moreover, Article 8(2)(b)(XX) of the Rome Statute criminalises the use of “weapons of a nature to cause unnecessary suffering”, reflecting the Geneva Conventions’ broader principle of limiting superfluous injury or unnecessary suffering. The Rome Statute also criminalises attacks on humanitarian and peacekeeping personnel under Article 8(2)(b)(III), reflecting obligations to protect humanitarian assistance enshrined in the Geneva Conventions.¹³⁴

Grave breaches of the Geneva Conventions, as defined under the articles specific for each of these Conventions,¹³⁵ are prosecutable under the Rome Statute, ensuring that individual criminal responsibility is imposed for serious violations of IHL.¹³⁶ The Rome Statute thus provides an enforcement mechanism that was previously absent from the Geneva Conventions, enabling the prosecution of perpetrators by a permanent international court.¹³⁷

6. Conclusion

The legacy of the 1949 Geneva Conventions lies in their continuing relevance to contemporary armed conflicts, as demonstrated by the ongoing disputes in the Middle East, Africa, and other regions, including Ukraine.¹³⁸ The adoption of the conventions was a milestone in international law, symbolising a collective effort to “humanise war”, while acknowledging the limits of what law can achieve in wartime. Ultimately, the 1949 Geneva Conventions and their 1977 Additional Protocols remain foundational instruments in international humanitarian law and their universal commitment to protect human dignity in times of armed conflict.¹³⁹

134 Henckaerts and Doswald-Beck, 2005, pp. 112–114, 582.

135 Geneva Convention I, art. 50; Geneva Convention II, art. 51; Geneva Convention III, art. 130; Geneva Convention IV, art. 147.

136 Henckaerts and Doswald-Beck, 2005, pp. 568 et seq.

137 Sassòli, 2024, pp. 485 et seq. Even the first ICC judgement that was adopted on 14 March 2012 in a case against Thomas Lubanga Dyilo convicted the accused of having committed war crimes (specifically the conscripting, enlisting, and using of children under the age of 15 to participate actively in hostilities).

138 Sassòli, 2024, p. 704.

139 International Committee of the Red Cross (ICRC), 2024, Campaign – Respect the Rules of War, Respect Humanity during Armed Conflicts; see also Crowe and Weston-Scheuber, 2013, pp. 2 et seq.

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International Refugee Law I: Migration Law vs. Refugee Law International and EU Law Perspectives

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ABSTRACT

International Refugee Law is the totality of all documents and normative acts regulating the special situation of refugees at international, regional or continental level. As such, it can be found within the European Union. Refugee law is not a distinct right, separate from migration law, but rather an integral part of it which is supported by the fact that migration and refugee issues are often dealt with together. Given the situations faced by mankind and the need to provide the most appropriate regulation possible for situations of populations being forced to leave their territory, both international law and existing EU law in this area are becoming increasingly consistent, as demonstrated by the weak form of previous documents when compared with the complexity of the more recent ones. International migration law and refugee law applies to people who have had to move from one territory to another for various reasons, and find themselves in a vulnerable situation where their fundamental rights and freedoms are affected and they need protection through concrete and effective measures. Although at a cursory glance it could be argued that the term refugee is totally different from the term migrant, in reality this is not the case; a refugee is a person who migrates for certain reasons, and therefore conceptually the term refugee is contained in the term migrant or, in other words, a refugee is a migrant who leaves his or her territory because of persecution. In addition to refugees, there are other vulnerable persons in need of protection, such as persons suffering serious harm and in need of subsidiary protection, stateless persons, but also internally displaced populations, some of which do not benefit from adequate rules.

KEYWORDS

protection, migrants, refugees, persons suffering serious harm, stateless persons, internally displaced populations

1. The Difference Between the Terms “Migrant” and “Refugee”

Since time immemorial, man, the being endowed with reason and conscience, has wanted to enjoy a state of well-being throughout life. With the evolution of our society, this state of well-being began to encompass certain milestones we have slowly come

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to call rights, which in modern times have become fundamental human rights, taking on a universal scriptural form with the adoption on December 10th 1948 by the UN General Assembly of the Universal Declaration of Human Rights.¹

This international document centralised the most important benchmarks and requirements which, once fulfilled, are the prerequisites for the attainment of a state of well-being by every human. By way of reminder only, giving the readers the opportunity to study them in detail if they wish so, following in the footnote I would like to give a brief overview of these rights, which is necessary for the sections that follow. Thus, people must be free and equal, and the behaviour of one towards the other must be one of common sense (art. 1); people must be able to exercise their rights without distinction of any kind, irrespective of the criteria that might be invoked to differentiate them (art. 2); people have the right to life, liberty and security of person (art. 3); slavery is strictly excluded (art. 4); freedom from torture, cruel, inhuman or degrading treatment or punishment (art. 5); the right to legal personality (art. 6); equality before the law without distinction (art. 7); the right to seek just satisfaction before a court of law when one's rights are violated (art. 8); the exclusion of arbitrariness in matters of arrest, detention or exile (art. 9); the right of access to an independent and impartial tribunal when subject to criminal charges (art. 10); the right to be presumed innocent (art. 11, para. 1); the right to be held criminally responsible only for acts prescribed by law and to be punished only by penalties prescribed by law (art. 11 para. 2); the right to a personal and family life, home and correspondence without arbitrary interference (art. 12); the right to freedom of movement (art. 13); the right to asylum (art. 14); the right to citizenship (art. 15); the right to marry and found a family (art. 16); the right to own property (art. 17); the right to freedom of thought, conscience and religion (art. 18); the right to freedom of opinion and expression (art. 19); the right to freedom of peaceful assembly and association (art. 20); the right to take part in the government of one's country and to hold public office in it (art. 21); the right to social security (art. 22); the right to work with all its attributes (art. 23); the right to rest and recreation (art. 24); the right to a reasonable standard of living (art. 25); the right to education (art. 26); the right to participate freely in cultural life and scientific progress (art. 27); the right to social and international organisation (art. 28).

In addition to summarising these rights, I would also like to draw attention to some extremely important points in the content of the declaration. First of all its preamble states that it is essential that human rights are protected by the authority of law, but it is well known that this authority is determined and imposed by each individual country. Then, according to the last sentence of Article 2 these rights are exercised in a particular country or territory and their political, legal or international status must not adversely affect the exercise of these rights. According to the right to freedom of movement provided for in Article 13, any person may choose to reside within the frontiers of a state, while having the right to leave any country, including their own, and to return to their country. This right is distinct from the right to be

1 United Nations General Assembly, 1948.

a citizen of a particular country as regulated by art. 15, which takes the existence, exercise and protection of rights and obligations between the citizen and the country of which he or she is a citizen to another level, for example, in accordance with art. 21, it gives the citizen the right to participate in the government of the country of which he or she is a citizen and to be elected to its highest authorities.

Having said this, a number of conclusions can easily be drawn from the whole of the declaration: people live their lives in certain countries and territories where they exercise their fundamental rights, and the existence of a closer link with a particular country or territory, such as through citizenship, ensures that these rights are better exercised because they are protected at the highest level.² Having the right and the possibility to leave the country or territory in which they live, or being forced to do so and establish their residence in another country, the exercise of the rights of the “person leaving the territory”³ suffers, and their level of protection is downgraded, because in the new country or territory, by not being a citizen they no longer enjoy the same level of protection, but a lower one. When people leave a country in which they are citizens and move from to another country, it should be ensured that in this new country, in this new territory, the exercise of rights should continue to exist at a certain level in order to be effective, but this is not a simple matter.

An initial problem is that people who leave the territory they live in sometimes do not leave the country they live in, and in other situations they leave both the territory and the country; a second problem is that people leave the territory and the country for different reasons; and a third is that people who leave territories and countries may have closer or minimal ties with them. As a result of these situations, in a broad sense, people who leave their territory acquire a different status and a different approach in the community, and as such are referred to differently.

A first term used for such people is *migrant*, and in order to understand it more deeply we have turned to the way the notion to which it refers – *migration* – is explained in French, referring to an important work published in France.⁴ The term migration therefore refers to the movement in space of the population, of people, which is not a phenomenon of our times or of contemporary times, because the movement in space of populations has been going on since ancient times, for example the exodus of the Jews from Egypt, or their deportation to Assyria. The phenomenon was also present in the Middle Ages, being closely linked to the great invasions that took place in the

2 For example, in Romania, according to art. 1 paras. 1 and 3 of Law No. 21 of 1 March 1991 on Romanian nationality, Romanian nationality is the connection and belonging of a natural person to the Romanian state, so thus Romanian citizens enjoy the protection of the Romanian state; A similar understanding is reflected at the European level in the European Convention on Nationality, adopted under the auspices of the Council of Europe; as a simple example I would give the steps taken by each state to protect through repatriation their own citizens stranded in the Gaza Strip after the outbreak of war between Israel and Hamas.

3 As different terms are used for people leaving a country to settle in another one, what will be explained in the following sections, seemed to me to be the most appropriate and comprehensive notion to use now.

4 Encyclopaedia Universalis, 2002, pp. 119–125.

4th and 5th centuries and the Crusades, as well as being found in contemporary eras, as we know well. In the latter two periods, however, the phenomenon of migration differs from that of earlier periods in terms of the gradual formation of states and the emergence of national sentiment, which has led to a distinction between international migration and internal migration, the former having gained momentum in the 19th century with the growth of steamship navigation and the development of railways, and being determined by a number of factors such as demographic, economic, political and religious factors, and which led, for example, to the migration of Europeans to the American continent. As for internal migration, this took place from rural areas to cities. The phenomenon of migration in the 20th century was largely determined by all that the two world wars generated and caused.

This can be summarised by saying that migration has many different causes, and referring to the few mentioned above, it should be emphasised that in the cited work an interesting distinction is made between spontaneous migration, which is the result of a momentary decision made by a migrant, and migration caused by an external intervention, which in most cases is organised, and of which there are two relevant and widely known examples, namely the deportation to Siberia of Russians convicted for political reasons and of common crimes, and the transfer to North America and then to Australia of British convicts. At other times, organised migration was not about the use of force, but the promise by a state leadership of land grants, tax exemptions or military services to attract nationals of other states to populate or repopulate territories. Keeping things in proportion, new countries such as the United States, Canada, Argentina, Brazil, etc. were populated in this way, with the help of state administrations, emigration agencies, shipping and railroad companies, etc.

The duration of migration can be permanent, when migrants leave their own country with the intention of settling permanently in another, or temporary, when migrants return to their own countries after a period of time.

In terms of destination, migration is internal if it takes place within the borders of the same country, and external, which of course involves crossing the borders of a country. Internal migration can take many forms including, as relevant examples, the migration of a rural population to the cities, and alternative migration for work or leisure. External migration can be continental or transcontinental and even transoceanic, although whatever form it takes should not allow it to be confused with colonization.

Of course, of greatest interest is international migration, which has several important forms of manifestation, one of which is transatlantic migration, which began in the 16th century with the discovery of America, and which led the Spanish, Portuguese, French, English and Dutch to cross the Atlantic Ocean to their new territories. To these must be added the people from Africa who were unwillingly transported across the oceans to be used as a labour force. From the 19th centuries onwards, transatlantic migration took place in huge proportions, with mainly Europeans migrating to the United States and Canada, but also to Australia, and later even to Brazil and Argentina, with origins from across Europe.

It is worth mentioning here that armed conflicts have played an important role in migration, due to, on the one hand, the departure of civilians from war zones and, on the other, the flow of workers to cities to work in armaments factories. A famous example of this is the exodus of Polish people before the German invasion, and the deportation of Polish people to Western territories who were replaced by German settlers, and the transfer of Germans to other countries. It is estimated that more than 30 million Europeans were displaced or deported since the outbreak of war in 1943. Similarly in the Far East, with the invasion of China by Japan, the civilian population shifted to Indochina and Burma, and the number of Chinese settlers reached 30 million.

After the end of the Second World War, the economic prosperity and industrial development of some countries created a phenomenon known as reverse migration, in the sense that countries that had lost population up to this point began to regain it, a relevant example being France, which received large numbers of workers from the countries around it.

In a similar scenario, migration is also presented in another equally prestigious study,⁵ in which another term of interest for the theme of this chapter has been analysed, namely that of the *refugee*, on which I will elaborate. The authors of the paper⁶ have shown that refugees can be any homeless, involuntary migrants who have crossed the border and no longer enjoy the protection of their former government. Here it should be noted that before the 19th century movement from one country to another did not require passports or visas, since the right of *asylum* was commonly recognised and granted. Although there have been several waves of refugees throughout history there was no refugee problem before the emergence, fixing and closing of state borders in the late 19th century.

For many centuries refugee movement has been the result of religious and racial intolerance, and among the famous and relevant examples in history are the expulsion of Jews from Spain at the end of the 15th century, the exodus of the Huguenots from France in 1685, and the evacuation of Jews from Germany, Austria and the Czech Republic in the 1930s. In political terms, refugee movements in the modern period were due to the oppression of non-conforming minorities by state leaders. In this regard, after the Revolution and the Civil War in Russia between 1917 and 1921, more than 1.5 million people, opponents of communism, left the country, then between 1915 and 1923 more than one million Armenians left Turkey, many Spaniards moved to France between 1936 and 1939 because of the civil war, the flight of the Chinese to Taiwan and Hong Kong from 1949 onwards, and many more examples of this kind which have been being numerous and scattered throughout history, right up to the great landmark of the Second World War, which, as we have seen above, involved massive population movements.

5 The New Encyclopaedia Britannica, 2003, Vol. 6, pp. 136–137.

6 The New Encyclopaedia Britannica, 2003, Vol. 9, p. 998.

Going through the explanations of migration and migrants, then those on refugees, we see that refugees are nothing other than migrants who move from one territory to another for special, and I would say, particular reasons.

In order to further clarify these notions, I have turned to another study, this time of a linguistic nature,⁷ on the basis of which I will mention that *migration* is essentially a mass movement of a population from one territory to another, determined by economic, social, political or natural factors, while *refuge* is the withdrawal from an occupied territory, flight from danger in search of support or shelter.

The final conclusion would be that a large-scale movement of people from one territory to another is called migration, and when migration is not voluntary nor spontaneous on the part of the migrants who freely decide to migrate, but it takes place forcibly, against the will of individuals, regardless of the source of the compulsion, then the migrants become known as refugees.

Bearing in mind this distinction, which brings with it certain specific features of migration, namely refuge, the point of reference in this respect is, as mentioned above, the Second World War and the fact that the international community has established that such persons, or even more so, such categories of persons, must be able to exercise their fundamental rights. The States of the world have concluded treaties, conventions, agreements and protocols to establish a system of protection for all migrants in general and refugees in particular. All international or regional regulations of this kind constitute migration and refugee law.

In addition to refugees, migration also includes other categories of people who leave their territory, such as “internally displaced populations”, which has already been mentioned, and “stateless persons”, etc., which will be considered in the following sections.

2. Coverage of International Migration and Refugee Law

First of all I believe that some clarifications should be made, namely, in view of the terminology developed above, which shows that refugees are a component of migration, and due to the latter having the widest scope and consistency, it seems natural to analyse international migration law and then refugee law.

2.1. International Migration Law

An initial international document with reference to migration is the Convention concerning Migration for Employment adopted in Geneva on 1st July 1949,⁸ which establishes a form of cooperation between the member states of the International Labour Organisation and the International Labour Office, as well as with other organisations, the creation of a competent and free of charge assistance service for

7 Romanian Academy, 2009, pp. 653, 935.

8 International Labour Organization, 1949.

immigrant workers, and accurate information about it. It also establishes the obligation to combat misleading propaganda on migration, to facilitate the departure, travel and reception of migrant workers, and to ensure good health conditions and necessary medical care. An important aspect of the convention is that all member states are obliged to put authorised migrant workers on an equal footing with nationals with regards to facilities arising from the provision of work. The provisions of the Convention also covers family members of migrant workers, as well as categories of persons to whom they do not apply. As will be seen below, these issues will be extensively regulated in another international document.

Another international document is the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, adopted in Geneva on June 24th 1949,⁹ which establishes obligations on member states to combat illegal migration for the purpose of work, putting in place measures both with regard to workers who work illegally and employers who have recourse to irregular labour. It should be noted that the rules of this convention will also be covered in another document.

The most extensive and complex regulation concerning persons who migrate for work is the UN Convention on the Protection of the Rights of Migrant Workers and Members of their Families, adopted by the UN General Assembly Resolution 45/158 of 1990.¹⁰

From its very beginning, in Part I – Scope of application and definitions, the Convention states that it applies to all migrant workers and members of their families without any distinction of any kind based on sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status (art. 1 para. 1), and with regards to the temporal dimension, the Convention covers the entire migration process, including preparation, departure, transit, period of stay and activity, and return to the State of origin or residence (art. 1, para. 2). The Convention also indicates the persons to whom it does not apply (art. 3), such as persons performing official functions, persons sent to participate in development and cooperation programs, investors, refugees and stateless persons, students and trainees, seafarers and offshore workers not residing in the state of employment, for whom other specific regulations exist.

The Convention further defines the term migrant worker as a person who is to be employed, is employed or has been employed in a remunerated activity in a state of which he or she is not a national, and it also defines and clarifies other terms which are included in the term migrant worker, namely frontier worker, seasonal worker, seafarer, offshore worker, itinerant worker, project-tied worker, specifically employed worker, self-employed worker, each of these terms differing from the others in the specific nature of the work and the length of the worker's stay in the state in which he

9 International Labour Organization, 1975.

10 United Nations General Assembly, 1990.

or she works (art. 2), and also giving shape to the term family member (art. 4), which does not entail further discussion.

The Convention also refers to legal migrants, i.e. those authorised by the State of employment to enter its territory and carry out an activity, and illegal migrants, that is persons who do not meet the previous legality requirements (art. 5).

Part II – non-discrimination with respect to rights – consists of a single article (art. 7), which establishes the obligation for States Parties to respect and ensure the exercise of rights without any discrimination.

In Part III – the human rights of all migrant workers and members of their families – the Convention also regulates a first right (art. 8), which in a way, underlies the Convention and the whole issue, namely the right to leave any state, including the state of origin, but also to return to and remain in the state of origin, the accepted restrictions being related to the protection of national security, public order, public health or morals or the rights and freedoms of others, followed by the right to life (art. 9), prohibition of torture or cruel, inhuman or degrading treatment or punishment (art. 10), prohibition of slavery and servitude, forced and compulsory labour (art. 11), which does not refer to forced labour regarded as the punishment for a crime and does not include work of a person in detention, work in cases of emergency or calamity, and work regarded as a normal civil obligation that is imposed on other citizens of the state. Next comes the right to freedom of thought, conscience and religion (art. 12), the limitations of which are similar to those already set out above, the right to hold opinions without interference, the right to freedom of expression, which is subject to specific restrictions (art. 13), the right to privacy with all that this entails (art. 14), and the right to property (art. 15).

A broader approach concerns the right to liberty and security of the person (arts. 16–17), which entails protection by the state against all forms of violence, threats and intimidation by any perpetrators, and requires that the identity of migrants and their family members be verified in accordance with the law, arbitrary arrest and detention being excluded. When deprived of their liberty in accordance with the law, they have the right to be informed, in a language they understand, of the reasons for their arrest and of the charge against them, and to be brought before a judge or officer authorised to exercise the judicial power in order to be tried within a reasonable period of time or to be released, it not being the rule that they should be deprived of their liberty pending trial, but release may be subject to certain safeguards. At the same time, in the event of the deprivation of liberty for whatever reason, the consular or diplomatic authorities of the state of origin or the state representing the interests of the detained persons must be informed without delay of their situation, if so requested, and persons deprived of their liberty have the right to communicate with these authorities without delay, as well as the right to be informed of this right and of all rights deriving from other treaties. They also have the right to apply to a court to have their detention ordered, under which procedure they have the right to an interpreter, and if it is found that unlawful detention has taken place they are entitled to compensation. The convention further states that migrants and members

of their families who are deprived of their liberty must be treated with humanity and respect, and in places of detention they should as a rule be separated from convicted persons and treated differently from non-convicted persons, also minors should be separated from adults and tried as soon as possible. As far as the execution of a prison sentence is concerned, it is established that it should lead to their reformation and social rehabilitation, and during the period of detention they should have equal rights with nationals.

Concerning access to justice in the Convention (arts. 18–19) it is established that the migrants and the members of their families have the right to equality before the courts and tribunals with nationals of the state in which they are working, and that when they are subject to a criminal charge they have the right to a fair and public hearing by a competent, independent, impartial and legally established tribunal; and they also benefit from the presumption of innocence; and the minimum guarantees established by the Convention being the following: to be informed promptly and in detail in a language which they understand, of the nature and cause of the accusation in order to have adequate time and facilities for the preparation of their defence, to be able to communicate with their chosen counsel; to have the case tried expeditiously, to be present at the trial; to have the right to defend themselves in person or through legal assistance without payment by them, of which they must be informed; to examine and have examined both prosecution and defence witnesses under equal conditions; to have the free assistance of an interpreter if they do not speak the language used in court; and to have the right to silence and to not be self-incriminated. It also provides for the right to appeal to a higher court, the right to compensation for miscarriages of justice, *ne bis in idem*, the legality of incrimination and punishment, and the fact that humanitarian considerations arising from the status of the person should be taken into account when determining and imposing a sentence.

Furthermore, in the Convention (art. 20) it is established that the non-fulfilment of contractual obligations by a migrant or a member of his or her family may not lead to his or her imprisonment, or the withdrawal of an authorisation of residence or work permit or expulsion, unless the fulfilment of the obligation was a condition for obtaining the permit or authorisation, after which importance is attached to the documents of these categories of persons by making their confiscation and destruction a condition for their confiscation (art. 21). The measure of expulsion is regulated in detail by the Convention (art. 22), which stipulates that migrants and members of their families may not be subject to collective expulsion, each case of expulsion being individual. Expulsion is permitted, but only on the basis of a decision taken by a competent authority in accordance with the law. The expulsion decision must be communicated to them in a language they and their family members understand, in writing, together with the grounds on which it is based, and they must be informed of these rights. If this decision is not final, the person concerned has the right to submit the reasons why he or she should not be expelled and the right to have the decision reviewed by a competent authority, unless it is related to national security. Pending the review of the expulsion decision, the person concerned has the right to apply for

a suspension of the expulsion. If an expulsion decision has been enforced and then annulled, the person concerned is entitled to compensation and the annulled decision will not prevent their return to that state. Where expulsion is ordered, a person shall be given the necessary time to receive his or her salary entitlements and to fulfil the related obligations. A person to be expelled may apply for entry to a state other than his or her state of origin. Expulsion does not entail costs for the person expelled and does not affect the rights of other migrants or their family members.

As migrants and their family members are entitled to the protection and assistance of the consular or diplomatic authorities of the state of origin, or of a state representing their interests, this right is not limited in any way in the case of expulsion (art. 23).

An interesting right contained in the Convention (art. 24), which shows the inferior level at which the migrant and their family members are placed and should also give us food for thought, is the right to recognition of everywhere as a person before the law.

Given that the purpose of migrants is to work, it naturally regulates everything that work entails (art. 25), from remuneration to any conditions of employment, which places them on the same level as nationals from the state of employment, and ensures the continuation of their right to work and their right to participation in trade union activities or any other similar associations (art. 26), any restrictions being based on their necessity under the rules of a democratic society, in the interests of national security, public order, and the protection of the rights and freedoms of others.

On social security (art. 27), the Convention also grants migrants and their families a high level of protection, equal to that of nationals, including the right to medical care (art. 28), especially emergency care, which cannot be refused on the grounds of any irregularities relating to their stay in the country or their employment.

Since all aspects of life also take place during the period of migration, the Convention stipulates that the child of a migrant worker has the right to a name, birth registration, nationality (art. 29) and education (art. 30), where he or she is treated equally with nationals of the state concerned, without being affected by any irregularity concerning residence or employment.

Through the Convention cultural identity (art. 31) is respected and even encouraged, and with regards to the end of the period of residence and work in another state, it is established that migrant workers and their family members have the right to transfer their earnings, savings, effects and personal property (art. 32).

After establishing the obligation of states to communicate all these rights to migrants and members of their families (art. 33), the Convention sets out another very interesting obligation incumbent on migrants, which in recent times has often been violated by them, at least according to media reports,¹¹ namely the obligation

11 See for example the acts of violence by Romanian immigrants in Leeds against property and law enforcement; Express, 2024.

to respect the laws and regulations of any state of transit and employment, and to respect the identity of the inhabitants of these states (art. 34).

Before moving onto the next Part, it should be emphasised that the aim here is not to regularise migrant workers or family members whose situation is irregular, but to ensure sound and fair conditions for international migration (art. 35).

Part IV of the Convention – Other rights of migrant workers and members of their families who are documented or in a regular situation – regulates rights that are closely linked to the fact that people migrate to the accepting state in order to work. Some of the rights already covered are reproduced here with certain nuances, but new rights are also provided for. First of all, it is specified that these rights are for legal migrants in the accepting state (art. 36), i.e. those with residence and work documents that comply with the legislation of the state of employment, not illegal migrants, so that the right to information on these conditions is applicable to their admission, i.e. their stay, paid activities, the requirements they must meet, and the authority to which they can address themselves (art. 37).

Migrants have the right to be temporarily absent, but also to move freely within the territory of the accepting state and to choose their residence, the only restrictions being those of public order (arts. 38–39). Next comes the right to form associations and trade unions, which again is only subject to public order restrictions (art. 40), and the right to take part in the public affairs of their state of origin, to vote and stand for election in elections in their state, and to have political rights in the state of employment, if that state grants them such rights (arts. 41, 42). Further on (art. 43), it is stated that migrant workers shall benefit from equal treatment with the nationals of the state of employment regarding their access to educational institutions and services, vocational guidance and placement, vocational training and retraining, housing, social and health services, cooperatives and self-managed enterprises and cultural life. As is only natural, attention has also been paid to the families of migrants by facilitating the reunification of their members, who enjoy equal treatment with migrants, with an emphasis on the integration and education of their children (arts. 44–45). In order to live their lives properly and carry out their work in good conditions, migrants have the right to bring or take their personal effects, household effects, and work equipment without paying taxes, subject to legislative provisions to the contrary (art. 46), and also to transfer their earnings and savings (art. 47), and with respect to the income derived by them or members of their families, although double taxation is accepted if it is provided for by certain conventions, the level of taxation may not be more onerous than that of nationals in similar circumstances, and the same situation applies with respect to deductions or exemptions which are applicable to such nationals (art. 48).

If migrant workers are granted separate residence and employment authorisations, respectively, they must be of equal duration and facilitate, where appropriate, the choice of activity or the finding of another (art. 49), with the proviso that in the event of a migrant worker's death, the authorisation should be maintained for family members if the law of the state so permits, and if not, that a reasonable period of

time should be allowed for them to leave the state of employment after settling their affairs there (art. 50), with the specification that they should only be interdependent in exceptional circumstances (art. 51). The state of employment must allow migrant workers to choose their own work, even to work on their own account, but restrictions and conditions are permitted when certain jobs are limited, when a certain qualification is required, when work is limited in time, when nationals of the state of employment have priority (art. 52), and all this also benefits family members of migrant workers who are personal holders of a residence and work authorisation (art. 53). Migrant workers are also placed on the same footing as nationals of the state of employment with regard to dismissal, unemployment benefits, access to work programs to combat unemployment, access to alternative employment, the right to address the competent authorities if the terms of their contract have been breached by their employer (art. 54), and in the performance of a certain paid activity (art. 55). Expulsion is also included in this part of the Convention, where reference is made to the previous regulation and two clarifications are included to the effect that expulsion may not be carried out in order to deprive the migrant of the rights deriving from the authorisation to stay and work, and that the analysis preceding the decision to expel a person must take account of humanitarian considerations and the length of time the migrant has been present and residing in the state of employment (art. 56).

The Convention regulates in Part V– provisions applicable to certain categories of migrant workers and members of their families – a number of rights intended for certain categories of migrant workers and members of their families who are also legally resident. The rights contained in the preceding parts are fully recognised, with the following modifications (art. 57). The categories of migrant workers envisaged here by the Convention are seasonal workers, itinerant workers, project workers, specified-employment workers and self-employed workers, for whom the Convention makes certain adjustments or indicates the rights they are entitled to, based on their specific nature and the work they perform, which will not be repeated here (arts. 58–63).

With Part VI– the promotion of sound, equitable, humane and lawful conditions in relation to international migration of workers and members of their families – the Convention establishes the need for consultation and cooperation by the state parties concerned in relation to the regulatory field, pointing out that attention must be paid not only to the needs and resources of labour, but also to all the needs of migrant workers and their family members. It is therefore necessary to develop appropriate services for migrant workers and their family members through which policies on this form of migration can be formulated and of course, implemented. To ensure information exchange, consultations and cooperation with other states in the field covering all aspects of this migration are ensured, to which reference has already been made, as well as consular and other services to meet the social, cultural and other needs of migrant workers and members of their families (art. 64–65).

As for the recruitment of workers for employment in another state, the Convention (art. 66) states that this activity may be carried out only by public services or public

bodies of the state in which such operations take place, those of the state of employment if there is an agreement between the states concerned, by a body established on the basis of a bilateral or multilateral agreement, and by potential employing agencies or persons acting on their behalf if, in accordance with the legislation of the states concerned, they have acquired the necessary authorisations, approvals and are under the supervision of the public authorities of the state parties concerned.

Upon the expiration of authorisation of residence or employment, or when in an irregular situation, migrant workers and members of their families should return to their state of origin, which should be done in an orderly manner and through the cooperation of the state parties (art. 67). In order to prevent and eliminate illegal or clandestine movements or the employment of migrant workers in irregular situations, both state parties and states of transit must cooperate and take measures to combat the dissemination of misleading information on emigration and immigration, to detect and eradicate illegal or clandestine movements, and to sanction those involved, to impose penalties on all those who resort to violence, threats or intimidation against migrant workers or members of their families who find themselves in an illegal situation, and to eliminate the employment on their territory of migrant workers in an unlawful situation and to penalise the employers of such workers, who must not however, affect the rights of migrant workers deriving from their employment in relation to their employer (art. 68). If migrant workers and members of their families are found in an illegal situation in the territory of a state, that state must take measures to put an end to that situation, and if the situation is regularised in accordance with national legislation and existing agreements, the circumstances of their entry into the territory of that state, the duration of their stay, their family situation and other relevant considerations must be taken into account (art. 69). The working and living conditions of migrant workers and members of their families must be the same as those of their own nationals (art. 70).

This part of the Convention focuses on the repatriation of the bodies of deceased migrant workers or members of their families, who shall, when appropriate, be assisted in matters of compensation for the prompt settlement of any issues arising there from under national law and any existing agreements (art. 71).

The Convention also has a Part VII, entitled the application of the Convention, which regulates in detail the establishment, composition, organisation and functioning of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, composed of 14 experts of high standing, reputation, moral character, impartiality and recognised competence in the field covered by the Convention. Of relevance in this section, is the way in which the Committee works with state parties through the UN Secretary-General, in that state parties submit a report for consideration on the legislative, judicial, administrative and other measures they have taken to implement the provisions of the Convention. The Committee shall examine the reports and transmit appropriate observations to the state parties concerned, which may in turn submit observations. The Committee shall be assisted in its work by the International Labour Office, other specialised agencies and bodies

of the United Nations, as well as intergovernmental organisations or other bodies. The annual reports of the Committee shall be transmitted by the Secretary-General of the United Nations to the Economic and Social Council, the United Nations Commission on Human Rights, the Director-General of the International Labour Office and other relevant organizations (Arts. 72–78).

Part VIII – General Provisions – it is stated that this Convention does not affect the right of each state party to determine the criteria governing the admission of migrant workers and members of their families, except in matters relating to their legal status and treatment states, where parties must abide by the Convention. Moreover, the Convention does not interfere with more favourable rights and freedoms granted to migrant workers and members of their families under national laws or other agreements. The rights covered by the Convention may not be waived or derogated from, and states parties to the Convention must ensure that, if the rights and freedoms covered by the Convention are violated, an effective legal remedy is available, irrespective of who has committed the violation, including state officials, and that redress for such conduct is available, as well as remedies, together with a commitment to adopt such legislative and other measures as may be deemed necessary to give effect to the provisions of the Convention (art. 79–84).

The last part of the convention, IX – final dispositions – establishes the depositary of the convention in the person of the Secretary General of the United Nations, that this convention is open for signature by all states, that it is subject to ratification, but also to adherence to by any state, regulating both the procedure of adherence, as well as the procedure of denunciation of the convention, which respectively are the reservations that states can make to the text of the convention (art. 85–93).

It can therefore be seen that the Convention is the cornerstone in the field of international migration, emphasising and supporting legal migration, with some tacit acceptance of illegal migration, although this is not supported or encouraged in the wording. The Convention is based on the rights recognised in the Universal Declaration of Human Rights, but qualified here and developed in the light of the specific scope of the area covered, namely migrants and their family members residing and working legally in another state. In many cases, when regulating the rights of migrants, the Convention does not refer to their levels of protection, but as has been pointed out in several places above, it nevertheless refers by comparison to the level of protection provided to the nationals of the state of employment, its own people, without making any further reference to lower levels of protection, and therefore it can be stated that the Convention places on an equal footing, in terms of the rights conferred therein, citizens, nationals of the state of employment, migrant workers and members of their families lawfully present in the territory of that State, or whose stay and gainful activity have become lawful in the meantime.

2.2. International Refugee Law

As mentioned above, a landmark event in the refugee situation was the Second World War, which at a European level, generated large population movements. At the end of

the Second World War, in view of the humanitarian disaster, the Convention relating to the Status of Refugees was concluded in Geneva on July 28th 1951.¹² Since this Convention will be the subject of a detailed analysis in the next chapter, only an overview will be provided here.

First of all it must be mentioned that this is not the first international act concerning refugees, for example art. 1 let. A of the Convention lists other earlier ones, but the Geneva Convention is the most wide-ranging, complex and stable act. Then, in the preamble to the Convention, the principle is reaffirmed that human beings, without any distinction between them, must enjoy fundamental rights and freedoms, which is why this Convention has sought to revise and codify previous international agreements on this subject in order to provide the instruments and protection that refugees need. Another important aspect of the Geneva Convention is that from the outset, it is made clear that granting the right of asylum can entail difficult tasks for the various states, which can only be achieved through international solidarity. It also emphasises the social and humanitarian character of the refugee situation.

With regards to the content of the Articles, it is necessary to make a brief mention of the term refugee, which is closely related to this chapter and its preceding sections and which, according to art. 1 let. A para. 2, shall apply to a person who owing to events occurring before January 1st 1951, and to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or who, not having any nationality and being outside the country of his or her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return. It should be noted that the term refugee as used in the Geneva Convention merely confirms the points made above from a terminological point of view.

A final aspect of a general nature that results from the content of the Geneva Convention is the different level of protection offered to refugees depending on each fundamental human right or freedom included in its content. This degree of protection varies from the highest level which is equal to the protection offered by a state to its own citizens, for example the right to religion provided for in art. 4, to the lowest level which is equal to the protection afforded to foreigners in general by that country, as is clear from art.13 on the right to movable and immovable property. There are also intermediate levels of protection, such as those afforded in the country of domicile or residence, as in art. 12 on personal status, or those afforded to citizens of a foreign country, as in art.15 on the right of association.

The Geneva Convention was supplemented and amended by the Protocol relating to the Status of Refugees, concluded in New York on January 31st 1967.¹³ In connection to this, it should be pointed out here that this act extended the application of

12 United Nations, 1951, Convention Relating to the Status of Refugee.

13 United Nations, 1967, Protocol Relating to the Status of Refugees.

the Convention to other persons in temporal terms, i.e. any person in the situation described in art. 1 of the Geneva Convention, which was referred to earlier, being considered a refugee, but not only as a result of events occurring before January 1st 1951, and also excluding the geographical limitation as set out in art. 1, paragraphs 2 and 3 of the Protocol. A detailed analysis of the Protocol as an integral part of the Geneva Convention will be made in the following chapter, establishing the manner of cooperation of national authorities with the United Nations, the relationship between international and national rules on the subject, and the modalities of accession or denunciation of the Protocol and, by implication, of the Convention.

Another important regulation is the New York Declaration on Refugees and Migrants, adopted by the UN General Assembly by resolution 71/1 on September 19th 2016.¹⁴

Due to the fact that the declaration is first and foremost concerned with refugees, it seemed more appropriate to set out the statement on it here, even if it also refers to migrants, whose issue has been dealt with in the previous section.

In the introduction of this document, considered to be a political declaration of the 193 heads of state and government, the need for its adoption was pointed out, recognising that since ancient times mankind has been on the move, with people migrating in search of economic opportunities and horizons, others to escape conflict, poverty, food insecurity, persecution, terrorism, human rights violations, abuse, climate change, natural disasters, and other environmental factors, etc. Following this and noting the large number of migrants at that time, participants agreed that orderly, controlled migration is more beneficial for the whole of humanity than forced and irregular migration, which brings with it complex challenges. While expressing solidarity with all those who are forced to uproot themselves, it was also recognised that the increased number of migrants creates very serious problems for both destination and transit states, and that no state can manage such movements alone, and therefore argued that greater international cooperation is needed to assist affected countries and communities. Extremely importantly, it was also agreed to address the root causes of large movements of refugees and migrants in particular through enhanced efforts aimed at early crisis prevention, preventive diplomacy, conflict prevention and peaceful conflict resolution, better coordination of humanitarian action, development efforts and peace building, the promotion of the rule of law at national and international level and the protection of human rights, while also addressing poverty, instability, marginalisation, exclusion, lack of development and economic opportunities, in relation to which some of the successes achieved such as the Sendai Framework for Disaster Risk Reduction 2015-2030 were also listed. Proclaiming freedom and equality in dignity and rights and advocating the prohibition of discrimination of any kind together with the firm condemnation of any acts contrary to them, the participants made a series of commitments that cover refugees and migrants together as well as each group separately. The commitments made by

14 United Nations General Assembly, 2016, New York Declaration for Refugees and Migrants.

the authors of this declaration emphasise the human side of the refugee and migrant issue by practically covering the rights stipulated in the conventions analysed in this chapter. These commitments gave shape to new directions for action to improve the situation of refugees and migrants and to develop non-binding guiding principles for migrants in vulnerable situations. Essentially these relate to the development of sustainable approaches leading to the resilience of both refugees and the communities hosting them, the provision of additional and predictable funding but also support for the development of hosting in particular states, the finding of additional ways for refugees to be admitted to third countries, including through the use of resettlement, and the development and application of a broader refugee response framework that can be applied in both long-standing and new situations.

This declaration practically took another step forward by ensuring the conditions for the elaboration of the Global Refugee Pact, which would not create new legal norms and would not introduce fundamental elements of refugee protection, but would provide the framework for their implementation, based on the principles of international cooperation and responsibility sharing. In addition to this, the declaration also foresaw the adoption of a Global Compact for Safe, Orderly and Orderly Migration, which would contain a set of principles, commitments, understandings between member states on all international migration and make a meaningful contribution in all aspects of its management.

The New York Declaration therefore set out by consensus of the participants the political and concrete actions by Member States together with other stakeholders to produce positive effects on the way the international community as a whole responds to migration and refugees.

The Global Compact for Safe, Orderly and Orderly Migration adopted in Marrakesh on December 19th 2018¹⁵ is to some extent the sequel to the New York Declaration (which will be covered in the next section) representing the commitment of the signatory states to improving cooperation in the field of international migration as migration affects countries, communities, migrants and their families. The Pact aims to review all measures in the field of migration on the basis of the experiences gained up to the date of its adoption, thereby providing a 360 degree vision of international migration. The Pact then emphasises that safe and orderly migration works for all if it is carried out in a well-informed, planned and consensual manner. At the outset of the Pact, the principles underlying the document are set out, namely: people-centred, international cooperation, national sovereignty, the rule of law and due process, sustainable development, human rights, respect for human rights, respect for gender, respect for the rights of the child, and the approach by all governments and society as a whole. The pact also brings to the attention of the international community twenty-three objectives, the most important of which I consider to be saving lives and achieving coordinated international efforts on missing migrants, followed by the eradication of human trafficking, which are then developed one by one.

15 United Nations, 1999, Regulations, Rules and General Principles of International Law.

3. EU Protection

The international regulations on migration in all its forms have not remained without an echo at EU level, where the legal provisions relating to this phenomenon have merely adapted them to continental and Union particularities, creating mechanisms that give them a very good practical applicability.

In the following section, the relevant normative acts in chronological order will be presented in a more or less extensive form, as appropriate, with an emphasis on directives, due to the effects they have had or should have had on the legislation of Member States and in order to highlight how the concepts, procedures, and regulations in this area, which raise so many problems and sometimes puts Member States in extreme situations, without even considering its enormous human dimension. Finally, however, with the 2024 migration reform, in addition to the adopted directive, which remains in force and is to be implemented, the adopted regulations will also be presented, whose provisions, together with those of the directive, are intended to create a comprehensive legislative framework on migration, some of which take over many of the institutions provided for in previous directives, while others regulate complementary institutions and procedures.

The first document to which I feel I should refer is The European Convention on the Legal Status of Migrant Workers, adopted in Strasbourg on November 24th 1977,¹⁶ regulates the situation of migrant workers who are nationals of Council of Europe member states, first of all by laying down the forms of recruitment, which is conducted through the official bodies of the party states, the costs of the entire procedure not being borne by the migrant worker. In order to recruit migrant workers, they may first have to undergo a medical, professional and vocational examination. Migrant workers are guaranteed both the right of exit and the right of admission under the Convention. They will at the same time be provided with a precise employment contract or specific offer even before their departure to the receiving state, and will receive information on all aspects of the elements of their life and work. Where collective recruitment takes place, travel expenses should be borne by the employer. If a Contracting Party State has admitted a migrant worker, he or she will be granted both a work permit and a residence permit in the receiving state. Migrant workers and members of their families will receive all the assistance they need to settle and adapt to their new state, and during their stay in the receiving state migrant workers will be supported by the Contracting Parties in recovering the amounts due in respect of maintenance obligations for persons remaining in the state of origin, and for family reunification. The provision of housing is one of the aspects covered by the Convention, as is the training of migrant workers and their family members, with the proviso that children are given the opportunity to learn their mother tongue. The rules of the Convention concern working conditions, the transfer of savings, social security and

16 Council of Europe, 1977, European Convention on the Suppression of Terrorism.

health care. Since this is in the field of labour law, the convention lays down rules on the termination of employment, dismissal and reinstatement. Migrant workers have the right of access to the administrative and judicial authorities of the receiving State during their stay, and during the course of their work.

Looking at the content of the Convention and the rules contained in subsequent European documents, it can be seen that it is one of the first forms of regulation at European level of legal migration for the purpose of work.

After many years Council Directive 2003/9/EC of 27th January 2003 establishing minimum standards for the reception of asylum seekers in member states¹⁷ was adopted. With reference to the Directive, it should firstly be emphasised that through asylum a person can obtain the right to settle in the territory of another country in order to receive protection, shelter and refuge, which is a first form of international protection for people in special situations. Then, as the title says, the aim of the Directive is to establish minimum standards for the reception of asylum seekers in member states, which is why it applies to all third country nationals and stateless persons who lodge an application for asylum at the border or on the territory of a member state, as long as they are allowed to remain on the territory of the member state as asylum seekers, and also to their family members if they have been included in that application (art. 1–3).

Once an application for asylum has been filed, asylum seekers are informed by the member states within a reasonable time, but not more than 15 days from the date of submission of the application to the competent authority, of the advantages and obligations they have, of the organisations or groups of persons that can assist them in the following, usually in written form and in a language they understand, but may also be given orally (art. 5).

Within three days, applicants must receive from the member states a document which serves the dual purpose of certifying their status as asylum seekers and authorising them to remain in the territory of that state until their asylum application has been decided. As regards the freedom of movement within the territory of the member state concerned, member states may decide to grant freedom of movement, but also to restrict it in cases where the applicant is in detention or has filed an application at the border. The document issued must be valid throughout the procedure. Member states may also provide applicants with travel documents if it is necessary for the applicant to reach the territory of another member state (art. 6). As has already been mentioned, asylum seekers can, as a rule, move freely within the territory of the member state or within a limited area. Applicants may be assigned a place of residence where, under certain circumstances they should stay, and which may only be left on the basis of an authorisation, which is not required for their presence before the authorities. Applicants must always notify the authorities of any change of place of residence (art. 7). Where member states offer an applicant a residence,

17 European Union, 2003, Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers.

it must be capable of ensuring the unity of the whole family residing in the territory of the member state (art. 8). For public health reasons, member states may require the applicant to undergo medical examinations (art. 9).

This document also pays particular attention to minors, whether they are asylum seekers or family members of asylum seekers, by allowing access to the education system under similar conditions for children of member state nationals. Education will take place during the time until the enforcement of a removal order, it may be limited to state institutions and may take place in accommodation centres. Minors may also be offered access to secondary education if they have reached the age of adulthood. Access to education may not be postponed for more than 3 months from the date of the application for asylum, which may be extended to 1 year if access to the education system is facilitated. If access to the educational system is not possible due to the minor's situation, then other means of education may be offered (art. 10).

An applicant may be allowed access to the labour market, but member states may set a time limit within which access may not take place, which may not exceed one year from the date of submitting the asylum application, and the delay is not attributable to the applicant, conditions under which access to the labour market is allowed, and priority access to the labour market for certain categories of persons such as Union citizens (art. 11). Asylum seekers also have the right to access vocational training even if they do not have access to the labour market (art. 12).

Member states must adopt provisions on material reception conditions in order to guarantee an adequate standard of living to ensure the health and subsistence of asylum seekers from the moment they submit their applications. Accommodation can take place in a variety of locations, ranging from centres for asylum seekers to private hotels, and the personal financial contribution of the asylum seeker can range from not being necessary at all, if the asylum seeker's material condition or situation does not allow it, to paying the full costs. Particular attention should be paid to the organisation of asylum centres (art. 13–14). Asylum seekers are offered not only emergency care, but also the basic treatment of illnesses (art. 15).

The benefit of reception conditions may be limited or withdrawn by member states when the asylum seeker: leaves the place of residence determined by the competent authority without informing it or obtaining its permission, fails to comply with the obligation to report to the authorities, fails to provide the requested information, fails to attend personal interviews within a reasonable time set by national law, has made another application in the same member state, and has concealed the fact that he or she has financial resources and has not benefited adequately from reception conditions. Member states may also refuse reception conditions if an asylum seeker cannot demonstrate that his or her application was lodged as soon as possible. Decisions to limit, withdraw or refuse reception conditions, together with related sanctions where appropriate, must be objective, impartial and reasoned (art. 16).

Persons with special needs enjoy slightly differentiated treatment (art. 17–20). Thus, in the case of minors, the well-known principle of the best interests of the child takes precedence, and they benefit, where necessary, from rehabilitation, mental

health and qualified assistance services, while in the case of unaccompanied minors, the necessary representation by a guardian or other body responsible for the protection of minors or other such form of representation is provided as soon as possible. The situation of minors shall be regularly assessed. Minors shall be placed, for the duration of the procedure, together with adult family members, either in a foster family, or in specialised accommodation for minors, or in other places suitable for minors. The placement of minors in adult centres may only be made if the minor has reached the age of 16. The brothers and sisters of minors must be kept together with the minor. Member states must make efforts to trace their family members. Staff dealing with these categories of minors must have specialised training.

Victims of torture or violence must also receive appropriate treatment for the harm caused by such acts (art. 20).

Where negative decisions have been taken against asylum seekers, they must be subject to appeal before a judicial body, while access to legal aid must also be available in accordance with national rules (art. 21).

For the reception system covered by this Directive to be effective, member states must regularly inform the Commission about applicants, reception conditions must be subject to monitoring and control, and the staff involved must be qualified (art. 22–24).

Council Directive 2004/83/EC of April 29th 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted,¹⁸ supplements the provisions of the above-mentioned Directive, completing the legal framework necessary to deal with the issue of persons in need of and seeking protection at EU level in a uniform manner. It should be mentioned that this Directive refers to two different forms of protection and, in order to understand and distinguish between them, it is necessary to know the meaning of two concepts. Thus, “refugee” means

‘any third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country’ or any stateless person in such a situation. Also, “person eligible for subsidiary protection” means “any third-country national or stateless person who does not qualify as a refugee but in respect of whom there are serious and substantial grounds for believing that, if returned to his or her country of origin or, in the case of a stateless person, to the country of former habitual residence, he or she would face a real risk of suffering serious

18 European Union, 2004, Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection.

harm and is unable or unwilling to avail himself or herself of the protection of that country.’ (art. 2)

In the procedure following the submission of an application for international protection, an individual evaluation of the facts and circumstances either provided by the applicant, or apparent from the documentation provided, relating to the applicant’s age, background, including relevant family members, identity, nationality or nationalities, country or countries, place or places of previous residence, previous asylum applications, itinerary, etc., is first carried out. The fear of persecution may also result from events occurring after the applicant has left the country of origin. States, parties or organisations, non-governmental agencies may be both agents of persecution or serious harm and agents of protection, depending on their activity in relation to the rights and freedoms of the applicant. There is a possibility that a particular person, although seeking international protection, may not need it because in a particular part of his or her country he or she has no reason to fear persecution or serious harm, and the applicant may remain in that part of his or her country of origin (art. 4–8).

To be considered a refugee, a person must fulfil several conditions. Firstly, he or she must suffer acts of persecution, which in turn must be sufficiently serious by their nature or repeated nature, so as to amount to a serious violation of fundamental human rights or an accumulation of various measures. Acts of persecution may take the form of violence of any kind, legal measures of whatever nature if they are discriminatory, prosecution or punishment if they are disproportionate or discriminatory, a lack of legal remedies, being held liable for a refusal to perform military service if covered by exclusion clauses, acts against persons on the grounds of sex, and acts against children (art. 9). The grounds for persecution must be based on race, religion, nationality, membership of a particular social group and political opinion (art. 10).

The Directive also lays down the situations in which refugee status ceases, i.e. if he or she has voluntarily re-availed him or herself of the protection of the country of which he or she is a national, has voluntarily regained his or her nationality after having previously lost it, has obtained a new nationality and enjoys the protection of the country from which he or she had acquired it, he or she has voluntarily returned to the country which he or she had left or outside where he or she had remained for fear of persecution, the circumstances in connection with which he or she was recognised as a refugee have ceased to exist and he or she can no longer refuse to avail himself of the protection of the country of which he or she is a national or in which he or she used to have his or her habitual residence after having been a refugee. All these circumstances are of an alternative nature, and member states shall examine whether they are of a definitive nature (art. 11). Recognition as a refugee is excluded if a national or stateless person has been granted another protection or assistance by a UN body, agency or institution (other than the UNHCR, but the competent authorities of the country in which he or she has taken up residence) that considers he or she has the same rights as if he or she were a national of that country, has committed a crime

against peace, has committed a war crime or a crime against humanity, has committed a serious non-political crime outside the country of refuge before being admitted as a refugee or acquiring a residence permit, or has been guilty of acts contrary to the purposes and principles of the United Nations. These situations of exclusion also concern those who commit acts of instigation or complicity (art. 12).

Refugee status is granted to any third-country national or stateless person who fulfils the above conditions. Member states shall revoke refugee status, order its cessation or refuse to renew it if, after having granted refugee status, they establish that the refugee should have been excluded from refugee status, that there has been a distortion or omission of certain facts, or that false documents were used which played a determining role in the decision to grant refugee status. Member states may also revoke, cease or refuse to renew refugee status if there are reasonable grounds for considering him or her a danger to the security of the member state in which he or she is present or has been convicted by a final judgment of a particularly serious crime constituting a danger to the society of that state, and if the procedure has not yet been concluded, member states may decide not to grant refugee status if they find that such circumstances have arisen (art. 13–14).

The second, subsidiary, form of protection is granted to a person who has suffered serious harm consisting of the death penalty or execution, torture or inhuman or degrading treatment or punishment, serious threats to the life or person of a civilian, as a result of generalised violence arising from internal or international armed conflict (art. 15). A third-country national or stateless person ceases to be eligible for subsidiary protection if the circumstances that gave rise to the grant of protection have ceased to exist or have changed to such an extent that protection is no longer needed. Here too, member states must ensure that the change of circumstances is permanent (art. 16). A person is excluded from the category of persons eligible for subsidiary protection if his or her conduct is reprehensible and he or she subscribes to the circumstances for which exclusion from refugee status is also ordered and provisions apply accordingly (art. 17). The granting of subsidiary protection status, as well as the revocation, cessation or refusal to renew it, are subject to the same conditions as for refugee status (art. 19).

The content of international protection largely covers the same issues as Directive 2003/9/EC (the principle of non-refoulement, information of persons, maintenance of family unity, residence permit, travel documents, access to employment, access to education, social protection, health care, the situation of unaccompanied minors, access to housing, freedom of movement, access to integration facilities, and repatriation), in some cases with a slightly broader content, generated by the status of the refugee or person granted subsidiary protection, so that a review of them would be exhaustive and would make it difficult to identify the aspects that are relevant to the issue addressed. Just by way of example, it should be pointed out that the residence permit is granted for a period of at least three years and is renewable (art. 20–34).

As in the previous Directive, there are provisions on the cooperation between member states, the specialisation of staff carrying out tasks in this area, and the

communication of information to the European Commission, its transposition etc. (arts. 35–40).

Another legislation adopted in this area is Council Directive 2005/85/EC of December 1st 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status,¹⁹ the explanatory memorandum of which states that the European Union's objective of establishing an area of freedom, security and justice open to those who are compelled to seek protection within the Union requires a common asylum policy and a Common European Asylum System based on the Geneva Convention and its successor instruments, founded on the principle of non-refoulement, which means that no one shall be sent back to persecution. The aim of this directive is both to establish minimum standards and a minimum framework for the procedures for granting and withdrawing refugee status in order to limit the secondary movement of asylum seekers between member states, and to create an effective channel of access to procedures with all that this entails for each applicant, with particular attention being paid to the situation of unaccompanied minors, where the best interests of the child must be paramount. This directive raises the question of the admissibility of asylum applications from the point of view of the applicant's safety in his or her country of origin, the possibility for member states to consider a third country as a safe country of origin, and the common criteria for granting such status, with the proviso that all of this is subject only to a presumption *juris tantum* regarding the safety of the country concerned. In light of these considerations, it has been pointed out that there are situations in which member states should examine the substance of asylum applications, and in which they should not have such obligations. It has also been pointed out that this Directive does not affect the fulfilment of member states' responsibility to maintain public order and internal security, but also that the measures that states must take in this area may be in accordance with the principle of subsidiarity, given that the Directive seeks to respect the principle of proportionality in order to achieve its own objective.

After reiterating its purpose (art. 1) and defining certain terms (art. 2), the Directive states that its scope covers all applications for asylum lodged in the territory of the member states, including at the border or in transit zones, and the withdrawal of refugee status without regard to diplomatic or territorial asylum (art. 3).

In order to ensure that the provisions of the Directive are properly and effectively applied, member states are required to designate a determining authority (art. 4), provided that asylum applications lodged in one member state but addressed to another member state are decided by the member state on whose territory the application is lodged. The Directive allows States to designate a completely different authority to deal with certain situations, namely: transferring the applicant to another state, deciding on the asylum application on the basis of national security provisions, carrying out a preliminary examination in case of a new application, and in the case of procedures

19 European Union, 2005, Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.

initiated at the border, refusing permission to carry out specific procedures in the border area and when the applicant has come from a safe third country.

As the Directive sets minimum standards, it is natural that member states may set or maintain more favourable standards regarding the procedures covered by the Directive (art. 5).

The procedure is initiated by an application for asylum, which must be lodged in person and at a specified location. However there are certain exceptions, such as in the case of dependants of the person submitting the application for their benefit, from whose consent is still required. Although the situation of minors is a special one, member states may nevertheless determine the cases in which a minor may submit an application in his or her own name or through a representative or in which the application of an unmarried minor is considered to be a valid application (art. 6).

As a general rule, applicants are allowed to remain in the member state in order to carry out the procedure until a decision is taken, with the mention that this is not a right to a residence permit. However there are exceptions, such as the surrender or extradition of a person to another member state, a third country, or an international criminal court (art. 7).

When examining applications, it is necessary that their submission in the shortest possible time does not lead to a rejection, and that decisions on asylum applications are taken after a proper examination of them, i.e. applications must be examined and decisions must be taken individually, objectively and impartially, provided that accurate and updated information is obtained from a variety of sources by staff familiar with the relevant standards (art. 8). The decisions of the decision-making authority must be in writing, and must state the reasons in fact and in law, as well as being open to appeal, which must be brought to the attention of the applicant. The obligation not to state the reasons for the decision may exist if the applicant is granted comparable status, and the obligation to communicate all information relating to the decision and the appeal in writing does not exist if this has occurred in a previous procedure, even the adoption of a single decision is allowed if it concerns all the dependants (art. 9).

The guarantees granted to asylum seekers concern informing them in a language they understand about all aspects of the procedure, providing the services of an interpreter, giving them the possibility to communicate with the UN High Commissioner for Refugees, communicating the decision taken within a reasonable time, and providing information about the outcome of the decision in a language they understand (art. 10). Asylum seekers have a number of obligations, including the obligation to cooperate with the competent authorities by informing them of their presence, presenting themselves to the authorities, handing over relevant documents, informing the competent authorities of their current residence or address and any changes to them, accepting to receive communications at the latest of these, submitting to body searches, and photographing and recording their own statements (art. 11).

An important part of the procedure is the personal interview (art. 12–14) which takes place before a judgment can be given. This interview may be conducted by the applicant, by any adult dependant of the person who made the application, or by a minor.

The personal interview may be omitted if a positive decision is expected, if a meeting with the applicant has already taken place, if the application is considered unfounded on the basis of the information provided by the applicant, or of course if it cannot actually take place. It is important to note that the absence of a personal interview does not prevent the determining authority from making a decision, nor does it negatively influence the way in which the application is dealt with, although this can be taken into account. The interview is conducted individually with the person requesting the application, but in exceptional circumstances he or she may be accompanied by family members, in conditions of confidentiality by a highly trained person, in the presence of an interpreter to facilitate good communication, or other third parties if their presence is regulated and necessary. A report on the interview and the information obtained during the interview is drawn up and the interviewees have access to it, they can approve or refuse to approve it, which does not prevent the determining authority from taking a decision on the asylum application.

The Directive also regulates the right to legal assistance and representation (art. 15–16) which is generally provided for a fee and at the applicant's own expense, and confers access to a legal adviser or other counsellor. It is free of charge if the determining authority has given a negative decision and the applicant so requests. Member states may provide that legal assistance and representation shall be free of charge only before the courts or tribunals for persons who lack sufficient resources, or for access to legal advisers or other counsellors specifically designated for this purpose by national law or only in appeal proceedings. However, member states must ensure that legal assistance and representation are not arbitrarily limited. Member states may also provide for the manner in which requests for legal assistance and representation are to be made and dealt with, as well as financial limits and certain time limits in the case of free legal assistance and representation, or even that applicants should not receive more favourable treatment than their own nationals in similar cases. Member states may also require reimbursement of all or part of the costs incurred if the applicant's financial situation improves, or if the decision was taken on the basis of false information provided by the applicant. Legal assistance and representation consists of the right of the legal adviser or other counsellor to have access to the information in the applicant's file, which is restricted if it could jeopardise the national security of the organisations or persons providing it, or of the person or persons to whom it relates, or if it would prejudice the investigation; the right of access to restricted areas such as places of detention, transit areas for the purpose of consultation with the applicant, the restriction being possible for the purposes of security, public order, administrative management of the area or efficient examination of the application, provided that the restriction does not make it impossible for the adviser to have access to the applicant. Member states may provide for the presence of the advisers or counsellors at the interviews with the applicant, without their absence preventing the authorities from conducting the personal interview with the applicant.

As indicated above, particular attention is given by the Directive to unaccompanied minors (art. 17) who are immediately provided with representation or assistance

by a representative for the examination of the asylum application, the representative having the opportunity to inform the minor on how to prepare for the interview, which the representative may attend to ask questions and make comments, without the representation of the minor during the interview excluding the obligation to attend the interview. Member states are exempted from the obligation to appoint a representative for a minor, for when the minor will reach the age of adulthood before a decision is taken, if he or she receives the services of a legal adviser or other specialised adviser free of charge, if he or she is or has been married and if the minor is 16 years of age or older. In the latter situation, however, a representative will be appointed if the minor is unable to support his or her asylum application alone. If the application is made by an unaccompanied minor, the interview must be conducted by a person specialised in the needs of minors and the decision must be drafted by such a person. Member states may conduct medical examinations of minors to determine their age, in which case they must be informed in advance in a language they understand about the purpose, the method of examination, the consequences of the examination and the consequences of refusing to have the examination. Minors must give their consent to medical examinations in person or through their representatives, and if the medical examination is refused, the decision to reject the asylum application cannot be based solely on refusal, nor can such a refusal prevent the authorities from taking a decision on the minor's asylum application.

The Directive expressly provides that member states shall not detain a person for the sole reason that he or she has submitted an asylum application. If detention is nevertheless used, it must be replaced as soon as possible by judicial supervision (art. 18).

Member states may regulate by national law the withdrawal or abandonment of the asylum application (art. 19–20). If the application is explicitly withdrawn, a decision to discontinue or reject the application or to discontinue the examination without taking a decision on the application must be regulated. If the application is implicitly withdrawn or the applicant implicitly renounces the application, a decision to discontinue the examination or to reject the application must also be taken. An implicit withdrawal or implicit abandonment of the application for asylum shall be presumed where the applicant has not supplied information essential to his or her application, has not appeared for a personal interview unless such conduct was involuntary or the applicant has absconded or has left without permission from the place where he or she was detained or living without contacting the competent authority within an acceptable period of time, or has not complied with reporting duties or other obligations to communicate. Member states should provide for the possibility for such an applicant to subsequently request the reopening of his or her case, for which a time limit may be set, and for the possibility to resume the procedure from the place where it was stopped. Member states must also ensure that such a person is not subject to expulsion, contrary to the principle of non-refoulement.

According to the Directive the UN High Commissioner for Refugees directly or through an organisation working on his or her behalf must be authorised by member

states to have access to asylum seekers and transit zones, to have access to information on asylum applications and all that follows on the basis of such applications, provided that the applicant gives his or her consent to present his or her views (art. 21).

During the procedure of gathering information, member states must ensure the protection of the applicant, as such they shall not provide data and information to the alleged perpetrator of the persecution (art. 22).

A significant part of the Directive deals with first instance proceedings (arts. 23–36), where certain procedures are regulated, as well as some concepts of great importance in their conduct.

In order to ensure the fluency and understanding of the entire procedure legislated here, it should be considered necessary to first refer to the explanations given in the Directive with reference to certain concepts. The first is the concept of “first country of asylum”, according to which a given country may be considered to be the first country of asylum for a particular asylum seeker if he or she has been recognised as a refugee in that country and is still able to avail him or herself of the protection granted or enjoys some protection in that country, even if it is known under another title, or protection which includes the principle of non-refoulement, but only if he or she is readmitted to that country (art. 26). The second concept is that of a “safe third country” and means that the competent authorities of a state are confident that in that country an asylum seeker will benefit from respect for the following principles: the life and liberty of asylum seekers are not endangered on grounds of race, religion, nationality, membership of a particular social group or political opinion; the principle of non-refoulement is respected in accordance with the Geneva Convention; the prohibition of expulsion, as laid down in international law, with violation of the right not to be tortured and subjected to cruel, inhuman or degrading treatment respected; there is a possibility to apply for refugee status and to benefit from protection. An application of the concept, in turn, can take place if rules in national law establish the need for a link between the asylum seeker and that country, on the basis of which the asylum seeker would go there, if there are rules on the methodology by which the competent authorities of a state determine that a particular country can be covered by the concept, if rules are developed in accordance with international law allowing for an individual examination on the basis of which it can be determined that a particular country is safe for a particular applicant and giving that applicant the right to challenge the safe country concept. When a decision is made using this concept, the authorities of a member state must inform the applicant accordingly and provide him or her with a document informing them that the authorities of a third country have been informed that their application has not been examined on its merits. If that country does not allow the asylum seeker to enter its territory, member states must allow the asylum seeker to follow a procedure that complies with all the guarantees set out in the Directive. Member states must inform the Commission which countries have been granted the safe third country concept (art. 27).

The third is the concept of “safe country of origin” which means that a country can be considered as such for a particular asylum seeker, after the individual

examination of the application and only if he or she is a national of that country or is a stateless person and has previously had a stable residence in that country, i.e. has not shown serious reasons for considering that country not to be a safe country of origin in his or her particular circumstances (art. 31). It should also be noted that at EU level, the Council, on a proposal from the Commission and after consulting the European Parliament, adopts a minimum common list of third countries which member states consider to be safe countries of origin, but member states may also adopt legislation allowing them to designate at national level countries other than those on the minimum list, although in both cases each country on the list must meet the conditions and offer the guarantees laid down by the directive (arts. 29–30).

The fourth is the concept of a “safe European third country”, which in turn means a country that has ratified and complies with the provisions of the Geneva Convention without any geographical limitations, has an asylum procedure laid down by law, has ratified and complies with the European Convention for the Protection of Human Rights and Fundamental Freedoms, and has been designated as such by the Council. Moreover, the Council has the power, on a proposal from the Commission and after consulting the European Parliament, to adopt or amend a list containing such countries. Where the determination of an asylum application is based on the safe European third country concept, member states will proceed as in the case of an applicant to whom the safe third country concept has been applied (art. 36).

The procedure now starts with the submission of an application for asylum, which member states deal with in an examination procedure in accordance with the principles and guarantees of the Directive (art. 23). The examination procedure must be carried out quickly, properly and completely. If a six-month period is exceeded and a solution has not yet been found and given, the member state will inform the applicant of this delay or inform them of the time by which a solution is expected to be given. The examination procedure may be accelerated as appropriate in certain special situations, where member states may prioritise or accelerate certain procedures and the cases outlined in the Directive would theoretically lead to the rejection of the application. In addition to the examination procedure, which is considered to be a general common procedure, member states may regulate special derogating procedures (art. 24) consisting of a preliminary examination for the settlement of cases where new applications have subsequently been made, procedures for the settlement of cases taking place at the border, and derogations when the procedure is centred on the concept of a safe European third country.

According to the Directive, an asylum application can be considered inadmissible by member states (art. 25) when: another member state has granted refugee status; a country which is not a member state is considered as the applicant’s first country of asylum; a country which is not a member state is considered as a safe third country for the applicant; the applicant is allowed to remain in the member state concerned for other reasons, receiving a status equivalent to refugee status; the applicant is allowed to remain in the member state concerned for other reasons which preclude return pending the outcome of a procedure to determine his or her status; the applicant has

submitted an identical application after a final decision has been taken; a dependant of the applicant submits an application although he or she has given his or her consent to their own case being dealt with in an application made on his or her behalf.

An application is unfounded (art. 28) only if the determining authority has established that the applicant does not qualify for refugee status, but also in cases where the applicant has not fulfilled the obligations laid down for him or her by the Directive referred to above.

As regards subsequent applications (arts. 32–34), the Directive provides that the member state may provide that a subsequent application may be examined as part of the examination of the previous application or as part of the examination of the decision, if it is subject to appeal, provided that the new application can be considered at that stage. Member states may also receive a subsequent application if there has been a withdrawal or abandonment of the first application, but also after a decision has been taken on the previous application. If a subsequent application is submitted, it is subject to a preliminary examination as to whether any new facts or elements have come to light which are relevant to establish whether the person qualifies as a refugee. If the preliminary examination establishes that the conditions for refugee status appear to be fulfilled, the application will proceed to the next stage, i.e. it will go through the examination procedure. A subsequent application may be examined if it is found that there are grounds for reopening a procedure. Member states may decide to examine the application further only if the applicant has been unable, through no fault of his own, to inform the authorities of the circumstances of the case as set out above. A subsequent application may also be submitted by a dependant of the person who submits an asylum application, if the situation of the dependant justifies a separate application. Member states may maintain or adopt the procedure for subsequent applications if the applicant intentionally or owing to serious negligence fails to go to a reception centre or to appear before the competent authorities at the appointed time. For the processing of subsequent applications, Member States must provide all necessary guarantees on the one hand, and may lay down certain conditions on the other hand.

The procedures to be carried out at the border (art. 35) have a derogatory character from the usual ones and should mainly refer to the fact that persons who have made an application at the border may stay in the border area or transit zones, but as stated above, only for the purpose of the procedure; applicants are informed about their rights and obligations, have access to an interpreter; applicants are interviewed before the competent authority takes a decision in such procedures on their asylum application by persons qualified in this field; applicants may consult legal advisers or other counsellors, and if they are minors they have the benefit of an appointed representative. If the competent authority refuses to allow entry, it must also state the reasons in fact and in law why the application for asylum is unfounded or inadmissible. The decision on the application must be taken within a reasonable time limit, which in this case is much shorter, i.e. four weeks, failing which the applicant is allowed to enter the territory of the member states in order for his application to be

processed under common procedure. Border procedures are only used if the number of arrivals is not high and if applicants are accommodated in border or transit zones.

Refugee status can be withdrawn (arts. 37–38), and such a procedure can start when new facts or information come to light that lead to a reassessment of the validity of refugee status. As part of the procedure for the withdrawal of refugee status, the Directive stipulates that member states must ensure that the refugee benefits from certain guarantees such as: being informed in writing of the reassessment of the refugee status, the opportunity to present the reasons for maintaining his or her refugee status in a personal interview or in a written statement, as appropriate. In addition to these guarantees, member states must ensure that the competent authority is able to obtain accurate and updated information on the situation in the country of origin of the refugee from various sources, including the UN High Commissioner for Refugees, which may also be obtained from the perpetrator of the persecution, but in such a way that the latter does not learn about the refugee, the reassessment of his or her status or endanger the refugee, his or her dependants and family members in the country of origin. Once the procedure has been completed, the decision to withdraw refugee status must be communicated to the refugee in writing, must state the reasons in fact and in law, and the refugee must be informed of the appeal. Member states may decide that the refugee's refugee status lapses if the refugee has ceased to be a refugee and has unequivocally renounced recognition as a refugee.

The Directive under review also regulates appeal procedures (art. 39), governed by the principle of the right to an effective remedy, stating that member states must ensure that asylum seekers have an effective remedy before a court or tribunal if their application has been dismissed as inadmissible, if the decision was taken following a procedure at the border or in transit zones, when it was based on the use of the safe European country concept, when there is a refusal to reopen the examination of the application after the conclusion of the procedure, when a decision has been taken not to examine a subsequent application, when a decision has been taken not to allow entry to the territory of the state when the application was made at the border or in the transit zone, and when a decision has been taken to withdraw refugee status. For the conduct of such a procedure, states may establish time limits, but also rules such as whether or not the granting of an appeal allows the refugee to remain in the territory of that state, the provision of a subsequent appeal or the provision of interim measures in case the initial appeal does not allow the refugee to remain in the territory of the state. If an applicant has been granted rights and benefits, but under a different status, then he or she will also benefit from a subsequent appeal where a court or tribunal decides that the initial appeal is inadmissible or unlikely to succeed on the grounds of insufficient interest of the applicant to pursue the procedure. Of course, member states may also provide for rules on the implicit withdrawal by an applicant of an appeal or the implicit renunciation by the applicant of that appeal, as well as the procedural steps to be followed.

In addition to the procedural rules developed at length in Directive 2005/85/EC, there are other European legislative acts.

It should be mentioned first of all, that the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, was signed in Dublin on June 15th 1990,²⁰ and it is this that establishes the commitment of the member states to examine the application of any foreigner who applies for asylum at their borders or on their territory, but also states the fact that that application will be examined by a single member state in accordance with national law and international obligations. It is also provided that any member state has the right to examine an asylum application lodged by an foreigner, even if it is not its responsibility according to the criteria laid down in the convention, in which case the responsible member state is relieved of its obligations which are taken over by the new state, but also that any member state retains the right to send an asylum seeker to a third state in accordance with the provisions of the Geneva Convention, in accordance with its national law.

The state responsible is determined as soon as the asylum application is submitted on the basis of a number of criteria (arts. 4–8) such as: the existence in a member state of a family member belonging to the applicant who has acquired refugee status; the possession of a valid residence permit; the possession of a valid visa; the member state where the applicant first entered illegally; the member state responsible for controlling the entry of aliens into the territory of the member states; the first member state with which the asylum application is submitted, etc. The powers and obligations of the responsible member states similar to those set out above are set out in the Convention, with the natural specificity of the field covered.

The provisions of the Dublin Convention have been further developed on certain levels by means of other legislative acts such as Council Regulation (EC) No. 2725/2000 of 11 December 2000 concerning the establishment of “Eurodac” for the comparison of digital fingerprints for the effective application of the Dublin Convention,²¹ which established a Central Unit, a computerised central database for the processing of dactyloscopic data, and the means of transmission of data between the member states and the central database.

Similarly, Council Regulation (EC) No. 343/2003 of 18th February 2003 established the criteria and mechanisms for determining the member state responsible for examining an asylum application submitted in one of the member states by a third-country national,²² which took over and regulated the issues covered by the Dublin Convention in more detail.

20 European Union, 1997, Agreement establishing the World Trade Organization.

21 European Union, 2000, Council Regulation (EC) No. 2725/2000 on the establishment of ‘Eurostat’.

22 European Union, 2003, Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

Another important European regulation concerning persons in need of international protection is Directive No. 2011/95/EU of the European Parliament and of the Council of 13th December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and the content of the protection granted,²³ which is in fact a recast of Directive No. 2004/83/EC analysed above, and which is why, as will be seen below, it takes over most of the previous regulations, with Annex II to the new directive even establishing a correspondence between them.

This new directive on the subject was necessary, as is clear from the explanatory memorandum, for reasons of clarity, in order to contribute further to the implementation of the common asylum policy (paras. 1 and 2), with the main objective of ensuring that all Member States apply common criteria for identifying those persons who are in genuine need of international protection, ensuring a minimum level of benefits for such persons in the Member States (para. 12). This directive also refers to two categories of persons who would require international protection, namely refugees and persons eligible for subsidiary protection, both of which defined here, but since the two definitions are similar to those provided in Directive No. 2004/83/EC, they will not be repeated here.

The content of the new directive will be summarised below, as it often repeats the provisions of the other directive verbatim in an attempt to highlight the new features.

Directive No. 2011/95/EU also allows Member States to adopt or maintain more favourable standards for the two categories of persons in need of international protection (art. 3).

When assessing applications for international protection, the assessment of facts and circumstances (art. 4) is similar to the previous regulation. The same applies to the need for international protection arising outside the country of origin (art. 5), with differences here taking the form of the use of different terms; for example, the new regulation refers to “a well-founded fear”, whereas the previous regulation refers to “justified fear”, which is essentially the same thing. The agents of persecution or serious harm (art. 6) remain unchanged in their regulation, but the agents of protection do (art. 7), because in addition to stating that protection can only be provided solely by the state, political parties or organisations, including international ones, that control the state or a significant part of it, it specifies that they are agents of protection if they are willing and able to provide protection. It also emphasises that such protection must be effective and not temporary. There are also improvements regarding protection within the country (art. 8), as Member States may determine that an

23 European Union, 2011, Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and on the content of the protection granted.

applicant does not need international protection, if they have no well-founded reason to fear persecution or serious harm, and if they have access to protection against such persecution or harm, even if only in one part of their country, but only if they can travel safely and legally and will settle in that area. Furthermore, the examination of this data must be based on accurate and up-to-date information obtained from relevant sources such as the UN High Commissioner for Refugees and the European Asylum Support Office. Regarding the first category of persons requiring international protection, namely refugees, acts of persecution and grounds for persecution (art. 9–10), between which there must be a close connection, have not undergone any legislative changes. If the conditions set out in the directive, mentioned above, are not met, exclusion occurs (art. 12), which allows any third-country national or stateless person to be excluded from recognition as a refugee, with no differences between the two regulations, just as there are no differences in the granting of refugee status (art. 13). As for the cases where a third-country national or stateless person ceases to be a refugee (art. 11), there is only one change in the new directive. This concerns the fact that when the circumstances that led to a person with citizenship being recognised as a refugee no longer exist and, as such, they can no longer continue to refuse to seek protection from their own country of nationality, or the circumstances that led to a stateless person being recognised as a refugee have ceased to exist and they can return to the country where they had their habitual residence, refugee status ceases. By way of exception, if any of them can invoke compelling reasons arising from previous persecution, which cause them to refuse to benefit from the protection of the country of which they are a citizen, and in the case of a stateless person, the country where they usually resided, refugee status does not cease. With regard to the revocation, cessation, or refusal to renew refugee status (art. 14), the provisions of this directive are the same as those of the old directive, containing both mandatory and optional cases for maintaining the status granted.

The second category of persons in need of international protection covered by this new directive are “persons eligible for subsidiary protection”, a concept that differs slightly from that in the previous directive through the introduction of the term “eligible”, which simply differentiates them from *refugees* in that they do not meet the conditions to be classified in this category that enjoys primary protection. This second category of persons in need of subsidiary or secondary protection, are those covered by serious harm (art. 15) regulated in the same way in both directives. The cessation of a person’s eligibility for subsidiary protection (art. 16) is slightly adjusted in the new directive in that, as in the case of refugees, the cessation does not apply to a beneficiary of subsidiary protection if they can invoke compelling reasons resulting from previous persecution, which justify their refusal to benefit from the protection of the country of which they are a citizen, and in the case of a stateless person of the country where they normally resided, a provision that forms a new paragraph 3. The exclusion (art. 17) from the category of persons benefiting from subsidiary protection is similar to that in the previous directive. The status conferred by subsidiary protection,

in its components granting subsidiary protection status (art. 18), revocation, cessation or refusal to renew subsidiary protection status (art. 19) contain no changes.

The content of international protection granted to the two categories of persons contains slight changes, the first of which are found in the general rules (art. 20) in that paragraphs 6 and 7, which refer to the reduction of benefits granted to a refugee and to a person benefiting from subsidiary protection, have been removed if this is intended to create the conditions necessary for their recognition as such persons. Protection against return (art. 21) and information (art. 22) have similar content in both directives, but family unity (art. 23) is different in the new directive, in that in paragraph 2 there were two more subparagraphs, the first of which established that with regard to the family members of those benefiting from subsidiary protection status, Member States have the possibility to lay down conditions for the applicability of these benefits, an aspect supplemented by the following subparagraph, which requires Member States to ensure that the benefits granted guarantee an adequate standard of living. The new directive and the previous one contain the same rules on the issuance of residence permits (art. 24) and travel documents (art. 25). Concerning access to employment (art. 26), there are differences between the two directives in that paragraph 3 of the previous directive concerning the possibility for Member States to take into account the rules generally applicable in that sector of activity, namely public services, the situation of the labour market, and their obligation to ensure that these persons have access to employment under the conditions in question, which has not been included. Similarly, paragraph 4 has been amended in the sense that the new directive requires Member States to make every effort to facilitate full access for beneficiaries of international protection to the activities regulated under this article, such as vocational training, professional training, etc., which is stricter than the similar obligation in the previous directive. Similarly, access to education (art. 27) has been amended in the sense that the paragraph which required Member States to ensure equal treatment between persons subject to international protection and their own nationals in procedures for the recognition of diplomas, certificates, or other official qualifications, is no longer maintained, but its content is found in a more developed form in a new article on access to procedures for the recognition of qualifications (art. 28), which in addition to establishing the obligation of Member States to ensuring equal treatment in these procedures, also regulates the obligation of States to make every effort to facilitate access for beneficiaries of international protection who cannot provide documents certifying their qualifications, to the bodies competent for the assessment, validation, and accreditation of prior learning, while also referring to Directive No. 2005/36/EC of 7th September 2005 on the recognition of professional qualifications. Social protection (art. 29) has retained its regulation, but healthcare (art. 30) has been slightly modified in paragraph 2, which represented a derogation from paragraph 1, providing for the possibility for Member States to limit healthcare for beneficiaries of subsidiary protection to basic benefits on an equal footing with their own nationals. With regards to unaccompanied minors (art. 31), the amendment in the new directive consists of an elaboration of paragraph 5, which established

that when international protection is granted to an unaccompanied minor and the identification of family members has not yet begun, Member States shall proceed to identify them as soon as possible, but only after granting international protection to the minor, continuing the identification process if it has already begun. Furthermore, the collection, processing and dissemination of information on the minor's relatives must be confidential if their life or physical integrity is threatened, especially when they have remained in the country of origin. Access to housing (art. 32) contains a new paragraph 2 establishing the possibility for Member States to have a national practice of dispersing beneficiaries of international protection, while at the same time having an obligation to prevent discrimination and provide equal opportunities in terms of access to housing. Freedom of movement within the Member State (art. 33) retains its content, but access to integration facilities (art. 34) has undergone slight changes both in structure, with a single paragraph and in content, in the sense that Member States must ensure access to integration programs or create preconditions for guaranteeing access to such programs, with no changes regarding repatriation (art. 35).

Administrative cooperation between its two segments (art. 36) relating to the creation of a national contact point within each Member State designed to cooperate with the Commission and its staff (art. 37), relating to the qualification of persons involved in this field have not undergone any changes, and the final provisions (arts. 38–42) are specific to the content and new vision of the directive, with the proviso that the previous directive is expressly repealed here.

The reform of Directive No. 2004/83/EC through Directive No. 2011/95/EU has inevitably led to a reform of the procedural directives that facilitated its implementation. The first of these is Directive No. 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection,²⁴ which reformed Directive No 2005/85/EC discussed above, and which was a first measure on asylum procedures, as stated in the explanatory memorandum to the new directive. The main objective of the new directive is to develop standards for procedures in Member States for granting and withdrawing national protection in order to establish a common asylum procedure in the European Union, which is also reflected in the stated purpose of the directive (art. 1).

The first differences between the two directives appear right from the definitions section (art. 2), given that the vision of European legislators has changed for the better, with new elements being introduced. By way of example, it should be pointed out that the concept of “applicant in need of special procedural guarantees” has been defined as a “person eligible for subsidiary protection”, “international protection”, etc., which did not exist in Directive No. 2005/85/EC, but were still used in Directive No. 2011/95/EU, so that they could continue to be used in the scope of application (art. 3), given that the new directive applies to applications for international protection and not to asylum applications, as was the case in the previous one. By regulating

24 European Union, 2013, Directive 2013/32/EU on common procedures for granting and withdrawing international protection.

the authorities responsible for this matter (art. 4), the new directive refers to two of them, namely the deciding authority and an authority other than the former, as in the previous directive, except that the situations falling within the competence of an authority other than the deciding authority are limited to only two cases, namely the processing of cases under EU Regulation No. 604/2013 (which establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States)²⁵ and the granting or refusal of permission to enter the procedure carried out at the border, if the conditions for its implementation are met, and only if there is a reasoned opinion from the decision-making authority. Developments regarding the specialisation and training of the staff of the competent authorities in this field are more extensive, and a new provision has been added, establishing that when an application for international protection is lodged in one Member State but is addressed to the competent authorities of another Member State, it shall be dealt with by the authorities of the Member State where it was lodged. The new directive also provides for the possibility of Member States to establish or maintain standards more favourable than those laid down in this directive (art. 5).

In the next chapter on fundamental principles and guarantees, interesting changes have been made to access to the procedure (art. 6), which seeks to speed it up from the outset by setting short deadlines for the registration of an application for international protection, which is initially three working days, or which is six working days if the application is addressed to other authorities competent to receive but not register them, so that ultimately the possibility of extending the deadline to ten working days is established if several simultaneous applications are submitted by a large number of third-country nationals or stateless persons. Member States are also required to ensure that the staff of the authorities competent to receive such applications are well informed and trained and that a person who has applied for international protection has the effective opportunity to submit the application as soon as possible, with the result that Member States may consider that an implicit withdrawal of the application has taken place, a situation which will be addressed a little later. New provisions have been introduced regarding applications submitted on behalf of dependents or minors (art. 7), which establish the rule that every adult with legal capacity has the right to submit an application for international protection on their own behalf, with the exception of applications submitted by an applicant on behalf of persons dependent on them, provided that they give their consent to the application being submitted on their behalf at the time of submission or at the latest by the time of their interview, having been informed in advance of the consequences of submitting an application on their behalf and of their right to submit a separate application. If consent is not given,

25 European Union, 2013, Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States (recast) (replacing Regulation (EC) No. 343/2003).

it is possible to submit an application on one's own behalf. The minor has the right to submit an application for international protection on their own behalf if they have the legal capacity to act under the law of the Member State, either through their parents, other members of their family, an adult who is responsible for them, a representative, or even through the bodies referred to in Article 10 of Directive No. 2008/115/EC of 16th December 2008 on common standards and procedures in Member States for returning third-country nationals who have stayed illegally,²⁶ aspects which may be developed in domestic legislation. The new directive stipulates that information and counselling for persons who wish to apply for international protection (art. 8) must take place even in detention centres, border crossing points, or transit zones if there is information that such an application will be made, Member States are required to facilitate access to the procedure, but also to ensure effective access for organisations and persons providing advice in such situations to applicants.

The right to remain in the Member State during the examination of the application (art. 9) is regulated in both directives, referring to the permission to remain on its territory solely for the purpose of the procedure, until the decision is taken by the determining authority, without this constituting a right to receive a residence permit. Exceptions to this right apply in cases where a person submits a subsequent application, which will be discussed in more detail below, but also in cases of surrender or extradition to another Member State on the basis of a European arrest warrant, to a third country or to an international criminal court for other reasons, provided that this does not lead to the direct or indirect return of the person.

The requirements for examining applications (art. 10) are set out in both directives, in a more developed form in Directive No. 2013/32/EU, thus in addition to the obligation on Member States to ensure that applications for international protection are not rejected or excluded from examination on the sole ground that they were not submitted as soon as possible, the steps to be followed by the determining authority in examining applications have also been regulated, whereby it must first verify whether applicants meet the conditions for obtaining refugee status and only then whether they are eligible for subsidiary protection. The proper examination with a view to the issuing of a decision by the determining authority is also more comprehensive in the new directive because in addition to examining applications and taking decisions on an individual, objective, and impartial basis, obtaining accurate and up-to-date information, knowledge of the relevant standards by the staff of the authorities, it has also been added that the staff examining the applications and taking the decisions also have the possibility to consult experts on medical, cultural, religious, child, gender equality, and other issues. With regards to access to general information from the authorities examining the application and the adoption of rules on the translation of documents, these issues have been taken over from the old directive. The requirements regarding the decision of the determining authority (art. 11) are

26 European Union, 2008, Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals.

regulated similarly in both directives and recall that they refer to the communication of decisions in writing, their justification in fact and in law, the communication of information about the possibilities of challenging them, the absence of an obligation to communicate information if it has been communicated previously, and the adoption of a single decision for all dependants when the application is based on the same grounds unless this would lead to the disclosure of an applicant's personal situation or jeopardise their interests, especially if the persecution was based on gender, sexual orientation, gender identity, age, etc.

If we refer to the guarantees granted to applicants (art. 12), these are similar to those in the previous directive and in short, reiterate that they refer to informing applicants in a language they understand about everything involved in the procedure, providing an interpreter, the possibility of communicating with the UNHCR or another organisation for advice, communicating the decision within a reasonable time, informing them of the outcome of the decision in a language they understand, to which the new directive has added access for applicants and their advisers to accurate and up-to-date information obtained by the authorities and data obtained from consulting experts.

The regulations concerning the obligations of applicants (art. 13) are the same, though slightly more extensive in terms of the obligation to cooperate and body searches, but not essential in nature. The others, concerning informing the authorities of their presence and appearing before them, handing over documents, providing information about their current residence or address and receiving correspondence there, being photographed and having their oral statements recorded if they have been informed in advance, have not been amended.

Some interesting changes in the new directive concern the personal interview (art. 14). Thus, in addition to making the adoption of a decision conditional on a prior interview, it has also been established that when the interview concerns the substance of the application for international protection, it must be conducted by staff of the determining authority and not by other authorities, but by way of exception, if a large number of persons are seeking international protection, and the decision-making authority and its staff are unable to conduct the interviews, Member States may provide for the temporary involvement of staff from another authority in conducting these interviews, subject to prior training. In order to conduct interviews, it is also necessary to obtain general information on issues that could affect the applicant's ability to be interviewed if they have been subjected to torture in the past. The new regulation also allows any adult dependent on the applicant who has also submitted an application to participate in a personal interview, and these rules apply equally to minors. There are also changes regarding cases in which the personal interview may be omitted on the merits of the application, which are now only two in number and include the adoption of a positive decision, namely that the applicant cannot or is unable to attend the interview due to circumstances beyond their control. If the interview cannot take place for this latter reason or with the person dependent on the applicant, the applicant or the dependent person should be allowed within reason

to submit new information. In general, the absence of a personal interview does not prevent the determining authority from deciding on the application for international protection, and when the absence is due to circumstances beyond the applicant's control, this situation should not adversely affect the authority's decision. However, the applicant's failure to attend the interview may be taken into account unless there are valid reasons preventing him or her from attending. The requirements relating to the personal interview (art. 15) have been subject to new regulations concerning the conduct of the interview in conditions that allow the applicant to present all the reasons for his or her application and which, in addition to the competence of the person conducting the interview and the interview being conducted by a person of the same sex, also provide for the provision of an interpreter to ensure proper communication between the applicant and the person conducting the interview, in the language preferred by the applicant, the prohibition of the person conducting the interview from wearing military uniform, and interviews with minors to be conducted in a manner appropriate to them. Otherwise, the regulations concerning the conduct of the interview without the presence of family members except in exceptional cases, its confidentiality, and the presence of third parties at the interview are those of the previous directive. The content of the personal interview (art. 15) is a new regulation and concerns the possibility for the applicant to present the necessary elements to support their application as fully as possible, and to provide explanations regarding missing elements, inconsistencies, and contradictions in their statements. There are also regulatory changes regarding reports on personal interviews and their recording (art. 17), under which Member States are required to ensure that the personal interview is the subject of a detailed and factual report containing all the necessary elements or a transcript, but also the possibility of providing for audio or audio-video recording of the interview. These regulations also provide for the possibility of the applicant to make comments or clarifications, either verbally or in writing, on the content of the report or transcript, which are brought to their attention, a right that may be waived if the interview is recorded and the recording is admissible as evidence in appeals. For the same reasons, the applicant and his or her counsel are also granted the right to access the report, transcript, or recordings when the application is decided on its merits or, at the latest, on appeal. If the applicant refuses to confirm that the content of the report or transcript accurately reflects the interview, the reasons for the refusal shall be recorded in his or her file, but this shall not prevent the deciding authority from taking a decision.

The medical examination (art. 17) is also a new provision and involves the identification of signs of persecution or serious harm that have occurred in the past, provided that the applicant consents. It may be ordered by the determining authority, but Member States may also require the applicant to undergo such an examination. A refusal to undergo the medical examination will not prevent the determining authority from taking a decision on the application for international protection. Medical examinations are carried out by qualified medical professionals and are paid for from public funds. If the medical examination is not provided for in national law,

applicants may nevertheless undergo such an examination on their own initiative and at their own expense.

Legal assistance, as a general concept, has received increased attention in the directive, as it is broader in scope and introduces new elements. The first section of this issue concerns the provision of free legal and procedural information in first instance proceedings (art. 19). This means that applicants are provided with free legal and procedural information, which, in the event of a negative decision, also covers the reasons for the decision and available remedies. Legal assistance and representation may also be granted in proceedings at first instance, but Member States may provide in their legislation that this shall not take place in cases where the appeal which the applicant wishes to bring has no real prospect of success, in which case there is an obligation to ensure that an appeal against such a decision is available before a court on the one hand, and on the other hand that the Member State must ensure that there is no arbitrary restriction of free legal assistance and representation and no impediment to effective access to justice. The provision of free legal and procedural information and the granting of legal aid and free representation may be subject to certain conditions (art. 21). One of these conditions is that Member States may provide that all such free services are to be provided by non-governmental organisations, experts from government authorities, or specialised state services. Furthermore, it may be provided that these free services are granted to persons who do not have sufficient resources or through legal advisers or other specially appointed advisers. Another limitation of these services would be to grant them only for appeal proceedings, thereby depriving applicants who are no longer in the territory of the respective state of their benefits. Member States may also impose financial limitations, with fees and costs being granted as in the case of their own nationals but may also provide for full or partial reimbursement of costs when the applicant's financial situation improves. The right to legal assistance and representation at all stages of the procedure (art. 22), including the situation after a negative decision has been taken, is available to applicants at their own expense and consists of consultation with a legal adviser or other counsellors authorised for that purpose, in accordance with national law, in matters relating to applications for international protection, but Member States may allow non-governmental organisations to provide legal assistance and representation free of charge. The scope of legal assistance and representation (art. 23) primarily concerns the advisor's access to the information in the applicant's file on which the decision will be based. Restricting access to this information may be permitted on an exceptional basis if disclosure of the information or sources would jeopardise the national security of organisations, persons providing the information, or persons to whom the information relates, or if it would jeopardise investigations into applications for international protection or international relations between states. However, Member States may ensure access to information and sources for certain authorities and lay down in their national legislation certain procedures to ensure that the applicant's right of defence is respected, including by allowing access for his or her counsel, if he or she has been security cleared, where the information is relevant to

the examination of the application or to a decision to withdraw international protection. Member States shall also ensure that the adviser has access to restricted areas, such as specialised accommodation centres, for the purpose of consulting with the applicant, allowing the applicant to attend the personal interview accompanied by the adviser, with the proviso that the advisor's intervention may be limited to the end of the interview, adopting rules governing the presence of advisors at interviews conducted during the procedure, and requiring the applicant to be present at the personal interview even when their advisor is present and to answer the questions asked in person.

A new section refers to applicants who need special procedural guarantees (art. 24), a case that is assessed after submitting an application for international protection within a reasonable time, being integrated into the procedures already established, without the need to devise a separate administrative procedure. When such applicants have been identified, they will be supported in order to benefit from their rights and to comply with the obligations set out in the directive throughout the asylum procedure. If such support cannot be provided in accelerated procedures or in border procedures (which will be discussed below), especially if the applicant needs special procedural safeguards as a result of torture, rape, or other serious forms of psychological, physical, or sexual violence, these procedures will not be followed, in which case at least the safeguards relating to the right to an effective remedy (which will also be mentioned later) will be provided. These special safeguards will also be provided if information subsequently emerges regarding their necessity, without necessarily reopening the procedure.

Guarantees for unaccompanied minors (art. 25) are regulated in both directives, but more extensively in Directive No. 2013/32/EU, when in cases where it is naturally necessary, reference is also made to Directive No. 2013/33/EU (which will be further analysed). The provisions on ensuring the representation and assistance of unaccompanied minors by a representative, the representative's ability to inform the minor about everything involved in the personal interview and its consequences, the representative's ability to ask questions and make comments during the interview, the presence of the unaccompanied minor at the interview even if the representative is absent, have been supplemented with provisions on informing the minor about the appointment of the representative and the performance of their duties in accordance with the principle of the best interests of the child, on the need for the representative to have the necessary expertise in this regard, and on the replacement of the representative only if necessary. It is also interesting that it has been stipulated that organisations or persons who may come into conflict with unaccompanied minors cannot be their representatives. The new directive provides for a single case in which no representative will be appointed for an unaccompanied minor, namely the possibility of reaching the age of 18 before a decision is taken at first instance. The provisions stipulating that the interview of an unaccompanied minor must be conducted by a person with knowledge of the minor's special needs and that the decision on the asylum application of an unaccompanied minor must be drafted by an official with

the necessary knowledge in this regard, are similar in both directives. With regard to the medical examination to determine the age of unaccompanied minors, it has also been established that this shall be carried out if, on the basis of general statements or other relevant indications, Member States have doubts about the applicant's age, with the proviso that if, after the medical examination, doubts remain, the applicant shall be considered a minor. It has also been provided that the medical examination shall be carried out with respect for human dignity, using minimally invasive procedures, and by medical professionals who will ensure that a reliable result is obtained. Aspects relating to the information provided to unaccompanied minors, the expression of consent to undergo a medical examination, the invalidity of a decision to reject an application for international protection on the grounds of refusal to undergo a medical examination, not preventing the decision-making authority from deciding on the application for international protection when the minor refuses to undergo a medical examination, taking into account the best interests of the child when implementing the directive, are also similar to those in the previous directive. For the first time the new directive regulates the procedure to be followed when, during the asylum procedure, Member States identify a person as an unaccompanied minor, in which case they may continue the examination procedure specific to first instance procedures when the applicant comes from a country considered a safe country of origin (a concept that will also be addressed in first instance procedures), the applicant has lodged a subsequent application for international protection that is not inadmissible (a concept that will also be addressed in first instance procedures), and there are serious reasons to consider the applicant a danger to national security or public order, or he or she has been forcibly expelled for such reasons. Also in such a situation, the border procedure may be continued when an unaccompanied minor has been identified if: he or she comes from a safe country of origin; he or she has submitted a subsequent application; he or she may be considered a threat to national security or public order or has been forcibly expelled for serious reasons of security or public order; there are reasons to believe that a third country, which is not a Member State, is a third country alone for the applicant; the applicant has misled the authorities by presenting false documents; the applicant has destroyed or removed identity or travel documents in bad faith, which would have contributed to establishing his or her identity or nationality, the latter two cases may be taken into account strictly in individual cases and if the applicant attempts to conceal relevant elements that could lead to a negative decision and only if the applicant has been given the opportunity to justify these actions, even by consulting their representative. At the same time, in the case of an unaccompanied minor discovered at a later stage, Member States may: consider the application inadmissible if a country that is not a Member State is considered a safe country for the applicant, provided that this is in the best interests of the child; not grant legal aid and free representation, but offer the possibility of an effective remedy if the minor's representative has legal training in accordance with national law.

In all cases involving unaccompanied minors, they must at least be guaranteed the rights set out in the section on the right to an effective remedy if their application has been rejected as unfounded or inadmissible, when their application for the reopening of the case has been rejected, after it has been discontinued, if a decision has been made not to examine at all or in full, as will be seen in this procedure.

Detention (art. 26) is regulated in both directives, though slightly differently in the new directive, which prohibits the detention of a person solely on the grounds that they have applied for international protection, referring here also to Directive No. 2013/33/EU, as well as ensuring a rapid judicial review in the event of detention.

Before addressing the issue of first instance proceedings, this directive, like the previous one, regulates several situations that would effectively prevent the continuation of such proceedings, but not their initiation. The first concerns the explicit withdrawal of the application (art. 27), which stipulates that in such a situation, Member States must ensure that the responsible authority can either adopt a decision to discontinue the examination of the application or reject it, or discontinue the examination without adopting a decision, followed by the obligation to record this information in the applicant's file. Similar to the previous directive, in the case of the implicit withdrawal or implicit abandonment of the application (art. 28), Member States must take measures to ensure that the deciding authority also adopts a decision in accordance with the situation that has arisen, in the sense of terminating the examination or rejecting the application, except that under the new regulation, the latter solution may only be adopted if the determining authority considers the application to be unfounded following an examination of its merits on the basis of art. 4 of Directive 2011/95/EU discussed above. The implicit withdrawal or renunciation by the applicant of the application for international protection may be presumed when: the applicant has not complied with requests to provide essential information under those provisions of Directive No. 2011/95/EU; has not appeared for the personal interview (set out above), unless he or she demonstrates within a reasonable time that the circumstances arose for reasons beyond his or her control; has absconded or left without permission the place where he or she was staying or was detained without contacting the competent authority within a reasonable time or has not appeared regularly before the authorities, or has not fulfilled his obligation to communicate, both within a reasonable time, unless the impossibility of doing so was due to circumstances beyond his control. In order to implement these provisions, Member States may set deadlines or guidelines. Member States shall also ensure that the applicant has the right to request the reopening of his or her case or to submit a new application, which shall however, avoid the procedure for subsequent applications that will be presented below. Similarly, as a new element in this directive, Member States may stipulate a period of at least nine months after which the case cannot be reopened or the new application can be treated as a subsequent application with all the consequences that this entails, but also that the case can only be reopened once. It is also important that Member States must ensure that such a person is not expelled contrary to the principle of non-refoulement. Finally, as in the old regulation, these provisions allow

Member States to determine that the deciding authority should resume the review of the case from the point at which it was interrupted. The Directive also stipulates that these regulations do not affect EU Regulation 604/2013.

As in the previous directive, the new regulations highlight the role of the UNHCR (art. 29) and the organisations acting on its behalf in the territory of the Member State, i.e., to have access to applicants, information, and to present their opinions.

The method of collecting information on individual cases (art. 30) is regulated in the same way as in the previous directive, essentially referring to the non-disclosure of information on individual applications for international protection and the prohibition of obtaining information from the alleged perpetrators of serious harm in a manner that would inform them of the application and inevitably endanger the applicant and his or her family members.

The regulation of procedures at first instance begins with the examination procedure (art. 31), which introduces several new elements, including the comprehensive regulation of the time limit for its completion and a reduction in the number of cases in which the procedure is accelerated. Therefore, the examination procedure, which is based on compliance with the principles and guarantees presented above, involves processing applications for international protection as quickly as possible, in an appropriate and comprehensive manner. The initial six-month time limit for completing the procedure, as provided for in both directives, begins when the state responsible for examining the application is determined on the basis of EU Regulation No. 604/2013, and the applicant is present in the territory of that state and has been taken into custody by the competent authority, conditions which should be considered to be cumulative. The extension of the deadline by a new period of up to nine months has also been regulated, if there are complex factual and legal elements, a large number of nationals or stateless persons simultaneously request international protection, or the applicants fail to comply with their obligations under art. 13 (referred to above). The six- and nine-month time limits may be extended by three months in exceptional situations based on duly justified circumstances, when a proper and complete examination of the application for protection is necessary. The Directive also provides for the postponement of the conclusion of the examination procedure without prejudice to art. 13 and 18 of Directive No. 2011/95/EU, when the determining authority is unable to take a decision within the time limits referred to, due to an uncertain situation in the country of origin, which is of a temporary nature. In such a situation, Member States are required to review the situation in the country of origin every six months and to inform the applicants concerned, as well as the Commission, within a reasonable time, of the reasons for the postponement. The maximum time limit for completing the procedure is set by the directive as 21 months from the date of submission of the application, with the proviso that the starting point of this time limit differs from that set for the six-month time limit, being earlier than the latter. However, Member States may exceed the six-month time limit for postponing the conclusion of the procedure and the maximum time limit of 21 months if a proper and complete examination of the application for international

protection is necessary. As in the previous directive, it has been established that when a decision cannot be taken within the initial six-month period, the applicant shall be informed of the delay, provided with information on the reasons for the delay and the estimated time frame for a decision to be taken on his or her case. Priority in the examination of an application has been separated from the acceleration of the procedure, and for the first step, the likelihood that the application is well-founded or that the applicant is vulnerable under art. 22 of Directive No. 2013/33/EU or belongs to the category of applicants who need special procedural guarantees, such as unaccompanied minors, is taken into account. The examination procedure may be accelerated and carried out at the border or in transit zones in the following cases: when submitting the application and presenting the facts, the applicant has only invoked aspects that are not relevant for examining the conditions necessary to benefit from international protection; the applicant comes from a safe country of origin (a concept that will be explained shortly); the applicant has misled the authorities with regard to their identity, nationality, and the authenticity of their documents by presenting false information or documents or by concealing information and documents that would have had a negative impact on the decision; the applicant is likely to destroy or remove in bad faith those identity or travel documents that would have helped establish their identity or nationality; the applicant's statements are inconsistent, contradictory, false, implausible, and contradict well-verified information from their country of origin, which makes their application for international protection unconvincing; the applicant has submitted a subsequent application for international protection that is not considered inadmissible (as will be seen below); the applicant's request was only to delay or prevent the enforcement of a decision that had been made or was about to be made, which would lead to their expulsion; the applicant entered the territory of the Member State illegally or extended his or her stay illegally and, in addition, without good reason, did not report to the authorities or did not submit his or her application as soon as possible in relation to the circumstances of his entry into the territory; the applicant refuses to comply with the obligation to have his or her fingerprints taken in accordance with the relevant European legislation; on reasonable grounds, the applicant may be considered a threat to national security or public order, or the applicant has been forcibly expelled on serious grounds of security and public order under domestic law. The adoption of a decision by accelerating the procedure may be subject to reasonable time limits.

A new section on unfounded applications (art. 32) has been introduced in this directive, similar to the section on unfounded applications in the previous directive, under which Member States may consider an application to be unfounded if the determining authority has established that the applicant does not meet the conditions for international protection under Directive No. 2011/95/EU. In the case of such applications, for which the conditions for accelerated examination are met, Member States may also consider them unfounded if they are defined as such in national law.

The section on inadmissible applications (art. 33) is found in both directives, but with a reduction and modification of the cases in which an application may be

considered as such. Under both regulations, an application is considered inadmissible if it is not examined in accordance with EU Regulation No. 604/2013. The possibility for states to consider an application inadmissible concerns cases where: another Member State has granted international protection; a country that is not a Member State is considered to be the applicant's first country of asylum (a concept that will be addressed below); a country that is not a Member State is considered a safe third country; the application is considered as a subsequent application when no new information has emerged regarding the examination to determine whether the applicant meets the conditions for international protection under Directive No. 2011/95/EU; a person dependent on the applicant submits an application after having agreed to have their situation dealt with in an application made on their behalf, and there are no factual elements relating to that person that would justify a separate application. For the first time, special rules are provided for the interview on the admissibility of the application (art. 34), which stipulate that applicants shall be given the opportunity to express their views on the grounds for considering their applications inadmissible, and that the interview shall take place before the determining authority takes a decision on the matter. Member States may provide that staff of authorities other than the determining authority may conduct such an interview, provided that they have received basic training in this field.

As has been seen so far, there are several concepts whose definition and application determine the correctness of the resolution of an application for international protection. The first of these, with similar provisions in both directives, is "the concept of the first country of asylum" (art. 35), according to which a country can be considered as such for a particular applicant if he or she has been recognised as a refugee in that country and can still avail him or herself of the protection offered or if he or she benefits from sufficient protection in that country on other grounds, including the principle of non-refoulement, both options being conditional on his or her readmission to that country. Furthermore, in order to apply these provisions, states may also consider those relating to the concept of a safe third country. It is important to note that applicants have the possibility to challenge the application of the concept of first country of asylum to their personal situation. The concept of "safe country of origin" (art. 36) is regulated in both directives, with differences in their structure, and is considered to exist if the applicant is a national of that country or is a stateless person who previously had stable residence in that country and has not presented serious reasons for that country not to be considered safe in relation to his or her personal situation and the conditions that must be met in order to be eligible for international protection under Directive No 2011/95/EU. In the case of this concept, Member States may lay down rules and procedures for an application in their national legislation. At the same time, the directive also establishes the manner in which Member States may maintain and adopt legal provisions for the designation of safe countries of origin at a national level (art. 37), as well as the fact that their situation must be reviewed periodically. The assessment of a country as a safe country of origin must be based on several sources of information, in particular

those provided by other Member States, EUAA, UNHCR, the Council of Europe, and other relevant international organisations, after which Member States must communicate to the Commission which countries are considered as falling into this category. The concept of a “safe third country” (art. 38) is regulated in both directives with a single amendment, which will be highlighted as such. Therefore, the concept of a safe third country can only be applied if the competent authorities are certain that, in a given country, the applicant will be treated in accordance with the following principles: life and liberty are not threatened on grounds of race, religion, nationality, membership of a social group, or political opinion; there is no risk of serious harm as defined in Directive No 2011/95/EU (a new principle introduced in this directive); the principle of non-refoulement is respected; the prohibition of expulsion in violation of the right not to be tortured or subjected to cruel, inhuman, and degrading treatment is respected; there is a possibility of being recognised as a refugee and benefiting from international protection. The application of this concept of a safe third country is subject to the rules laid down in domestic law concerning; the need for a link between the applicant and the third country in question; the methodology by which the competent authorities ensure that this concept can be applied, which includes examining in each individual case the safety of the country for a particular applicant, and the designation by the Member State of countries considered safe; their compliance with international law, in the sense of allowing an individual examination of a particular situation to determine whether the concept of a safe third country can be applied and ensuring that the applicant has the opportunity to challenge the application of the concept in his case, as well as the link between him and that country. When a decision is taken based solely on the application of this concept, Member States are required to inform the applicant and provide him or her with a document informing the authorities of the third country that the application has not been examined on its merits. It is important to note that if the third country does not allow the applicant to enter its territory, Member States must allow the applicant to follow a procedure in accordance with the fundamental principles and guarantees set out at the beginning of the directive. When applying this concept, Member States must also inform the Commission of the countries considered to be safe third countries.

This new directive introduces a new concept through its regulations, namely that of a “safe European third country” (art. 39), under which a country can be considered as such if it has ratified and complies with the provisions of the Geneva Convention without geographical limitations, has a legally established asylum procedure, has ratified the ECHR and complies with its provisions, including standards relating to legal remedies. The application of the provisions relating to this concept allows Member States not to carry out a partial or full examination of the applicant’s request if it has been established that he or she is attempting to enter or has entered their territory illegally from a safe European country. Of course, the provisions of the directive establish the possibility of the applicant to challenge the application of this concept in his or her personal situation. Member States may lay down rules for the implementation of the concept, relating to the consequences of the decisions taken,

in compliance with the principle of non-refoulement, but also derogations from its application on humanitarian, political or public international law grounds. Even when a decision based on this concept is implemented, Member States must inform the applicant and provide them with a document informing the authorities of the third country that their application has not been examined on its merits. Member States shall also ensure that, if a safe European third country does not take back the applicant, they have the possibility to apply for a procedure in accordance with the principles and guarantees of the Directive and are required to inform the Commission of the countries to which this concept applies.

The procedure for subsequent applications (art. 39) is regulated in both directives, with certain differences and more extensively in the directive under review and assumes that a person who has submitted an application for international protection in a Member State is making new statements or submitting a subsequent application in the same Member State. In such a situation, the Member State will verify the new statements or elements of the subsequent application in the context of the examination of the previous application or the decision that is the subject of a judicial or administrative appeal, if at that time the authorities can take into account and consider the elements on which the new statements or applications are based. In the procedure for determining the inadmissibility of an application, a subsequent application for international protection is first subject to a preliminary examination to determine whether there are any new elements or data relating to the examination to establish whether the applicant meets the conditions for international protection. If the answer to this question is affirmative, the application is further examined in the light of the fundamental principles and guarantees laid down in the Directive. It should be noted that nothing prevents Member States from providing for other grounds for the further examination of a subsequent application. At the same time, states may provide for the application to be further examined if the applicant was unable, for reasons beyond his control, to bring new facts to light during the previous procedure, particularly in the context of an effective remedy, as regulated by the directive. When a subsequent application is not further examined, it is considered inadmissible, as was seen in the section on inadmissible applications. The directive also stipulates that the subsequent application procedure may be applied where a dependent person submits an application after having consented to the settlement of his or her case in an application submitted on his or her behalf, and where an unmarried minor submits an application after an application has been submitted on his or her behalf, as has been seen in the sections dedicated to these circumstances. In these two cases, the preliminary examination will also verify whether there are any facts that would justify a separate application. In the transfer procedure based on Regulation (EU) No. 604/2013, subsequent statements and applications submitted in the Member State making the transfer will be examined by the Member State responsible under that Regulation.

Alongside the negative consequences that subsequent applications may have, there are also exceptions to the right to remain (art. 40), not provided for in the previous directive, which mean that a person must leave the Member State. The cases in

which this occurs are: the submission of a new subsequent application which is no longer subject to examination, and which was made to delay or prevent the enforcement of a decision that would lead to his imminent expulsion from the Member State; the lodging of a subsequent application after a final decision has been taken to consider the first subsequent application inadmissible, or after a final decision has been taken to reject that application as unfounded. However, a return decision shall not be taken if it would lead to a breach of the Member State's international or European Union obligations. When making an exception to the right to remain on their territory, Member States may derogate from: the time limits applicable, especially in cases where the procedure is accelerated because the applicant is trying to delay or prevent the enforcement of a previous or imminent decision that would lead to expulsion; the time limits normally applicable in admissibility procedures, which have been outlined above; the procedure set out in the section on the right to an effective remedy.

The amendments in the new directive also mean that an applicant's failure to report to a reception centre or to the authorities is no longer regulated, and the procedural rules (art. 42) specific to subsequent applications have undergone several changes. These procedural rules are primarily intended to provide safeguards for applicants who submit subsequent applications. They also provide for Member States to lay down rules in their national legislation on preliminary examination, requiring the applicant to indicate the facts and provide evidence to justify a new procedure, allowing the preliminary examination to be carried out on the basis of written information alone, without a personal interview, with the exception of dependants and unmarried minors who have submitted a new application. At the same time, these rules must not make it impossible for the applicant to access a new procedure, or lead to the effective cancellation or drastic restriction of access. On the other hand, Member States must ensure that the applicant is informed of the outcome of the preliminary examination, the reason why his or her application is not being further examined, and the possibilities for appealing against the decision or requesting its review.

First instance procedures also include border procedures (art. 43), which are regulated in both directives, in a more restricted form and, naturally, with amendments in the second directive. According to these provisions, Member States may regulate: the adoption of decisions at the border or in transit zones on the admissibility of an application lodged in such places, which is in fact inadmissible; the substance of an application subject to the accelerated procedure. The directive stipulates that in border procedures, the decision must be taken within a reasonable time, not exceeding four weeks, otherwise the applicant must be allowed to enter the territory of the Member States so that his or her asylum application can be examined in accordance with the other provisions of the directive. If a large number of nationals or stateless persons submit applications for international protection at the border or in transit zones, border procedures may also be applied during the period when applicants are accommodated in places near the border or transit zone.

Both Directive No. 2013/32/EU and the directive reformed by it regulate the procedures for withdrawing international protection and refugee status under the previous directive, with the terminology being adapted to the new content and concepts. The first aspect concerns the withdrawal of international protection (art. 44), which may be examined when new elements or information come to light indicating that there are grounds to review the validity of international protection.

Procedural rules have also been laid down in the Directive for the withdrawal of international protection (art. 45) on the basis of which Member States must provide certain guarantees in this case, such as informing the beneficiary in writing that the competent authority is reviewing the conditions that led to the granting of such status and giving them the opportunity to present the reasons as to why their international protection should not be withdrawn in a personal interview or in a written statement. The rules of procedure also provide that Member States shall ensure that a competent authority obtains accurate and up-to-date information on the situation in the countries of origin of these persons and that this information is not obtained from the persecutor in a manner that would inform him or her that a particular person is the beneficiary of international protection and thereby place the beneficiary in danger. At the same time, Member States shall ensure that the decision of the competent authority is communicated in writing, that the decision is substantiated in fact and in law, and that it contains information on how to challenge it. If international protection is withdrawn, it is necessary to provide the beneficiary with legal assistance in accordance with the provisions of the Directive, as set out above. By way of derogation from all the procedural aspects outlined above, Member States may provide that international protection shall lapse if the beneficiary has renounced it or has become a citizen of the Member State concerned.

Similarly to the previous reformed directive, the last procedures included in the directive refer to appeals, except that the new regulations are more comprehensive. These procedures focus on the right to an effective remedy (art. 45) which must be brought before a court if it is directed against: a decision considering the application for international protection to be unfounded or inadmissible, taken at the border or in transit zones, or deciding not to conduct an examination by applying the concept of a safe European third country; a refusal to reopen the examination, if it is in a situation of the explicit or implicit withdrawal or abandonment of the application; a decision to withdraw international protection, within the framework of the procedure that has just been examined. In terms of its characteristics, an effective remedy must allow for a full and *ex nunc* examination of the facts and points of law by a court of first instance. Member States may set reasonable time limits and other rules necessary for the applicant to exercise their right. The directive also establishes that Member States may even provide for an *ex officio* review of decisions taken in border and transit zone procedures.

Furthermore, Member States may require applicants to remain on their territory until the time limit for exercising that right has expired or, if that right has been exercised, until the appeal has been decided. Similarly, it is the court that determines

whether or not the applicant remains on the territory of the Member State, if the decision taken has such a consequence and the law of the State does not provide for the right to remain, when: a decision has been taken to consider the application unfounded (in accordance with the provisions of the sections on unfounded applications and applications for which the procedure has been accelerated or examined at the border) or inadmissible; applications for the reopening of the case after it has been discontinued have been rejected; a decision has been taken not to examine or not to fully examine an application from a national under the procedure for determining a European safe third country. The directive stipulates that a court may decide that a particular applicant for international protection may remain on the territory of a Member State only in the case of procedures carried out at the border, if the applicant is provided with the necessary interpretation, legal assistance, and at least one week to prepare their application and submit arguments to the court in favour of granting their right to remain in the territory of the Member State until the procedure is resolved, and if the court examines the negative decision of the determining authority both in fact and in law. Member States may also allow the applicant to remain in their territory until the procedure determining whether the applicant may remain in the territory has been completed.

On the other hand, Member States may set time limits for the court to review the decision taken by the determining authority. Finally Member States may lay down in their national legislation the conditions under which an applicant is deemed to have withdrawn or implicitly abandoned their appeal and the rules on the procedure to be followed in such a situation. The general and final provisions (arts. 47–54) essentially refer to the possibility for public authorities to challenge administrative or judicial decisions in accordance with domestic law, respect for confidentiality during proceedings, cooperation between Member States and communication with the Commission, the preparation of a report on the application of the Directive, the conditions for transposition, transitional provisions, and the fact that the previous reformed Directive No. 2005/85/EC is repealed, so that any reference to that directive in any legislative act is deemed to refer to Directive No. 2013/32/EU.

European legislation on international protection has been supplemented by the adoption of Directive No. 2013/33/EU of the European Parliament and of the Council of 26th June 2013, laying down standards for the reception of applicants for international protection,²⁷ which is a recast directive introducing several substantive amendments to Directive No. 2003/9/EC, which it repeals. With regard to this new directive, given the aim of this chapter to present how European legislation in this area has been supplemented and developed, but also given that, unlike Directive No. 2013/32/EU, which has not been recast or repealed, but continues to apply, Directive No. 2013/33/EU was reformed and repealed by legislation adopted in 2024, and as such, an exhaustive presentation of it is not useful. Nevertheless, in order to highlight the legislative

27 European Union, 2013, Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast).

progress that has been achieved through it, the new elements it has brought should be briefly outlined here.

Therefore, considering the new institutions legislated through it and the legislative changes made, the new elements can be seen in the definitions section (art. 2), where terms and concepts that were not found in the previous directive have been explained. Within the general provisions on reception conditions, in the section on documents (art. 6), the last paragraph is newly introduced and refers to not requiring excessive and unnecessary documentation, and in the section on residence and free movement (art. 7), the new directive no longer includes the provision whereby Member States may require an applicant to remain in a place determined in accordance with national law. The most significant new element in the regulation is detention (art. 8–11), which, in addition to a section with this title, also presents other institutions that give it a unified whole regarding guarantees for applicants in detention, conditions of detention, detention of vulnerable persons, and applicants with special reception needs. The section on the schooling and education of minors (art. 14) has been expanded with two additional paragraphs, the first concerning the possibility for states to prohibit access to secondary education solely on the grounds that the minor has reached the age of majority, and the second concerning the fact that minors are entitled to preparatory courses, including language courses, if these facilitate their access to and participation in the education system. The section on employment (art. 15) has also been amended by setting a deadline of nine months from the date of submission of the application for international protection to the date when applicants have access to the labour market, as well as the conditions under which this occurs. The general rules on material reception conditions and medical care (art. 17) has undergone only a minor change in the last paragraph, which was expanded to include the provision of material reception conditions in the form of financial allowances or vouchers. The following sections have undergone minor structural or terminological changes, but a new section on the assessment of the special reception needs of vulnerable persons (art. 22) has been introduced. The development of regulations without any substantial changes, concerned minors, namely unaccompanied minors (art. 23–24), and victims of torture or violence (art. 25) has obtained a new regulation concerning the training of personnel dealing with them. With regards to legal remedies (art. 26), there are new regulations concerning cases where legal aid and free representation are either granted or not, the setting of financial limits, and the conditions for reimbursement of expenses. The other provisions in the final sections are similar in content to those in the reformed directive.

These few references, which at first glance appear telegraphic, are nevertheless intended to achieve the transition to the new legislative act which, as already mentioned, reformed and at the same time repealed Directive No. 2013/33/EU. This is EU Directive No. 2024/1346 of the European Parliament and of the Council of May 14th 2024, establishing standards for the reception of applicants for international

protection.²⁸ It is part of a broader legislative package, consisting of the aforementioned directive and several other regulations, which have aimed to bring about a comprehensive reform of the field of international protection.

The explanatory memorandum to this directive notes that, in addition to the desire for a common asylum policy and references to the Geneva Convention and the New York Protocol, which are also found in other directives on the subject, reference here is also made to the Common European Asylum System (hereinafter CEAS), which although has made progress, still shows significant differences between Member States, with consequences in terms of secondary movements and the unequal treatment of applicants wherever they lodge their application for international protection in the Union. Obviously, the explanatory memorandum is as usual extensive, but it is believed that the issues referred to here need to be highlighted, since they are succinctly supplemented by the subject matter of the directive (art. 1), which calls for the establishment of standards for the reception of applicants for the international protection in Member States, as in the previous, repealed directive.

With regard to the definition of certain concepts and terms (art. 2), the new directive differs in that it addresses several new concepts such as daily allowance, risk of absconding, and absconding, and the concept of public custody practically replaces that of detention, introduced in the previous directive with a new broad section to which was briefly referred to above, but which will be presented in detail here, because it replaces detention as terminology and more.

Similar to the old directive, the scope (art. 3) directs the regulations of the directive towards all third-country nationals and stateless persons, with two conditions: firstly that they submit an application for international protection on the territory of a Member State, at the external border, in its territorial sea or in transit zones; and secondly that they are allowed to remain in that territory as applicants. The directive also covers the applicant's family members, on the sole condition that they are included in the application for protection, excluding other categories of persons such as those seeking diplomatic asylum. An important point to note here is that Member States may decide to apply the provisions of the directive to forms of protection other than those established by Regulation (EU) No. 2024/1347, which will be discussed later.

At the same time, as is always the case with directives, including the previous one, Member States are allowed to adopt more favourable regulations through domestic legislation (art. 4), on the simple condition that they are compatible with the directive.

The conditions for receiving applicants contain general provisions which first address information (art. 4), as in the previous directive, but in a more comprehensive and modern way. Thus as soon as possible and in a timely manner, nationals must receive from Member States information on the reception conditions regulated by this directive, on their national reception system, in order to be able to exercise their

28 European Union, 2024, Directive (EU) 2024/1346 laying down standards for the reception of applicants for international protection.

rights and fulfil their obligations arising therefrom. The information on reception conditions in this directive may be standardised and subject to a model developed by the European Union Agency for Asylum, within a maximum period of three days, in accordance with Regulation (EU) No. 2024/1348, which will be presented later. The information must also include details of organisations or groups of persons providing assistance and legal representation for a fee or free of charge. The information may be provided in writing, in a form that is easily understood by the applicants, in a language they can understand, but it may also be provided orally or even visually, through pictograms or video materials. In the case of unaccompanied minors, the content and manner of conveying information must be adapted to their age, and take place in the presence of their representative, in written, oral, or visual form, especially if the language they understand is rare, and provided that the minor confirms that they understand what is being communicated. If the information is provided orally or visually, it shall also be provided in writing in the case of minors, unless it is clear that this is no longer necessary.

In the new directive, the rules on documents (art. 4) are more concise and provide, on the one hand for the issue of the document referred to in art. 29:1 of Regulation (EU) No. 2024/1348 to applicants, and on the other, limiting Member States' ability to require applicants to provide numerous and unnecessary documents or to fulfil administrative requirements in order to grant them their rights. Where applicants need to be present in another Member State for serious humanitarian or other imperative reasons, Member States may issue them with travel documents whose validity is strictly limited to the purpose and duration for which they were issued.

A new feature of this directive was the regulation of reception systems (art. 7), which incorporated some of the provisions of the section entitled "Residence and freedom of movement" from the previous directive, while other provisions were included in the section entitled "Restrictions on freedom of movement" in the new directive, as will be seen below. The first aspect concerns the possibility for applicants to move freely within the territory of the Member State, and the second aspect concerns the possibility for Member States to organise their reception centres as they wish, provided that they comply with the provisions of the directive, including the distribution of applicants in accommodation facilities on their territory, in order to be able to manage their asylum and reception systems, as long as this does not restrict the exercise of applicants' rights. The actual presence of applicants in the accommodation where they have been represented may be a condition for ensuring the material reception conditions by Member States. Similarly they may establish mechanisms for assessing and addressing the needs and presence of applicants in accommodation facilities, but also require applicants to provide their contact details and notify any changes thereto. It is also important to note that the directive does not oblige Member States to take administrative decisions within the provisions of this article.

The distribution of applicants within a specific geographical area (art. 8) is also a newly introduced section, which aims to limit the right of free movement of

applicants to a specific geographical area in order to ensure the rapid processing of their applications, for the geographical distribution of those applicants and even for the entire duration of the international protection procedure, these are aspects about which applicants are informed. The geographical area must ensure that applicants have access to the rights and guarantees to which they are entitled under this Directive, be large enough to allow access to the necessary public infrastructure and not affect their private life. Even in this situation, Member States are not obliged to take administrative decisions. Permission to leave the geographical area temporarily may be granted by Member States if the applicant requests it on the grounds of urgent and serious family reasons, or for medical treatment that cannot be provided in the geographical area established. Leaving the geographical area without permission only allows the Member State to apply sanctions in accordance with this Directive. An applicant who leaves the area to appear before the authorities and courts is not required to request permission but must inform the competent authorities of this fact. If during an appeal or judicial review, it is established that the applicant has been deprived of the exercise of his or her rights in that area, his or her allocation to that area shall no longer apply. It is important to note here that the provisions of this article will only apply once the Member State has laid down the conditions for its application in national law and then informed the Commission and the Asylum Agency on the basis of Chapter 5 of Regulation (EU) No. 2021/2303.²⁹

Although the following section on “restrictions on free movement” (art. 9) appears to be a continuation of the section on “residence and freedom of movement” in the previous directive, in addition to taking up only a few ideas, it also regulates new issues. Firstly, the provisions of this section allow Member States to decide that a particular applicant should reside in a specific place for the accommodation of applicants, if there are reasons of public order or risks of absconding, and the location allows this to be done effectively, especially in the case of applicants who are required to be present in that Member State or who have been transferred to the Member State where they are required to be present after absconding to another Member State. The obligation to be present is assessed in accordance with art. 17(4) of Regulation (EU) No. 2024/1351, which will be addressed after this directive. A possible temporary stay outside the designated place may be granted by Member States at the applicant’s request, in which case decisions shall be taken objectively and impartially, taking into account the applicant’s personal circumstances, and if they contain a negative response, they must be justified. When the applicant has to appear before the authorities and courts, he or she does not have to ask for permission but is required to inform the authorities of such movements. Finally decisions concerning the obligation to remain in a certain place or permission to leave that place must be proportionate, relate to the applicant’s situation, be justified in fact and in law, and applicants must

29 The referral is made to: European Union, 2021, Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010.

be informed of their adoption and content in a language they understand, in a clear and easily understandable form. These decisions must be subject to *ex officio* review by a judicial authority, especially when they apply for a period of more than two months.

Being taken into public custody (art. 10), the new concept that was introduced in this directive, takes over the sections on detention from the previous directive, where as was seen above, it was first introduced in the brief presentation of the latter. Although the regulations concerning public custody procedures are separated into four articles, it can be understood that they are interdependent, correlate with each other, and together regulate an institution recently considered by European legislation, which could simply be called public custody. Before addressing public custody procedures, it would be appropriate to show what this refers to, and the definition can be found, as mentioned above, in the definitions in the directive, where ‘taking into public custody means any measure of isolation of an applicant by a Member State in a specific place, where the applicant is deprived of his or her freedom of movement’ (art. 2(9)). The first procedure regulated is taking into public custody, where on the one hand, it is stated that this is not punitive in nature, i.e., it is not a sanction or punishment for the applicant, and on the other hand it is established that the measure must not be taken solely on the grounds that the person is an applicant or because of the applicant’s nationality. At the same time, it appears that this measure must also be taken as a last resort, i.e., when less coercive measures cannot be effectively applied. If an applicant is taken into public custody on the basis of existing possible data, it must also be determined whether he or she belongs to the category of applicants with special reception needs, a situation regulated further on in the directive, and if the assessment of the applicant has not been completed, it must be expedited and its results must form the basis for the termination or modification of public custody. The Directive establishes the grounds on which an applicant may be taken into public custody as follows: to establish or verify his or her identity or nationality; to establish the elements on which the application for international protection is based and which could not be achieved without taking him or her into custody, especially if there is a risk of absconding; when it is necessary to comply with the obligations imposed on the applicant, within the restrictions on free movement, if the applicant has not complied with them and there is a risk of absconding; when it is necessary to decide on the applicant’s right to enter the territory if the procedure is carried out at the border; if the return procedure is initiated on the basis of Directive No. 2008/115/EC of the European Parliament and of the Council, with all the requirements and consequences that this entails; in order to protect national security or public order in accordance with Article 44 of Regulation (EU) No. 2024/1351, with the proviso that all these grounds must be included in the domestic legislation of the Member States. Equally, Member States must provide for alternative measures in their national legislation, such as regular contact with the authorities, the provision of a financial guarantee, and the obligation to remain in a specific place.

For applicants under public custody, the directive also provides for safeguards (art. 11). The first refers to the shortest possible duration of public custody and its maintenance only for as long as necessary, based on the reasons presented above. Administrative procedures relating to detention must be carried out with care, and delays in these procedures that are not attributable to the applicant cannot justify the continuation of public custody. Public custody must be ordered in writing, must be justified in fact and in law, and must contain explanations as to why no alternative measures can be taken. Rapid judicial review must be ensured if the detention is ordered by the administrative authorities, and the procedure may be initiated *ex officio* or at the request of the applicant. Judicial review conducted *ex officio* or at the request of the applicant must be completed as soon as possible and, as a rule, within 15 days, or exceptionally within 21 days. Failure to comply with these time limits shall result in the immediate release of the applicant. At the same time, applicants must be informed immediately in writing and in a language they understand, of the reasons for their detention, the procedures laid down in domestic law for challenging the detention decision, and the possibility of requesting free legal assistance and representation, access to which must be provided free of charge by the Member States. It is also required that the detention be reviewed by a judicial authority at reasonable intervals, either *ex officio* or at the request of the applicant, especially if the duration is prolonged and if new elements arise that could call into question the legality of the detention. In the case of unaccompanied minors in such a situation, judicial review shall be carried out *ex officio* at regular intervals. If the detention is found to be unlawful, the applicant must be released immediately.

The conditions for taking into public custody (art. 12) provide for the placement of applicants in specialised centres, and if these do not exist, placement may be carried out in a prison, provided that the applicant is separated from other detainees and the provisions of the directive are applied. The separation will also apply to other nationals in public custody, and if this is not possible, the provisions of the directive must be applied. Applicants must have access to open spaces during public custody. Member States must ensure that representatives of the UNHCR or organisations acting on its behalf can communicate with and visit applicants, while respecting their privacy. The same opportunities must be provided to family members, legal or other advisers, and representatives of relevant non-governmental organisations. These opportunities may be restricted if, under domestic law there is an objective need based on security, public order, and the management of the centre, but only if these restrictions do not drastically limit or even prevent access. Member States must provide applicants in public custody with all information relating to the applicable legislation, their rights and obligations, in a language they understand, and the derogation from this obligation applies to situations where the applicant is detained at the border or in a transit zone, provided that the duration is as short as possible and that the derogation does not apply in the cases provided for in art. 43 of Regulation (EU) No. 2024/1348.

In the case of applicants with special reception needs (art. 13), their placement in public custody has several particularities. A first category of applicants with special

reception needs are those with health problems, which is why, if taking them into custody would seriously endanger their physical and mental health, they are not taken into public custody. There are exceptions to this rule, which require the monitoring of applicants and the provision of necessary and timely support, taking into account their individual situation and state of health. The second category of applicants with special needs is minors, for whom the rule is also that they are not taken into public custody, but are placed in appropriate accommodation, in accordance with the provisions of this directive, which will be referred to shortly. In cases where there are families with minors among the applicants, alternative methods must be used, based on the principle of family unity, and they must be placed in suitable accommodation. There are exceptions here too, involving taking families into public custody, but only as *ultima ratio*, if it has been established that alternative measures cannot be applied, when it is in their best interests in accordance with the provisions of the directive, and if one of the following two cases applies: the minors are accompanied, and the parent or guardian is taken into public custody; the minors are unaccompanied and are taken into public custody to ensure their protection. If minors are taken into public custody, it must be for a short period of time, minors must not be placed in prisons or other similar institutions, they must be released as soon as possible and placed in accommodation suitable for minors. Accommodation for minors must be staffed by qualified personnel and adults must not be accommodated there. Separate accommodation for minors may include exceptions regarding the use of common areas. It should be emphasised that all these activities are subordinate to the best interests of the child, which implies, among other things, ensuring the right to education, unless the period of custody is too short and this right cannot be exercised, participation in other activities such as leisure, play, recreation, etc. As regards families in public custody, the provisions of the directive stipulate that they must be provided with separate accommodation to ensure their privacy, and if they include minors, the accommodation must be in centres suitable for minors. Male and female applicants must be accommodated separately, but they may also be accommodated together if they are members of the same family and all those concerned have given their consent to live together. Another situation in which unaccompanied minors may be taken into custody and accommodated in facilities suitable for unaccompanied minors is when this occurs at the border or in the transit zone, with the exception of the situations provided for in art. 43 of Regulation (EU) No. 2024/1348, but the period must be reasonable, as short as possible, and limited to exceptional situations. In the event of such a derogation, Member States must inform the Commission and the Asylum Agency.

The provisions of the previous directive concerning families (art. 14) and medical examinations (art. 15) are also included in the new directive, with a clear focus on maintaining family unity, but also on subjecting applicants to medical examinations for reasons of public health.

Similar provisions are included in both directives with regards to the schooling and education of minors (art. 16), on which basis Member States are required to

provide the same level of access to education as for their own nationals if applicants have minors or are minors themselves. To this end, the specific needs of minors in exercising their right to education and health must be taken into account, and the education of minors must be integrated with that of Member State nationals, be of the same quality, and ensure continuity. Minors cannot be denied access to secondary education simply because they have reached the age of majority. Access to a general education system should happen as soon as possible and within a maximum of two months from the date of application, taking into account school holidays, with the mention that education can also be provided outside the general education system on a temporary basis. Furthermore, if the specific situation of the minor does not allow for their integration into the general education system, then Member States must find other ways to educate minors. In the same context, minors should benefit from preparatory courses, including language courses, in order to be integrated into the education system.

The section on employment is also regulated in the previous directive (art. 17), but in the latter the provisions are much broader, introducing new elements.

Access to the labour market is granted to applicants in accordance with domestic law within a maximum of six months from the date of registration of the application for international protection, this period may be extended if the competent authority has taken an administrative decision to that effect or if the extension is due to the applicant. Access to the labour market shall not be granted or shall be withdrawn if the Member State has accelerated the examination of an application on the merits pursuant to art. 42:1 (a)–(f) of Regulation (EU) No. 2024/1348. On the other hand, for reasons related to labour market policies or the level of youth unemployment, if there is a vacancy that can be filled by its own nationals, other EU citizens, other third-country nationals, and stateless persons legally residing in the Member State, the applicant's application for employment in that position may be rejected. Member States shall ensure that applicants who have access to the labour market are treated in the same way as their own nationals in general terms, with regards to employment conditions, freedom of association, education and vocational training, recognition of diplomas, access to appropriate assessment systems, etc. Restrictions on equal treatment may occur through their exclusion from: participation in the management of public law bodies and the exercise of a function governed by public law; the granting of subsidies and loans related to education and vocational training; education and vocational training not provided under an employment contract. With regards to the recognition of diplomas and access to appropriate assessment systems, a restriction may be imposed for a period of at least three months from the date on which the application was registered. Applicants also enjoy equal treatment with Member States' own nationals in terms of their entitlement to social benefits, but those that do not depend on periods of professional activity or contributions may be excluded. It is important to note that the right to equal treatment in relation to employment does not confer a right of residence on a national if in accordance with Regulation (EU) No. 2024/1348, the applicant's right to remain in the territory of the Member

State has been withdrawn. The recognition of qualifications obtained abroad for applicants who cannot provide supporting documents for their qualifications should be facilitated by Member States. Finally, it should be emphasised that access to the labour market cannot be withdrawn during the period of appeal, when the applicant has the right to remain in the territory of the Member State concerned and during the proceedings, until notification of a decision rejecting the appeal.

Language courses and vocational training (art. 18), as another section regulated in the directive, takes over a previous section of the old directive and introduces a new element concerning language courses. According to this section, applicants are guaranteed access to language courses, civic education, and vocational training if these are useful to them, even if they do not have access to the labour market. Applicants are required to cover or contribute to the cost of these courses, only if they have sufficient financial means.

The general provisions on material reception conditions and medical assistance (art. 19) are regulated in both directives in a similar manner, with minor changes introduced by the latter directive. According to these provisions, Member States must ensure that applicants have access to material reception conditions from the moment they submit their application for international protection in accordance with art. 26 of Regulation (EU) No. 2024/1348, and that these conditions provide them with an adequate standard of living, especially if they have special reception needs or are in public custody. Member States may make the full or partial provision of material reception conditions dependant on applicants not having sufficient resources to ensure an adequate standard of living. The obligation for applicants to bear or contribute to the cost of material reception conditions and medical care, or to reimburse the cost thereof, may only apply if they have sufficient resources to do so. In such a case, Member States must comply with the principle of proportionality. Where Member States provide material reception conditions in the form of financial allowances or vouchers, their value must be set either by law or in practice, in such a way as to ensure an adequate standard of living, which may be lower than that provided to nationals, and Member States must inform the Commission and the Asylum Agency of the levels set.

The new directive regulates, as the previous one did, the material conditions of reception (art. 20), similarly, with non-substantive changes and a few additions. These conditions directly concern accommodation in kind, which must ensure applicants an adequate standard of living and take place in premises specifically designated for the accommodation of applicants, in accommodation centres, houses, apartments, hotels, etc. Within the accommodation facilities, it is necessary to guarantee the protection of privacy, the possibility of communicating with relatives, counsellors, representatives of the UNHCR, other relevant bodies and organisations, as well as their access to applicants. At the same time, the provision of material reception conditions must take into account issues related to gender and age, the situation of applicants with special reception needs, the prevention of aggression and violence, the existence of specific facilities for mothers and their minor children, and the situation of dependent adult

applicants who should be accommodated together with their relatives already present in the territory of the Member State. With regards to the transfer of applicants from one location to another, the directive stipulates that this should only take place, when necessary, with applicants having the opportunity to inform their advisors of this fact. Those responsible for providing material reception conditions must be adequately trained, and Member States may even involve asylum seekers in the management of material resources and the non-material aspects of their lives. The directive also provides for the possibility of states to grant material reception conditions that differ from those already set out, on an exceptional basis, for as short a period as possible, where an assessment of the applicant's special reception needs is required, where the accommodation capacities normally available are temporarily exhausted, or where the large number of applicants makes them insufficient. Where material reception conditions are below the level set by the Directive, Member States must immediately inform the Commission and the Asylum Agency so that the contingency plan can be activated, but also when the reasons for activating it have ceased to exist.

As a new feature compared to the previous directive, a new section has been added concerning the conditions for admission to a Member State other than the one in which the applicant is required to be present (art. 21), which occurs when a decision has been made to transfer the applicant to the Member State responsible in accordance with Regulation (EU) No. 2024/1351, which is required to ensure reception conditions that comply with the standards of living required by European legislation. This situation is brought to the applicant's attention.

Medical assistance (art. 22) is regulated in both directives, the latter being slightly more comprehensive, where it establishes the obligation of Member States to ensure that applicants, wherever they are, receive medical assistance provided by general practitioners or specialists, that it is of adequate quality, including at least emergency care, the basic treatment of illnesses, especially serious mental disorders, and sexual and reproductive health services essential for the treatment of a serious physical condition. Medical assistance for children must be at the same level as that provided for children who are nationals. In the case of applicants with special reception needs, medical assistance must be adapted to those needs.

A slightly broader version also regulates the limitation or withdrawal of material reception conditions (art. 23), which provides for the possibility for Member States to do so when the applicant: leaves the geographical area or place of residence established without the necessary permission, or absconds; does not cooperate with the authorities or does not comply with the established procedural requirements; has submitted a subsequent application in accordance with art. 3(19) of Regulation (EU) No. 2024/1348; has concealed the fact that he or she has financial resources, thereby unduly benefiting from material reception conditions; or has seriously or repeatedly violated the rules of the accommodation centre, behaved violently or threateningly within it; does not participate in mandatory integration measures, except in circumstances beyond the applicant's control. If the Member State has taken a decision to restrict material reception conditions for the first two and last grounds, and these

have ceased to exist, Member States may restore all or part of the material conditions, and the decision taken shall be notified to the applicant. Decisions to limit material conditions must be taken objectively and impartially, after a thorough examination of the applicant's case, and must state the reasons on which they are based, taking into account the principle of proportionality, especially if the applicant concerned has special reception needs.

This directive pays particular attention to applicants with special reception needs (Chapter IV), which were also covered by the previous directive, but are now more developed and refer back to the terminology used in Directive No. 2003/9/EC instead of "vulnerable people".

First, the persons most likely to be applicants with special reception needs are listed (art. 24), namely: minors; unaccompanied minors; persons with disabilities; elderly persons; pregnant women; lesbian, gay, bisexual, transgender, and intersex persons; single parents with minor children; victims of trafficking in human beings; persons suffering from serious illness; persons with mental disorders including post-traumatic stress disorder; persons who have suffered torture, rape, or other serious forms of psychological, physical, or sexual violence.

The directive further regulates, in a more extensive form than in the previous one, the assessment of special reception needs (Article 25), which must be individualised and carried out as soon as possible after the submission of an application for international protection. It may be integrated into existing national procedures or into the assessment provided for in art. 20 of Regulation (EU) No. 2024/1348. The assessment identifies special reception needs, taking into account visible signs, statements or the behaviour of the applicant, statements of the parents or representative of the applicant. The assessment must also be completed as soon as possible, with the directive setting a deadline of 30 days from the date of submission of the application for international protection or a deadline provided for in art. 20 of Regulation (EU) No. 2024/1348. It is clear that if special reception needs are identified at a later stage of the international protection procedure, Member States must assess and address them. Moreover, the support provided to this category of applicants must take into account their special reception needs throughout the international protection procedure, and their situation must therefore be monitored accordingly. The provisions of the directive in this section also apply to staff assessing special reception needs, in relation to which it stipulates that they must: receive training to enable them to identify signs of special reception needs; include in the applicant's file information on the nature of the special needs including a description of the visible signs indicating them the measures established to respond to the special needs; refer applicants to the competent doctor and psychologist for further assessment, if their consent is obtained beforehand or afterwards, in which case an oral translation of the information provided to applicants may be used, carried out by specialised translators or, in their absence, by any other adult. The Directive prohibits the assessment procedure from taking the form of an administrative procedure, from being intended for categories of applicants

other than those with special needs, and from affecting the assessment carried out on the basis of Regulation (EU) No. 2024/1347.

The situation of minors is also regulated in the new directive (art. 26), similarly to the previous directive, with a small addition to the provisions. Here too, the focus is on the best interests of the child, which are considered a priority for Member States, who must ensure a standard of living adequate for the child's physical, mental, spiritual, moral, and social development, for the child's development in all areas. The factors underlying the analysis of the best interests of the child relate to: family reunification, the minor's well-being and social development, his or her safety and security, and the minor's views in accordance with his or her age and maturity. Member States are required to ensure that minors have the opportunity to participate in various leisure, recreational, and outdoor activities, but also that they have access to school materials. When minors have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman, and degrading treatment, or armed conflict, Member States must ensure that they have access to rehabilitation services, mental health care, and qualified assistance designed for such victims. The accommodation of minors is specific and requires them to live with their parents, an adult family member responsible for them, or their unmarried brothers and sisters. The directive prohibits persons working with minors from having a criminal record involving children and also stipulates that they must receive initial and ongoing training and respect the confidentiality of data relating to their work.

The section on unaccompanied minors (art. 27) is found in both directives, but it is much more developed in the current one. In the case of this category of applicants, an important role is played by the representative who is assigned to an applicant if he or she claims to be a minor or there are objective reasons to believe that he or she is a minor. The provisions of the directive establish the appointment of a provisional representative and then the appointment of a permanent representative within 15 working days from the date of submission of the application for international protection. The permanent representative may be the same person as that referred to in art. 23:2 of Regulation (EU) No. 2024/1348. In order to fulfil this obligation, Member States must include in their contingency plans (which will be discussed shortly) measures to ensure the appointment of representatives and persons acting in a temporary capacity if they are faced with a large number of applicants who are unaccompanied minors. If the contingency plans are not sufficient to cope with a large number of requests, the appointment of representatives may be postponed by ten working days, and the number of unaccompanied minors who can be assigned to a representative may be increased from a maximum of 30 minors, as stipulated in the directive, to 50 unaccompanied minors, a situation about which the Commission and the Asylum Agency must be informed. If there is evidence to suggest that the applicant is undoubtedly over 18 years of age, the Member State is not required to appoint either a temporary guardian or a representative. Member States shall ensure that the temporary guardian and the representative are informed of their appointment, and that the minor is informed of the persons appointed. After their appointment, the temporary guardian

and the representative shall meet with the minor and take into account his or her views on his or her needs, their duties ending if, on the basis of art. 25:1 of Regulation (EU) No. 2024/1348, the competent authorities consider that the applicant is not a minor or ceases to be an unaccompanied minor. When an organisation is appointed as a temporary guardian or representative, it in turn appoints a natural person to perform the tasks set out in the directive.

The obligation to provide information is also incumbent upon the competent authorities, except that in their case it concerns: informing the unaccompanied minor that a representative has been appointed and how he or she can lodge a complaint against that representative in conditions of trust and safety; informing the authority responsible for ensuring reception conditions that a representative has been appointed for the minor; and informing the representative of relevant matters concerning the minor. The temporary guardian or representative may be replaced only when necessary, especially when they have not performed their duties properly. It is important to note that organisations or individuals who are or could be in conflict with the interests of the minor are not to be appointed as temporary guardians or representatives. In the same vein, states must establish administrative or judicial authorities to supervise the performance of tasks by persons with a temporary role and representatives, in accordance with the provisions of the directive, but also to examine complaints lodged by minors against persons with a temporary role and representatives.

Concerning the placement of minors, the directive stipulates that this must extend from the date of their admission to the territory of a Member State until the date on which they must leave that territory and must take place: with adult members of their family; in a host family; in specialised centres for minors; in other accommodation suitable for minors. Minors may be placed in accommodation centres intended for adults if they are at least 16 years old and this is in the best interests of the child. For the same reasons, brothers and sisters from the same family should be kept together. It should also be noted that as soon as a request for protection is made by an unaccompanied minor, Member States shall start searching for the minor's family members with the help of international organisations or other relevant organisations, with all activities being carried out in confidence, if there is a possible threat to the life or physical integrity of a minor or close relatives, especially if they have remained in the country of origin.

Aspects relating to victims of torture or violence (art. 27) have been regulated similarly in both directives and aim to ensure medical and psychological treatment, the provision of necessary care for the harm caused, rehabilitation and counselling services, in cases where applicants have been subjected to human trafficking, torture, rape, serious psychological, physical, or sexual violence, etc. The provisions require the provision of oral translation for this category of victims and rapid access to the specific services mentioned above. Here too, it is established that the staff dealing with such victims have appropriate initial and ongoing training and are bound by confidentiality regarding their work.

There are few differences between the provisions of the two directives concerning appeals (art. 28), a section requiring Member States to ensure that decisions on the granting, withdrawal, or reduction of benefits, on the refusal to grant permission to temporarily leave the geographical area to which applicants have been assigned, and on restrictions on freedom of movement affecting applicants individually, may be subject to appeal under the procedures provided for by national law or at least to appeal or judicial review in fact and in law before a judicial authority. In such proceedings, Member States must provide free legal assistance and representation, including all related services, if they are necessary for effective access to justice. These legal services shall be provided by legal advisers or other qualified persons in accordance with national law, provided that their interests are not or cannot be in conflict with those of the applicant. Free assistance and representation may not be granted if the applicant has sufficient financial resources or if it is considered that the appeal or judicial review has no real chance of success, especially if it is at its second or higher instance.

However, the decision not to grant free legal aid and representation must be open to challenge when taken by authorities other than judicial authorities. With regards to the costs of legal assistance and representation, the directive stipulates that Member States may impose financial limits or time limits on their provision, provided they do not arbitrarily restrict access to these services, and that equal treatment with their own nationals may be established with regards to fees, costs, and other reimbursements. Reimbursement, whether total or partial, of the costs incurred for free legal assistance and representation, may take place, but only depending on the applicant's financial situation, as stipulated in Regulation (EU) No. 2024/1348, or when the provision of these services was based on false information provided by the applicant. The Directive also provides for Member States to establish all necessary and specific procedural rules from the submission of the application to the provision of these legal services.

The last chapter of the directive, entitled “Measures to increase the efficiency of the reception system”, first contains regulations on the establishment of competent authorities (art. 30) by each Member State to fulfil the obligations arising from the directive, as well as their obligation to inform the Commission if any changes occur in this regard. Member States are then required to establish a system for the guidance, monitoring, and control (art. 31) of reception conditions in accordance with the standards developed by the Asylum Agency in accordance with art. 13 of Regulation (EU) No. 2021/2303. Contingency planning (art. 32) is the next section under which Member States, after consulting with the relevant entities, shall establish the measures necessary to ensure good reception conditions for applicants in accordance with the provisions of the Directive. A contingency plan may be drawn up using a template developed by the Asylum Agency and must be reviewed at least once every three years, with any changes or its activation being notified to the Agency. Regarding staff and resources (art. 33), the provisions of the directive emphasise the importance of continuous training and the integration of staff training into the European asylum

training program. At the same time, Member States must ensure that all necessary resources, such as staff, translators, and interpreters, are available to implement the directive. Monitoring and evaluation (art. 34) allow for the Commission to draw up a report on the application of the directive, proposing any necessary amendments where appropriate, and communicating it to the European Parliament and the Council. At the request of the Commission, Member States shall provide the information necessary for the preparation of the report, and the timetable for the fulfilment of the tasks by all those involved shall be established here. Under the section on transposition (art. 35), Member States must adopt all the laws and administrative measures necessary to comply with the Directive, indicating the relevant articles, and immediately communicate the legal provisions adopted to the Commission. As already mentioned at the beginning, with the entry into force of this new directive (art. 37), Directive No. 2013/33/EU (art. 36) is repealed, with the proviso that this does not affect the obligations of Member States under the previous directive, especially since the effect of its repeal is set to take effect on June 12th 2026.

In addition to Directive (EU) No. 2024/1346 presented above, the 2024 European legislative reform on international protection is supplemented by several regulations to which, as has already been seen, the directive itself refers to in certain situations. Although unlike directives, they will be presented in summary form, important general information about the role and innovations brought about by the regulations can be found on the official website of the Commission.³⁰

The first of these is Regulation (EU) No. 2024/1351 of the European Parliament and of the Council of May 14th 2024, on the management of asylum and migration, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No. 604/2013,³¹ which replaces the current Dublin III Regulation. This new regulation established, within the common framework for the management of asylum and migration in the Union (art. 3 et seq.), a solidarity mechanism for the functioning of the common asylum system (art. 6 et seq., art. 55 et seq.), and the criteria and mechanisms for determining the Member State responsible for examining an application for international protection (art. 16 et seq.) were laid down. A large part of these provisions refer to the powers of European institutions and the relations between them and Member States with a view to the joint and effective management of migration, but another part, contained in art. 16–55, concerns the procedure carried out by a Member State when it receives an application for international protection, where the institutions referred to in the above-mentioned directive are taken over (such as the right to legal advice, individual interviews, minors, etc.), but also new ones (such as the transfer of an applicant between Member States), which are applied within the framework of the procedure.

30 European Commission, 2025, Pact on Migration and Asylum: legislative files in a nutshell.

31 European Union, 2024, Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No. 604/2013.

The next in the adopted legislative package is Regulation (EU) No. 2024/1348 of the European Parliament and of the Council of May 14, 2024, establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, which, as its title indicates, amends and repeals Directive No. 2013/32/EU,³² with the proviso that although it has entered into force, it will only apply from June 12th 2026, the date until which the directive will remain in force and produce the effects established therein. This regulation incorporates the provisions of the repealed directive, updates them to reflect current issues raised by the granting of international protection, restructures them, and adopts new provisions such as the adequate capacity of a Member State at European Union level and the procedure to be followed when such capacity is reached.

Regulation (EU) No. 2024/1349 of the European Parliament and of the Council of May 14th 2024, establishing the border return procedure and amending Regulation (EU) 2021/1148,³³ is essentially a supplement to the previous regulation. Its provisions apply to third-country nationals and stateless persons whose applications, which have been subject to a procedure at the border, are rejected, which means, first, that they are not allowed to enter the territory of the Member State concerned, staying in places located at the external border or other spaces for a short period of time, namely 12 weeks, after which, if they have not done so in the meantime, they are given a deadline for voluntary departure, otherwise they are removed or returned.

Another European legislative act adopted in 2024 is Regulation (EU) No. 2024/1359 of the European Parliament and of the Council of May 14th 2024, on addressing crisis and force majeure situations in the field of migration and asylum and amending Regulation (EU) 2021/1147,³⁴ laying down temporary measures for exceptional crisis and force majeure situations in the field of migration and asylum in the Union. These measures are intended to meet the requirements of necessity and proportionality, while being appropriate for achieving the stated objectives of ensuring the protection of the rights of applicants and beneficiaries of international protection in accordance with international and European asylum law. The provisions of the regulation establish that a crisis situation exists when: there are massive flows of third-country nationals or stateless persons into a Member State, by any means of communication, which, given the characteristics of that State, would render the well-prepared asylum system dysfunctional; a third country or a hostile non-state actor induces and assists the movement of third-country nationals or stateless persons to the external borders or

32 European Union, 2024, Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

33 European Union, 2024, Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148.

34 European Union, 2024, Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147.

to a Member State in order to destabilise the Union or the Member State. On the other hand, force majeure is considered as abnormal and unforeseeable circumstances beyond the control of a Member State, the consequences of which could not have been avoided despite all due diligence, preventing that Member State from fulfilling its obligations under the relevant European legislation. These situations involve the Commission and the Council, but also other Member States through them, on which occasion the necessary derogations and solidarity measures between Member States will be established.

Regulation (EU) No. 2024/1358 of the European Parliament and of the Council of 14 May 2024 on the establishment of “Eurodac” for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No. 603/2013 of the European Parliament and of the Council³⁵ has been adopted because, by creating the system to which it refers: it ensures the proper application of previous regulations by supporting the asylum system; it contributes to the control of illegal immigration into the Union, the detection of secondary movements, and the identification of persons who are staying illegally; it ensures the protection of children; it allows Member States to compare data with that stored in Eurodac and thereby, to correctly identify persons in the database; it supports the objectives of the European Travel Information and Authorisation System and the Visa Information System, all in full respect of human dignity, fundamental rights, and principles as recognised to date.

Identical to the previous one, Regulation (EU) No. 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No. 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817³⁶ is meant to strengthen control of third-country nationals crossing the EU’s external borders to figure out if the people being screened might be a threat to internal security. Screening involves a thorough check of these nationals, including a preliminary medical check, a preliminary vulnerability check, identification or identity verification, biometric data recording, security checks, completion of a screening form, and referral to the appropriate procedure.

Regulation (EU) No. 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless

35 European Union, 2024, Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14 May 2024 establishing a framework for screening of third-country nationals crossing the external borders and amending Regulations (EU) 2016/399 and (EU) 2019/815.

36 European Union (2024) Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 establishing a union framework for safe and sustainable return and reintegration, and repealing Regulation (EU) 516/2014.

persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council³⁷ takes over, in an updated form and in line with the new realities, the concepts and procedures established by the directive it repeals, mentioned above, which, as we have seen, originate from an older directive. Therefore, it regulates the conditions that nationals of member countries or stateless persons must meet, in order to benefit from international protection, creating a uniform status for persons in need of subsidiary protection, which involves granting international protection. The new legislative act also establishes that a person's need for international protection outside their country of origin arises from a well-founded fear of persecution or a real risk of serious harm due to events that occurred after the applicant left their country of origin or due to their activities, after leaving their country of origin, due to the expression or continuation of the convictions, beliefs, or orientations they had in their country of origin.

The last of these legislative acts is Regulation (EU) No. 2024/1350 of the European Parliament and of the Council of 14 May 2024 establishing a Union Resettlement and Humanitarian Admission Framework, and amending Regulation (EU) 2021/1147³⁸ which, in general terms, establishes the procedure whereby a third-country national or a stateless person from a third country to which that person has been forcibly or voluntarily displaced as the case may be, is to be admitted to the territory of a Member State on the basis of a recommendation from the UNHCR, a Member State, the Asylum Agency, or a relevant international body. These regulations provide the framework for the legal and safe arrival of such persons, enhances the European Union's contribution to international initiatives on resettlement and humanitarian admission with a view to increasing the total number of places available for this purpose, and contributes to strengthening the Union's partnerships with third countries in regions where large numbers of persons in need of international protection have been displaced.

4. Other Persons in Need of International Protection

In addition to the categories of persons addressed so far, who are vulnerable in the exercise of fundamental rights and freedoms, we have identified two other categories of persons, namely stateless persons and internally displaced persons, both of whom require adequate protection measures.

37 European Union, 2024, Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 establishing a solidarity mechanism addressing situations when a Member State is confronted with disproportionate migratory flows or specific pressures on its asylum system.

38 European Union, 2024, Regulation (EU) 2024/1350 of the European Parliament and of the Council of 14 May 2024 establishing a Union Resettlement and Humanitarian Admission Framework, and amending Regulation (EU) 2021/1147.

4.1. Stateless Persons

It is clear from the data contained in the previous sections that international and European regulations, when dealing with asylum seekers, refugee status or subsidiary protection, have always taken into account citizens of other states, but also stateless persons who habitually reside in other states.

The vulnerability of stateless persons arises from the fact that as already stated, not having a nationality, they do not enjoy the highest level of protection afforded by a state to its own citizens. This is also the reason why the Convention on the Reduction of Statelessness was adopted in New York on August 30th 1961,³⁹ establishing measures to ensure that as many persons as possible have the nationality of a state, which is why the birth of a person in the territory of a given state requires the granting of nationality, and the convention lays down the procedures to be followed for granting it both by right and on application. For the purposes of the Convention, a child found in the territory of a contracting State is considered to have been born in the territory of that state, just as a child born on board a ship or aircraft is considered as being born in the territory of the state under whose flag the ship is sailing or the state where the aircraft is registered. Citizenship is also recognised for a person whose parents are nationals of a particular state. Under the Convention, loss of nationality is conditional on regaining another nationality, and deprivation of nationality is limited to a few specific cases.

Another international document intended to regulate and improve the status of stateless persons is the Convention relating to the Status of Stateless Persons adopted in New York on September 28th 1954,⁴⁰ which determines the persons to whom it applies and the exclusion of others by the protection granted. It provides that the personal status of a stateless person shall be governed by the law of the country of domicile, or failing that, by the law of the country of residence and that all his or her civil rights shall be subject to the formalities of that law, provided that those rights are recognised in the law of that state. The Convention then goes on to regulate fundamental rights more fully or more briefly, before finally stopping at the expulsion and neutralisation of stateless persons.

4.2. Internally Displaced Persons

Internally displaced persons have a contradictory characteristic: on one hand, they are citizens of a state or persons domiciled or residing in the territory of that state, they do not leave the territorial limits of that state, and on the other hand, they are displaced to areas in the territory of that state other than where they used to live, which is why they are in vulnerable situations, the exercise of their fundamental rights and freedoms is affected, and they need protection.

Unlike stateless persons, their situation is not regulated by any international document such as treaties, conventions, protocols, etc., but with the Report of the UN

39 United Nations, 1961, Convention on the Reduction of Statelessness.

40 United Nations, 1954, Convention relating to the Status of Stateless Persons.

Secretary-General's Representative on Internal Displacement of February 11th 1998, the Guiding Principles on Internal Displacement⁴¹ were drawn up, which show the extent of the phenomenon and the seriousness of the situation. The principles, 30 in number, are divided into several sections and are intended to identify the rights and guarantees relevant to the protection of persons against forced displacement, their protection, assistance during displacement, return, resettlement and reintegration. The principles are consistent with fundamental human rights and freedoms and provide guidance for all entities faced with such situations. In their essence the principles translate fundamental human rights and fundamental freedoms into the particular situations of internally displaced populations.

At a regional level, and of particular significance, we find the Kampala Convention adopted on December 6th 2012 by the African Union⁴², which seeks to promote and strengthen regional, national measures to prevent or alleviate, prohibit and eliminate the root causes of internal displacement, as well as to provide durable solutions, establish a legal framework of solidarity, cooperation, promotion of durable solutions and mutual support between states parties in such situations, which contains their obligations and responsibilities in the event of internal displacement of populations for their protection.

The current situation in the Gaza Strip, where the Palestinian population is in a critical situation within its own territory, demonstrates the need and calls for the adoption of European or international documents to protect the fundamental rights and freedoms of the displaced people.

41 United Nations Commission on Human Rights, 1998, Guiding Principles on Internal Displacement.

42 African Union, 2009, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).

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International Refugee Law II: The 1951 United Nations Convention Relating to the Status of Refugees

Nóra BÉRES

ABSTRACT

This chapter seeks to provide a brief overview on the Refugee Convention focusing on its two key elements, the refugee definition and the refugee status. Within the framework of this analysis, after discussing introductory issues such as the scope of international refugee law and the adoption and historical context of the Refugee Convention and its Protocol, the chapter also examines in detail the refugee definition (the inclusion, the exclusion and the cessation criteria) and the content of the refugee status. The refugee definition is a centrepiece of international migration law designating the potential beneficiaries of the refugee status, and by this designation, fulfilling the ultimate purpose of the Refugee Convention. Therefore, understanding the definition of refugees is crucial for seeing the broader context. The incremental nature of refugee rights is also an aspect that is worth analysing, thus the chapter devotes its last subchapter to this issue.

KEYWORDS

migration, non-refoulement, refugee convention, refugee definition, refugee status

1. Introduction: What Is International Refugee Law?

Personal sovereignty of states guarantees that individuals enjoy the protection of their country of nationality even when they are abroad by taking advantage of the toolbox of diplomatic and consular protection. Providing this protection for nationals is not a possibility but an obligation binding on states. Nevertheless, offering diplomatic and consular assistance presupposes the consent and willingness of the respecting state, and it can occasionally happen that this consent is totally absent, making it impossible for nationals to enjoy the protection of their home country. So as to assist to overcome these kinds of hurdles, international refugee law (hereinafter: IRL) covers

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those special situations when surrogate protection is provided by a state different from the country of nationality.¹

The issues of IRL are guided by three principles: the prohibition of discrimination, the principle of family unity, and the principle of non-refoulement.² The rationale behind the prohibition of discrimination stems from the solidarity-based approach of IRL, which is that states are not allowed to select only those refugees who are healthy, educated, and capable of working. The principle of family unity protects refugees from situations when they have to choose safety over their families. Even when close relatives (husbands, wives or direct descendants) are outside the scope of the refugee definition, they are free to live together with their refugee relative in the asylum state. Non-refoulement is certainly the most significant principle of IRL which applies both in international law and domestic law simultaneously. According to this principle, no individual may be deported or returned to a state, regardless of whether it is their country of origin, if their life or personal freedom is at risk of being violated in that country due to their race, nationality, religion, social status or political opinion.³

Taking into account the aim of this book, i.e., discussing the main issues of human rights-related branches of international law, it is worth providing a brief overview of a comparison between international human rights law (hereinafter: IHRL) and IRL. However, while these branches share a common essence in focusing on human dignity, the differences are notable.

IHRL	IRL
Protection of individuals, both nationals and aliens, under the jurisdiction of a state (<i>lex generalis</i>)	Protection of aliens fleeing from their country of nationality (compared to IHRL, it is <i>lex specialis</i>)
A shield used against abuses committed by any state whose jurisdiction the individual is under, including someone's country of nationality	A shield used for the protection of those fleeing from persecution in their country of nationality, and as a consequence, crossing international borders
Human rights are universal and unalienable (natural law approach is dominant)	Refugee status depends on formal legal criteria (positive law approach is dominant)
Applies to every human being	Applies only to asylum seekers and refugees
Every human being has human rights	Not every human being has refugee rights per se, they depend on circumstances provided by the legislator

Table.1. The Comparison of International Human Rights Law and International Refugee Law⁴

1 Kovács, 2016, p. 402.

2 Nagy, 2014, p. 527.

3 See: Mariam Kevlishvili's and Tamta Zaalishvili's work, as a separate chapter devoted to non-refoulement in this book. A detailed analysis of this principle can be found there.

4 Author's own compilation.

Currently, migration-related and refugee problems make IRL a highly relevant field of international law which is unambiguously underpinned by the intensity of ongoing public and political debates. Some key indicators also tell more than a hundred words on the relevance of IRL. According to the Refugee Data Finder, in mid-2024:

- there were 122.6 million forcibly displaced people worldwide as a result of persecution, conflict, violence, human rights violations or events seriously disturbing public order;
- there were 37.9 million refugees;
- there were 8 million asylum seekers; and additionally
- 5.7 million other people in need of international protection.⁵

These indicators are skyrocketing, even though the refugee problem dates back to more than a hundred years.

2. The Refugee Convention and Its Protocol in General Terms

The international community encountered the refugee problem as a global trend only in the twentieth century due to the fact that two historical-social-legal preconditions of this problem should have been met before the phenomenon gained universal significance. These were the closure of national borders and the magnitude of mass influxes following international and non-international armed conflicts.⁶

After World War I, some two million Russians, Armenians, and others were forced to flee their countries of origin between 1917 and 1926.⁷ Subsequently, for humanitarian reasons, the international community began to assume responsibility for protecting and assisting refugees, and the first institutional framework was provided under the auspices of the League of Nations, where numerous treaties were adopted: (I) the 1926 Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees;⁸ (II) the 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees;⁹ (III) the 1933 Convention relating to the International Status of Refugees¹⁰ (hereinafter: 1933 Refugee Convention); (IV) the 1938 Convention concerning the Status of Refugees Coming from Germany;¹¹ (V) the 1939 Additional Protocol to the Provisional Arrangement; and (VI) the Convention concerning

5 UNHCR, 2025, The UN Refugee Agency, Refugee Data Finder.

6 The Balkan Wars (1912–1913), the First World War (1914–1918), and its aftermath in the Near East, i.e., the wars in the Caucasus (1918–1921) and the Greco-Turkish War (1919–1922), caused significant refugee flows in the states involved, especially in the Russian Empire. Between one and two million refugees left Russia (or the Soviet Union) for Central Asia, East Asia, and the European countries of Asia Minor, between 1918 and 1922. See: Jager, 2001, p. 727.

7 Hathaway, 2021, p. 19.

8 League of Nations, 1926.

9 League of Nations, 1928.

10 League of Nations, 1933.

11 League of Nations, 1938.

the Status of Refugees Coming from Germany.¹² As a matter of fact, these treaties were strictly limited in their personal scope, focusing on Russians, Armenians, and Germans. Nevertheless, it is worth mentioning that the 1933 Refugee Convention was a more comprehensive and forward-looking treaty, and it also dealt with administrative measures (e.g., the issuing of Nansen certificates¹³), juridical conditions, labour conditions, industrial accidents, welfare and relief, education, and fiscal issues, as well as exemptions from reciprocity. The principle of non-refoulement was stipulated *ipso jure* under this treaty for the first time as well.

When World War II finally came to an end, an urgent need emerged within the newly set up United Nations (hereinafter: UN) that an institutional regulation of IRL is essential on the universal level. Initially, three specialised agencies of the UN were in charge of refugee issues: (I) the International Refugee Agency (hereinafter: IRA), terminated shortly after its establishment; (II) the United Nations Relief and Rehabilitation Agency (hereinafter: UNRRA), for Jews surviving the tragedy of Holocaust; and (III) the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter: UNRWA), taking care of Palestinian refugees.

Nonetheless, it soon became clear that the creation of a comprehensive refugee institution within the UN is inevitable.¹⁴ These steps paved the way to the adoption of the currently effective universal treaty regime of IRL that comprises two legal instruments: the 1951 UN Convention relating to the Status of Refugees (hereinafter: Refugee Convention)¹⁵ and its 1967 Protocol relating to the Status of Refugees (hereinafter: Protocol).¹⁶ Unlike the majority of the other UN covenants and conventions, they are not overseen by a treaty-based committee but by the Office of the United Nations High Commissioner for Refugees (hereinafter: UNHCR). With 146 ratifications,¹⁷ both instruments enjoy worldwide acceptance and many of their provisions qualify as customary norms of international law.

The Refugee Convention and its Protocol have three key elements that are of special significance from the perspective of IHRL: the refugee definition, the content of refugee status, and the principle of non-refoulement. According to Chetail, these pillars perfectly reflect the “existential dilemma” of refugee law, creating a fragile balance between the competence of states to control the access of aliens to their territory, while protecting the most vulnerable fleeing from gross human rights violations.¹⁸

12 League of Nations, 1939.

13 The so-called “Nansen certificates” were official refugee travel passports issued between 1922 and 1938. First, they were issued by the League of Nations’ Office of the High Commissioner for Refugees to stateless persons. The refugee travel passports quickly became known for their promoter, the Norwegian statesman and polar explorer, Fridtjof Nansen.

14 Kovács, 2026, p. 403.

15 United Nations, 1951.

16 United Nations, 1967, p. 267.

17 See: United Nations Treaty Collection, 1951, Chapter V (Refugees and Stateless Persons), No. 2.

18 Chetail, 2019, p. 169.

The Refugee Convention was drafted almost immediately after World War II, demonstrating the outstanding efforts of the UN's early work, recognising that the refugee problem affects the international community as a whole, and that cooperation and burden-sharing in this field are essential. In terms of the historical contexts of the Refugee Convention, it is noteworthy that the Refugee Convention was drafted as a response to the specific horrific events that took place during World War II, notably the Holocaust and the Stalinist expansion into Central and Eastern Europe.¹⁹ Its adoption was therefore the result of an era when refugees were primarily the persecuted victims of highly organised predatory states.²⁰

Taking into account the challenges of the post-war era, and the fact that most of the refugees were of European origin, victims of the Nazi mass extermination and the communist regimes in Central and Eastern Europe, the Refugee Convention originally included a deadline which limited its geographical and temporal scope of application to the then known groups of refugees, i.e. persons who had become refugees as a result of events occurring in Europe before 1 January 1951.²¹ After the adoption of the Refugee Convention, however, refugee issues unrelated to World War II emerged in different parts of the globe, leading to efforts to make the Refugee Convention fully applicable in any refugee situation. Consequently, the Protocol removing the geographical and temporal limitations was adopted sixteen years after the Refugee Convention.²² With the Protocol, the Refugee Convention assumed a universal scope. Since then, this has been the only modification ever attached to the Refugee Convention.

Even though the Refugee Convention is of great importance and reflects contemporary global challenges, the understanding that it is an outdated instrument has become commonplace in recent decades. According to Fitzpatrick, these criticisms stem basically from three reasons. One is that the Refugee Convention's persecution-centred approach seems anachronistic and conceptually inadequate in that forced migration is typically driven by violence that does not involve persecution.²³ Policy analysts also emphasise that the meaningful increase in the number of forcibly displaced persons (hereinafter: IDPs) has resulted in costly procedures, which are burdensome for states in economic and social terms.²⁴ Finally, and pragmatically, there has also been an erosion of support for the Refugee Convention among traditional asylum states, some of whom have expressed their desire for a new regime.²⁵

To set a hypothesis to this chapter, we should depart from the personal scope of the Refugee Convention, as the international protection it provides was tailored to a

19 Hernández, 2019, p. 427.

20 Shacknove, 2016, p. 165.

21 For a comprehensive analysis, see: Hathaway, 2021; Goodwin-Gill and McAdam, 2007; Lambert, 2010; Zimmermann 2011.

22 Weis, 1990, p. 1.

23 Zolberg, Suhrke and Aguayo, 1989, pp. 1–394.

24 Fitzpatrick, 1996, pp. 230–231.

25 Helton, 1994, p. 1623.

very limited category of refugees, i.e. individual political asylum seekers and not mass influxes. The Refugee Convention is therefore unable to provide protection for IDPs or those who flee from their home countries without persecution or owing to some other drivers not enumerated under the Refugee Convention, like armed conflicts, famine, or extreme poverty. Nonetheless, in spite of the criticisms, the Refugee Convention is still in force and every year millions of asylum claims are settled in accordance with its provisions. Therefore, to understand the effective operation of the refugee legal regime, the following sub-chapters will pursue a detailed analysis on the refugee definition and refugee status.

3. Who Is a Refugee?

According to the UNHCR, ‘a refugee is someone who has been forced to flee his or her country because of persecution, war or violence’. War and violence, either ethnic, tribal or religious, are leading factors of refugees fleeing their homes still today.²⁶ Nevertheless, the legal definition of the term “refugee” under the Refugee Convention is rather complex, basically due to the limitations attached to it. These limitations are rooted in finding a delicate balance between states’ obligations stemming from the principle of solidarity and states’ concerns regarding unmanageable mass influx. Thus, the refugee definition is a two-fold concept: on the one hand, it is essential to recognise those who are in need of international protection from persecution and their rights, on the other hand, it is also necessary to determine what the obligations of states are under international law when providing protection for the most vulnerable.²⁷ For the textual interpretation of the Refugee Convention, one should establish that the Contracting States emphasised the latter aspect: the focus is significantly more on state obligations rather than on the individual rights of refugees.

This feature of the Refugee Convention is unambiguously a result of the treaty’s historical background. In the era of its adoption, no universal human rights instruments existed; only the Universal Declaration of Human Rights²⁸ (hereinafter: UDHR) was adopted, which is not a treaty but a non-binding resolution of the UN General Assembly. Unlike human rights treaties adopted within the framework of the UN in subsequent years, the Refugee Convention does not simply enumerate unalienable and unconditional rights without discrimination for its beneficiaries. That is, the Refugee Convention is not a comprehensive instrument providing international protection for any victim of irregular forced migration. While human rights apply to

26 UNHCR, 2025, What is a refugee?

27 Chetail, 2019, p. 169.

28 United Nations General Assembly, 1948, art. 14(1): ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations’.

everyone due to the dignity inherent in every individual, refugee rights depend on the formal recognition of refugee status by states.²⁹

Article 1(A)(2) of the Refugee Convention provides,

‘[...] for the purposes of the present Convention, the term ‘refugee’ shall apply to any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.’

The refugee definition is the *raison d'être* of the Refugee Convention, and it is a fundamental category of international migration law. Refugees, unlike internally displaced persons, are involved in international migration, i.e. they are outside their country of origin, and at the same time, they are irregular forced migrants (*nota bene*, refugees can never be considered illegal migrants). Additionally, Article 14 of the 1948 UDHR enshrines the right to seek and enjoy asylum from persecution,³⁰ and states shall not abuse this human right in their asylum procedures. It only depends on states, however, who they will recognise as a refugee, and who will become an undocumented illegal alien.³¹ The Refugee Convention does not comprise the definition of asylum seeker, but it can be derived from Article 14 of the UDHR. In accordance with the UNHCR's pragmatic approach, an asylum-seeker is someone who is seeking or intends to seek international protection, either refugee status or complementary protection due to armed conflicts, human rights violations or persecution. At the end of the asylum procedure, not every asylum seeker will be found to be refugee, but every refugee was once an asylum seeker.³²

According to the Refugee Convention, refugee status is declaratory in nature. As the UNHCR eloquently stated, ‘he [an asylum seeker] does not become a refugee because of recognition but is recognised because he is a refugee’.³³ One can therefore conclude that the declaratory nature of the refugee status is based on a rebuttable presumption that asylum seekers are assumed to have the status of refugees with regard to the benefits of non-refoulement protection for the duration of the asylum procedure, unless subsequently it is proved otherwise.

Nonetheless, the refugee definition is a limited category from several perspectives. At the Conference of Plenipotentiaries³⁴ of the Refugee Convention, state delegates, as a consequence of their general fear of unmanageable mass influx, insisted they would not sign a “blank cheque” assuming unlimited and indefinite commitments in terms

29 Chetail, 2014, pp. 19–72.

30 Ádány, 2016, p. 239.

31 Nagy, 2014, p. 525.

32 UNHCR, 2025, Asylum Seekers.

33 UNHCR, 2011, p. 38.

34 United Nations, 1951, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary record of the 35th meeting.

of all refugees for the future.³⁵ As Bhabha points out, ‘from the outset, the refugee protection regime was intended to be restrictive and partial, a compromise between unfettered state sovereignty over the admission of aliens, and an open door for non-citizen victims of serious human rights violations’.³⁶ Thus, the final version of the refugee definition was adjusted in line with states’ estimates of the probable numbers of prospective beneficiaries.³⁷ Simply put, the refugee definition was tailored to cover individual political refugees, not the mass influx of migrants. It is also true, however, that the Final Act of the Conference of Plenipotentiaries³⁸ made a recommendation³⁹ for States Parties to apply the Refugee Convention “beyond its contractual scope” to other persons who otherwise would not be protected by the provisions of the Refugee Convention.

3.1. The Scope of the Refugee Definition: Who Is Covered?

Article 1(A)(2) of the Refugee Convention is also known as the inclusion clause of the refugee definition stipulating the positive criteria of earning a refugee status. As already referred to above, the refugee definition is inherently limited in scope and requires three requirements to be achieved, and contemporary scholarly discussion classifies these criteria as the inclusion, exclusion, and cessation clauses.⁴⁰

The inclusion clause enumerates four cumulative conditions of refugee status:

- condition (1): the refugee is outside his country of nationality;
- condition (2) the refugee is unable or unwilling to avail himself of the protection of the country of origin;
- condition (3) the reason for this inability or unwillingness is attributable to a well-founded fear of persecution; and
- condition (4) persecution or the lack of protection provided by the country of origin is in connection with at least one of five limitative grounds (race, religion, nationality, membership of particular social group, or political opinion).

These positive preconditions of the refugee status highlight a significant difference between refugee rights and human rights: although all refugees, like all human beings, have human rights, as an especially vulnerable group they are entitled to consideration and additional protection on a national and an international level. Rights under the Refugee Convention, however, unlike human rights, are not inalienable

35 Bem, 2004, p. 609.

36 Bhabha, 2002, p. 176.

37 Ibid., p. 155.

38 United Nations, 1951, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN Doc. A/CONF.2/108/Rev.1.

39 This recommendation served as an incentive to the subsequent adoption of regional instruments in Africa, Asia, Europe, and Latin America. See: Organization of African Unity, 1969; Asian-African Legal Consultative Organization, 1966; European Union, 2011; Cartagena Declaration, 1984.

40 For a comprehensive analysis, see in detail Goodwin-Gill and McAdam, 2007, pp. 63–197; Zimmermann and Mahler, 2011, pp. 281–465; Chetail, 2019, pp. 170–171.

and unconditional. In accordance with the inclusion criterion, refugee status offers a protection of substitution based on the principle of surrogacy when the country of origin violates the bond of trust, loyalty, protection, and assistance between the national and the state which otherwise constitutes the normal basis of society.⁴¹

3.1.1. Condition (1): *The Refugee Is Outside the Country of His Nationality*

According to the UNHCR's interpretation, the term "nationality" refers to citizenship, as in most cases refugees retain the nationality of their country of origin.⁴² The applicant's well-founded fear of persecution must be connected with his country of nationality. While the asylum seeker's well-founded fear of persecution is related to some other country, he can avail himself of the protection of the country of nationality, and therefore will not need international protection.⁴³ It functions as a *stricto sensu* rule, with no exceptions, that an applicant, who has a nationality, needs to be outside the country of his origin. Therefore, international protection cannot come into play as long as a person is within the territorial jurisdiction of his home country. IDPs, even though that they are also victims of forced migration and in need of protection, do not fall under the scope of the Refugee Convention. This *stricto sensu* rule is among the most significant limitations imposed by the Refugee Convention, and the growing mass of IDPs makes it an even more worrying problem for the international community.⁴⁴

3.1.2. Condition (2): *The Refugee Is Unable or Unwilling to Avail Himself of the Protection of the Country of His Nationality*

Inability to avail themselves of the protection of the country of nationality is caused by objective circumstances beyond the control of asylum seekers. For instance, insurgencies, grave disturbance, and (civil) wars may lead to a general situation in a country that prevents nationals from availing themselves of protection. These circumstances may also make state protection ineffective or simply denied, meaning services that are normally available for co-nationals become unavailable, which may intensify the applicant's fear of persecution. By contrast, unwillingness refers to asylum seekers who refuse to accept the protection provided by their home country. Unwillingness is more subjective than inability; however, it is counterbalanced by the qualification of "owing to such fear". The UNHCR points out the relationship between unwillingness and being outside one's country of origin, 'where a person is willing to

41 Shacknove, 2016, p. 164.

42 Like nationals of any state, stateless persons may also become refugees, and the Refugee Convention offers protection for them under art. 1(2) as follows, 'who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

43 UNHCR, 2019, pp. 25–26.

44 According to UNHCR's Refugee Data Finder, as of mid-2024, there were 68.3 million IDPs worldwide as a result of persecution, conflict, violence, human rights violations, or events seriously disturbing public order; see: UNHCR, 2025, The UN Refugee Agency, Refugee Data Finder.

avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country “owing to well-founded fear of persecution”.⁴⁵

Article 1(A)(2) of the Refugee Convention contains a subsequent parallel phrase that refers to stateless persons, ‘or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it’. In this context, “former habitual residence” means ‘the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned’.⁴⁶ In the case of stateless asylum seekers, the “country of nationality” is replaced by “the country of his former habitual residence”, and the expression “unwilling to avail himself of the protection” is replaced by “unwilling to return to it”. Logically, in the case of stateless persons, availment of protection will not arise. Obviously, not all stateless persons will be refugees; nonetheless, once a stateless person is recognised as a refugee in relation to the country of his former habitual residence, any further change of country of habitual residence will not affect his refugee status.⁴⁷

3.1.3. Condition (3): The Reason for the Refugee’s Inability or Unwillingness Is Attributable to a Well-Founded Fear of Persecution

The well-founded fear of persecution is a key element of the refugee definition. Nevertheless, fear is an inherently subjective condition and a state of mind, meaning the refugee definition includes a subjective element related to the person applying for asylum. In this vein, the evaluation of the applicant’s statements is more relevant than a judgement on the ongoing situation in the asylum seeker’s country of nationality. The evaluation of fear is inseparable from the assessment of the applicants’ personality, their psychological reactions, credibility, family background, and their membership of a racial, religious, national, social, or political group, as well as their own interpretation of their situation and their personal experiences. Counterbalancing the subjectivity of fear, the drafters of the Refugee Convention added the qualification “well-founded”. The UNHCR notes that “well-founded” implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation’.⁴⁸ The Refugee Convention sets a reasonable degree of likelihood of persecution for the applicant to demonstrate, and accordingly, judicial case law confirmed that states cannot apply a higher standard. Under universal treaty law, there is no adopted definition of the term “persecution”, and attempts to agree on such a definition have met with little success over the years. In accordance with Article 33 of the Refugee Convention, a threat to life or freedom on the grounds of race, religion, nationality, membership of

45 UNHCR, 2019, p. 27.

46 United Nations, 1950, Report of the Ad Hoc Committee on Statelessness and Related Problems, Lake Success, p. 39.

47 UNHCR, 2019, p. 27.

48 Ibid., p. 19.

a particular social group, or political opinion unambiguously counts as persecution; however, other gross human rights violations may also fall within the meaning of the term “persecution”.

3.1.4. Condition (4): The Five Limitative Grounds for Persecution

Race. Race is traditionally interpreted in line with Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination.⁴⁹ The term “race”, in its widest sense, covers skin colour, descent, and national or ethnic origin. According to the UNHCR, the mere fact of being the member of a particular racial group is not enough to substantiate a claim to refugee status; at the same time, there may be cases where, due to the circumstances affecting the group, such membership, in itself, provides a sufficient ground to fear persecution.⁵⁰ Discrimination on the grounds of race has been condemned world-wide over the years and is today identified as one of the most serious form of human rights violations.

Religion. When interpreting the term “religion”, the UDHR and the International Covenant on Civil and Political Rights⁵¹ (hereinafter: ICCPR) can serve as points of departure. Article 18 of the UDHR and Article 18 of the ICCPR deal with the freedom of thought, conscience, and religion that encompasses the freedom of the individual to change his beliefs, to manifest his religion even in public places, and his freedom in observance, practice, teaching, and worship. In accord with this, persecution on religious grounds may take place in various forms, e.g. it can be directed against those subscribing to a different belief system, or it can be directed against adherents of the same faith based on divisions within the religious group, such as a group’s or an individual’s refusal to recognise certain tenets of the same religion.⁵² According to the UNHCR, it may also assume the form of the prohibition of membership of a religious community, worship in private or in public, or religious instruction, or serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community.⁵³

Nationality. The term “nationality” under the Refugee Convention means more than citizenship, it is the civil status thereof.⁵⁴ Nationality may refer to membership in a particular ethnic or linguistic group and it sometimes overlaps with race. A typical scenario of persecution based on nationality occurs when two or more ethnic or linguistic groups live together within the boundaries of a state, conflicts ensue, and persecution or the threat of persecution arises. In these cases, when a conflict is combined with political movements, distinction between persecution on

49 United Nations, 1965, International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, p. 195.

50 UNHCR, 2019, p. 23.

51 International Covenant on Civil and Political Rights, 16 December 1966, UNTS, vol. 999, p. 171 and Vol. 1057, p. 407.

52 Hernández, 2019, p. 428; UNHCR, 2004, Guidelines on International Protection No. 6.

53 UNHCR, 2019, p. 23.

54 Hernández, 2019, p. 428.

the grounds of nationality or of political opinion is quite difficult, especially when a political movement is strongly connected with a specific nationality. In addition, persecution related to nationality may assume numerous other forms, e.g. when an occupying state targets the nationals living on the occupied state's territory, or it may even take place against stateless persons when they are deprived of the access to nationality they are legally entitled to. Although most cases involve persecution of individuals who belong to a national minority, there also have been incidents in various continents where a person belonging to a majority group might have feared persecution by a dominant minority.⁵⁵

Membership in a particular social group. The term “membership in a particular social group” is potentially the broadest category among the grounds for persecution under the refugee definition, the aim being to provide the Convention's protection for those otherwise not covered by the other four grounds. Simply put, this ground can serve as a “gap-filler” when none of the other grounds apply. For instance, in *González et al (“Cotton Field”) v Mexico*⁵⁶ the Inter-American Court of Human Rights (hereinafter: IACtHR) established persecution on the grounds of gender⁵⁷ as persecution on the grounds of membership in a particular social group. In this case, three young women disappeared after leaving work, their bodies later found in the cotton fields of their hometown. The women's bodies displayed evidence of intense physical and psychological torture, mutilation, and sexual abuse. During the investigations, law enforcement officials did not provide the young women with justice, and they were not willing to help the victims' mothers in finding out what had happened. Indeed, the families of the deceased received continual threats from local officials to withdraw their complaints. As a result of the mothers' testimonies, the work of advocates, and data supplied by civil society organisations, a systematic pattern of violence against women and widespread discrimination was presented to the IACtHR.⁵⁸

International courts have also confirmed that sexual orientation and gender identity may constitute “membership in a particular social group”. For example, *X, Y, Z v Minister voor Immigratie en Asiel*⁵⁹ concerned three asylum seekers in the Netherlands from Senegal, Sierra Leone, and Uganda. In each country of origin, homosexuality is a crime punishable by life imprisonment (except in Senegal where it is punishable by five years of imprisonment). Even though the applicants did not demonstrate that persecution had taken place in any of the cases, or that they had been threatened with persecution on the grounds of their sexual orientation, the Court of Justice of the European Union established that due to the criminalisation of homosexuality in their countries of origin, they would have a well-founded fear of being persecuted if they

55 UNHCR, 2019, p. 24.

56 *González et al. v Mexico*, 2016.

57 Edwards, 2003, pp. 51–57.

58 According to reports, between 1993 and 2005, 4,456 young women disappeared in this Mexican municipality. See: Centre for Women, Peace and Security, 2024, Tackling Violence against Women: Landmark cases – *González, Monreal and Mondárrez (“Cotton Field”) v. Mexico*.

59 *X, Y and Z v. Minister voor Immigratie en Asiel*, 2013.

were returned home. The European Court of Human Rights (hereinafter: “ECtHR”) arrived at a similar conclusion in *OM v Hungary*,⁶⁰ where the court held that the detention of a homosexual asylum seeker, who had fled Iran because of his homosexuality, was arbitrary, reiterating that sexual orientation and gender identity may be covered by the term “membership in a particular social group”.

When clarifying the term “membership in a particular social group”, *Canada (Attorney General) v Ward*⁶¹ is also a landmark case. The defendant, Patrick Ward, fled Northern Ireland for fear of being murdered by the Irish National Liberation Army (hereinafter: INLA), from which he had defected. He was ordered by the INLA to guard hostages; however, when he found out the hostages were to be executed, he let them escape. After being tortured by the INLA and serving three years in an Irish jail for his role in the hostage-taking, he fled to Canada where he applied for refugee status. In the Ward judgement, the Supreme Court of Canada adopted a broad interpretation of the term “membership in a particular social group” and took into special consideration the “defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative”. As Hernández sums up,⁶² in accordance with the Ward judgement, a particular social group can be defined by:

- innate or unchangeable characteristics, e.g., gender, linguistic background, sexual orientation;
- associations that are fundamental to the members’ human dignity, e.g. human rights activists; and
- a former voluntary status, as ‘one’s past is an immutable part of the person’.⁶³

Eventually, the court found that Ward did not fall into the category of “membership in a particular social group” but had been persecuted by the INLA due to his political opinion, i.e. the killing of innocent hostages is an unacceptable way to bring about political changes.⁶⁴ Consequently, the idea that a particular social group normally comprises persons of similar background, habits, or social status, may also include other grounds of persecution, such as race, religion or nationality.

Political opinion. Under Article 1(A)(2) of the Refugee Convention, the last of the grounds for persecution is political opinion. As has already been demonstrated with the Ward judgement above, the meaning of the term “political opinion” goes beyond political affiliation or membership in a political party. The UNHCR observes that,

‘holding political opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This presupposes that the applicant holds opinions not tolerated by the authorities, which are critical

60 *O.M. v. Hungary*, 2016.

61 *Canada (Attorney General) v. Ward*, 1993, paras. 67–68.

62 Hernández, 2019, p. 429.

63 *Canada (Attorney General) v. Ward*, 1993, para. 739.

64 *Canada (Attorney General) v. Ward*, para. 750.

of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant.⁶⁵

This implies that the concerned individual holds an opinion that has either been expressed or has come to the attention of the authorities. It may also be that the applicant has not given any expression to his or her opinions; however, owing to the intensity of his or her convictions, it may be reasonable to believe that those convictions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. In such a case, the asylum seeker can be considered to fear persecution on the grounds of political opinion.

In summary, Article 1(A)(2) of the Refugee Convention provides an exhaustive list of grounds for persecution, and excludes many typical drivers of forced migration, e.g., armed conflicts, extreme poverty, famine, natural disasters, pandemics, or persecution on other grounds.

3.2. Who Is Excluded?

The exclusion clause,⁶⁶ focusing on the common concerns of states regarding aliens accessing their territory, further underpins the conditionality and selectiveness of the refugee status. Even if the abovementioned positive preconditions have been satisfied, asylum seekers can be excluded from the protection provided by the Refugee Convention under other supplementary circumstances.

Article 1(D) of the Refugee Convention provides,

‘this Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.’

Additionally, Article 1(E) of the Refugee Convention states,

‘this Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.’

And finally, Article 1(F) of the Refugee Convention spells out,

65 UNHCR, 2019, p. 24.

66 Ibid., pp. 111–139; Chetail, 2019, pp. 169–177.

‘The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.’

As can be concluded from Articles 1(D), 1(E), and 1(F), a person cannot benefit from the substitute protection offered by the Refugee Convention if he:

- already enjoys some other form of international or national protection (IRO, UNRRA, UNRWA etc.);
- possesses the rights and obligations attached to nationality in the country of residence; or
- has committed serious crimes (crimes against peace [crime of aggression], crimes against humanity, war crimes, serious non-political crimes, and acts contrary to the purposes and principles of the UN).

3.3. When Does the Protection Cease to Apply?

The cessation clause⁶⁷ underlines the temporary nature of the Refugee Convention's protection.

Article 1(C) provides:

‘This Convention shall cease to apply to any person falling under the terms of section A if: (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, he has voluntarily re-acquired it; or (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; (6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to

67 UNHCR, 2019, pp. 140–163; Chetail, 2019, pp. 169–177.

invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.’

The provisions under Article 1(C) enumerate the reasons for the termination of refugee status. When the rationale for refugee status is no longer justifiable, the surrogate convention protection ceases to apply. The reasons for the termination of refugee status can be either connected with the refugee concerned and his or her voluntary acts or with a change of circumstances in the country of origin.

4. Refugee Status: The Rights of Refugees Under the Refugee Convention

Refugee status is defined by refugee rights and obligations. Their universal rights stem from two principal sources: IHRL and the Refugee Convention. The latter outlines the basic minimum standards for the treatment of refugees as well as their own obligations towards the host state. Regarding their obligations, refugees are required under Article 2 of the Refugee Convention to abide by the laws and regulations of their country of asylum and respect measures taken for the maintenance of public order. Their rights, as Hathaway explains, derive from the Refugee Convention and result in obligations on the side of states. These convention rights are still highly relevant, despite the significant development of IHRL since 1951. Throughout the last seven decades, several human rights conventions have been adopted, which provide legal safeguards and fundamental protection for refugees.

Why is it important then that not only the Refugee Convention but also human rights conventions provide guarantees for refugees? There are multiple reasons this two-layered protection is required. First, many refugee-specific problems are not covered by general human rights law. Second, economic rights in general are defined as duties of progressive implementation and may legitimately be denied to non-citizens by less developed countries. Third, not all civil rights are guaranteed to non-citizens, and most of those which do apply to them can be withheld on the grounds of their lack of nationality during national emergencies. And finally, the duty of non-discrimination under international law has not always been interpreted in a way that guarantees refugees the substantive benefit of relevant protections.⁶⁸ Still, international human rights law provides additional rights for refugees under the 1950 Refugee Convention, and its application and interpretation by international and national courts make it possible to refine the standards of refugee rights to respond to contemporary challenges.

Besides the determination of the refugee definition and conceptualising the principle of non-refoulement, the set of rights deriving from refugee status is the third fundamental pillar of the Refugee Convention. Indeed, access to protection is based upon these two other criteria: the recognition of the asylum seeker as a refugee, and

68 Hathaway, 2021, p. 173.

whether the asylum seeker is protected by the principle of non-refoulement.⁶⁹ While Shacknove defines the three core criteria of refugee status as asylum, material relief, and permanent resettlement,⁷⁰ Chetail identifies the essence of refugee status with criteria of entitlement and standard of treatment.⁷¹ Additionally, Molnár summarises protection status under the Refugee Convention as follows:

- the principle of non-refoulement, i.e. no States Party shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social or political opinion;
- recognised refugees should be provided with travel documents; and
- Contracting States should either provide refugees equal treatment with their own nationals (e.g. freedom of religion, access to justice, labour and social security rights, and intellectual property rights), or provide refugees with definitely not less favourable treatment than that provided for other foreigners (e.g. housing, self-employment, independent professions, and acquisition of property).⁷²

In detail, the Refugee Convention provides for:

Refugee rights	Respecting articles
The right to non-discrimination	Articles 3 and 5
The right to freedom of religion	Article 4
The right to be issued civil, identity, and travel documents	Articles 12, 27 and 28
The right to housing, land, and property, including intellectual property	Articles 13, 14 and 21
The right to access to justice	Article 16
The right to decent work	Articles 17 to 19 and 24
The right to education	Article 22
The right to social protection	Articles 23 and 24(2)–(4)
The right to freedom of movement within the territory	Article 26 and Article 31(2)
The right not to be punished for irregular entry into the territory of a contracting state	Article 31
The right not to be expelled, except under certain, strictly defined conditions	Article 32

Table.2. Refugee Rights under the Refugee Convention⁷³

69 Chetail, 2014, p. 23.

70 Shacknove, 2016, p. 276.

71 Chetail, 2019, pp. 177–179.

72 Molnár, 2016, p. 48.

73 Author's own compilation.

As for the treatment of refugees, the Refugee Convention sets three standards. There are rights, e.g. freedom of religion, access to justice, or the right to elementary education, where all refugees enjoy the same treatment accorded to nationals. There are other rights, e.g. the right to decent work or the right to association, where refugees are treated as most favoured aliens, i.e. a treatment accorded to nationals of a foreign country in the same circumstances. And there is a third category of rights, e.g. the right to housing or the right to freedom of movement, where refugees are treated not less favourably than the treatment generally accorded to aliens in the same circumstances.⁷⁴

The Refugee Convention's approach to refugee rights is not what is regularly provided under human rights instruments. It is not based on an enumeration of states' obligations equally applicable to all refugees. Instead, the drafters of the Refugee Convention attempted to give additional rights as the bond strengthens between the refugee and the asylum state. As a result, the structure of the refugee rights regime is incremental, i.e. whereas all refugees benefit from a basic set of rights, additional entitlements accrue as a function of the nature and duration of the attachment to the asylum state.⁷⁵ This was highlighted by the UK Supreme Court in *R (ST, Eritrea) v Secretary of State for the Home Department*.⁷⁶ The key issue here was the age of an Eritrean asylum seeker who had presented himself to police claiming that he was sixteen years old, it being unlawful for the Home Department under UK domestic law to detain unaccompanied minors except in limited circumstances. The Court stated,

'[t]he rights that attach to the status of refugee under the Convention depend in each case on the possession of some degree of attachment to the contracting State in which asylum is sought [...] An examination of the Convention shows that it contemplates five levels of attachment to the contracting States.'

A textual analysis of the Refugee Convention shows five levels of rights. The most basic set of rights, or core rights, are applicable as soon as the refugee comes under the *de jure* or *de facto* jurisdiction of the asylum state. The second set applies when the refugee enters into the asylum state's territory, and the third only inheres once the refugee is lawfully or habitually within the asylum state's territory. A fourth set of rights is applicable when the refugee is lawfully staying within the asylum state's territory, while the final rights accrue only upon satisfaction of a durable residency requirement. Hathaway is of the view that "as the refugee's relationship to the asylum state is solidified over the course of this five-part assimilative path, the Convention requires that a more inclusive range of needs and aspirations be met".⁷⁷ However, Hathaway describes this "assimilative path" as a doctrinal reconstruction that is not

74 Chetail, 2014, p. 42.

75 Hathaway, 2021, pp. 174–175.

76 *R (ST (Eritrea)) v. Secretary of State for the Home Department*, 2012, para. 21.

77 Hathaway, 2021, p. 177.

demonstrated by the *travaux préparatoires*, and accordingly, Chetail observes, ‘albeit attractive, this conceptualization of the refugee status as an assimilative process remains an *a posteriori* and essentially doctrinal reconstruction’.⁷⁸

At the same time, this incremental and multi-layered regime implies that the levels of refugee rights build upon each other: a refugee who enters into the asylum state’s territory is also under the *de jure* or *de facto* jurisdiction of the asylum state; a refugee who is lawfully or habitually within the asylum state’s territory has also entered into the asylum state’s territory; a refugee who is lawfully staying is also lawfully or habitually within the asylum state’s territory; and finally, a refugee satisfying the durable residency requirement is also lawfully staying within the asylum state’s territory. Consequently, it is a preliminary and especially significant issue to define the nature of the refugee’s attachment to the asylum state.⁷⁹ As the UK House of Lords highlighted in *Secretary of State for the Home Department v AH (Sudan)*,⁸⁰ ‘once they achieve refugee status, not merely are they safeguarded from return home but they secure all of the other manifold benefits provided for under the Convention relating to the Status of Refugees’.⁸¹ In the same case, the UK House of Lords established that each of the three Sudanese applicants had a well-founded fear of persecution in Darfur; nevertheless, in reconsidering their remitted appeals, it found that it would not be unduly harsh to expect the applicants to internally relocate to Khartoum.

This progressive entitlement to rights and benefits under the Refugee Convention determines the applicable law at the three stages of a refugee’s life cycle. At “level 1”, the recipients of rights are asylum seekers who are assumed to have a temporary presence, and the sole purpose of their entitlements is to make it possible to examine their applications. At “level 2”, the holders of rights are formally recognised refugees supported by the legislative intent to facilitate their progressive integration into the asylum state’s society. Finally, at “level 3”, rights encourage asylum states to naturalise refugees as a closure of the refugee’s life cycle.

5. Concluding Remarks

IRL covers those special situations when the consent and intent to give protection to its nationals against human rights abuses is absent on the side of the home state, and surrogate protection provided by a state different from the country of origin becomes crucially needed. In order to determine who is entitled to this surrogate protection, the Refugee Convention and its Protocol provide legal guidelines, most importantly, by conceptualising the refugee definition and the content of the refugee status.

78 Chetail, 2019, p. 181.

79 Hathaway, 2021, pp. 174–175.

80 *Secretary of State for the Home Department v. AH (Sudan)*, 2007.

81 *Ibid.*, para. 32.

The analysis of the refugee definition demonstrates that international protection was tailored to a very limited category of migrants, and the Refugee Convention is therefore not able to provide protection for IDPs or those who flee their home countries without persecution or owing to some other drivers not enumerated under Article 1(A) (2) (armed conflicts, famine, extreme poverty etc.). It is also worth mentioning that the Refugee Convention is not a human rights treaty guaranteeing unalienable and unconditional rights paired with refugee status. Although recognition of a refugee is declaratory in nature, rights stemming from refugee status are not unalienable and unconditional: the acquisition of refugee rights presupposes recognition, and these rights cease to apply when refugee status is terminated. Moreover, refugee rights are also incremental; that is, the more the bond strengthens between the refugee and the asylum state, the more the Refugee Convention provides for refugees.

Migration-related and refugee problems make IRL a highly relevant branch of international law these days, which is obviously demonstrated by the intensity of ongoing public and political debates. At mid-2024, there were 122.6 million forcibly displaced people, and 37.9 million refugees worldwide, alarming indicators of the current situation. International cooperation on this field is more significant than ever, and the revision of the effective treaty regime should also be considered to offer more efficient solutions for challenges generated by mass influx.

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International Refugee Law III: The Principle of Non-Refoulement

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ABSTRACT

The principle of non-refoulement is a fundamental aspect of international law that prohibits states from returning individuals to territories where they face persecution, torture, or serious harm. This principle is enshrined in the 1951 Refugee Convention and reinforced by human rights law, customary international law, and humanitarian law. It applies to refugees and asylum seekers, ensuring their protection from being returned to dangerous situations. While generally considered absolute, limited exceptions exist for national security or serious crimes. Despite its importance, challenges persist in its application and enforcement, including restrictive interpretations and variability among states.

This Chapter provides a comprehensive review of the principle of non-refoulement, covering its development, interpretation, and application in various international and national contexts. The review is structured around four main sub-chapters, each focusing on a different aspect of the principle.

The first sub-chapter explores the principle of non-refoulement under the Refugee Convention, including its historical development, interpretation, and exceptions. The second sub-chapter examines the principle's application in the case law of UN bodies, including the UNHCR and judicial/quasi-judicial bodies. The third sub-chapter discusses the principle's scope and application under the European Convention on Human Rights and the practice of the European Court of Human Rights. The final sub-chapter reviews the principle's application in other regional international courts, such as the Court of Justice of the European Union and the Inter-American Court of Human Rights, as well as national courts.

Overall, this Chapter provides a thorough analysis of the principle of non-refoulement, highlighting its importance in protecting individuals from persecution, torture, and serious harm. It also underscores the challenges and complexities that arise in its application and enforcement, including restrictive interpretations and variability among states.

KEYWORDS

non-refoulement, refugee, persecution, international protection, asylum

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1. The Principle of Non-Refoulement Under the Refugee Convention

1.1. Introduction

The principle of non-refoulement is a cornerstone of international refugee law, protecting individuals from being returned to countries where they would face persecution or harm. This principle has evolved over time, from its early roots in ancient practices of providing refuge to those fleeing persecution, to its codification in international law through the 1951 Refugee Convention.

The 1951 Refugee Convention and its 1967 Protocol establish the framework for non-refoulement, outlining the responsibilities of states towards refugees and asylum seekers. Article 33 of the Convention prohibits states from expelling or returning refugees to territories where their lives or freedom would be threatened, subject to certain exceptions related to national security and public order.

This Chapter explores the development of the non-refoulement principle, from its historical origins to its contemporary application in international law. It examines the scope and limitations of the principle, including the exceptions provided for in the 1951 Refugee Convention, and discusses the critical role of states in upholding the principle of non-refoulement in the protection of refugees and asylum seekers.

Outline of the Key terms:

- Asylum – A form of protection given by a State on its territory, based on the principle of non-refoulement and internationally or nationally recognised refugee rights, which is granted to a person who is unable to seek protection in their country of citizenship and / or residence, in particular for fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.¹
- Asylum seeker – In the global context, a person who seeks protection from persecution or serious harm in a country other than their own and awaits a decision on the application for refugee status under relevant international and national instruments. In the EU context, a third-country national or stateless person who has made an application for protection under the Geneva Refugee Convention and Protocol, in respect of which a final decision has not yet been taken.²
- Non-refoulement – In the global context, a core principle of international refugee and human rights law that prohibits States from returning individuals to a country where there is a real risk of being subjected to persecution, torture, inhuman or degrading treatment, or punishment, or any other human rights violation. In the international protection context, a core principle of international refugee law that prohibits States from returning refugees in any manner whatsoever to countries or territories in which their lives or freedom

1 European Migration Network, 2023, EMN Asylum and Migration Glossary, term: “Asylum”.

2 Ibid., term: “Asylum seeker”.

- may be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.³
- Refugee – In the global context, either a person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail themselves of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned before, is unable or, owing to such fear, unwilling to return to it. In the EU context, either a third-country national who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail themselves of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned before, is unable or, owing to such fear, unwilling to return to it, and to whom exclusion grounds do not apply.⁴
 - International protection – In the global context, the actions by the international community on the basis of international law, aimed at protecting the fundamental rights of a specific category of persons outside their countries of origin, who lack the national protection of their own countries.⁵

1.2. The Principle of Non-Refoulement Before the Adoption of the 1951 Refugee Convention

The principle of non-refoulement represents the foundation of both international refugee law and asylum, reflecting the international community's commitment to guaranteeing everyone's enjoyment of human rights, including the rights to life, liberty, and security of person, as well as freedom from torture and cruel, inhuman, or degrading treatment or punishment.⁶ It follows from the right to seek and enjoy asylum from persecution in other countries, as outlined in Article 14 of the Universal Declaration of Human Rights.⁷ Returning a refugee to persecution or danger jeopardises these and other rights.⁸

1.2.1. The Historical Overview of the Principle of Non-Refoulement

Since ancient times, individuals have fled their countries of origin, mainly for political or religious reasons, and host states, usually received the non-citizens coming to

3 Ibid., term: "Non-refoulment".

4 European Migration Network, 2023, EMN Asylum and Migration Glossary, term: "Refugee".

5 Ibid., term: "International Protection".

6 UNHCR, Note on the Principle of Non-Refoulement, 1997.

7 UNGA, UDHR.

8 Ibid.

their states for these reasons.⁹ Shaping the scope of legal protection for those who flee oppression to other countries commenced in the 19th century, alongside the need of accepting those who were in need of protection.¹⁰ While the protection of those non-citizens who are in need had been rooted in the legal nature of states since antiquity, the legal history of providing international protection was introduced during the League of Nations.¹¹ Throughout the League of Nations era (1921-1946), various institutions were established to undertake some or all responsibilities of the High Commissioner for Refugees: the Nansen International Office for Refugees (1931-1938), the Office of the High Commissioner for Refugees from Germany (1933-1938), the Office of the High Commissioner of the League of Nations for Refugees (1939-1946), and the Intergovernmental Committee on Refugees (1938-1947).¹² These organisations provided global protection to refugees based on international legal agreements typically concluded within the context of the League of Nations.

1.2.2. *The Principle of Non-Refoulement in the First Half of XX Century*

Initial attempts to establish the encompassing legal framework¹³ for the protection of refugees were made by adopting the Convention relating to the International Status of Refugees¹⁴ in 1933. It addressed various administrative actions, including the issuance of “Nansen certificates”, issues of refoulement, legal matters, labour conditions, industrial accidents, welfare and relief, education, fiscal policies, and exemptions from reciprocity, while also providing for the establishment of “committees for refugees”. The 1933 Convention represents a significant advancement in refugee protection and served as a foundational model for the 1951 Convention.¹⁵ The 1933 Convention was ratified by Belgium, Bulgaria, Czechoslovakia, Denmark, France, Great Britain and Northern Ireland, Italy, and Norway. Despite the low number of ratifications, it was through this Convention that the principle of non-refoulement gained recognition as a part of international treaty law.¹⁶

The Convention outlined the commitment¹⁷ of each contracting party to refraining from expelling or preventing the entry of refugees, such as expulsions or non-admittance at the border (refoulement), who had been granted regular residency within its territory,¹⁸ however, the Convention made an exception for the considerations of national security and public order.¹⁹

9 Goodwin-Gill and McAdam, 2007, p. 47.

10 See e.g., Parry and Fitzmaurice, 1965, pp. 53–4, 64–5.

11 Jaeger, 2001, pp. 843, 727.

12 Ibid., pp. 843, 729.

13 Goodwin-Gill and McAdam, 2007, p. 202; Zimmermann, Machts, and Dörschner, 2011, pp. 1399–1401.

14 Convention Relating to the International Status of Refugees, 1933.

15 Jaeger, 2001, pp. 843, 730.

16 Ibid.

17 Fitzmaurice, 2013, pp. 1, 2.

18 Convention on the International Status of Refugees, 1933, art. 3.

19 Ibid.

Furthermore, article 3 of the Convention pledged not to deny entry to refugees at the borders of their countries of origin. Meanwhile, the very same provision gave discretion to the Contracting States to implement any internal measures it considered necessary for refugees who, having been expelled for reasons of national security or public order, and who were unable to exit its territory due to the lack of required authorisations and visas, which they had not received despite their requests or the involvement of relevant institutions.²⁰

According to Gilbert, the 1933 Convention established the *non-refoulement principle* as a recognised element of international treaty law.²¹

As Goodwin-Gill and McAdam observe, the limited ratifications of instruments that featured ambiguous or complex provision significantly hindered the formal principle of non-refoulement. Nevertheless, the necessity for protective principles for refugees started to become apparent.²²

The subsequent significant stage in global protection was represented by the establishment of the International Refugee Organization (IRO) founded on 15th December 1946 through Resolution 62 (I) of the UN General Assembly. It functioned from 14th July 1947 until its dissolution on 28th February 1952, mainly focusing on the resettlement of refugees and internally displaced persons.

The far-reaching displacement²³ resulting from warfare and human rights violations during and after the Second World War encouraged the expansion of the non-refoulement principle to the protection of the right to asylum of those refugees who had fled their homes at great lengths. Soon after the formation of the United Nations, the General Assembly secured the right of refugees to remain in their host countries should they have “valid objections” to returning to their countries of origin. Resolution 8(1) accorded forcefully displaced non-citizens protection from their forceful return.²⁴ And after several years, the notion of non-refoulement was introduced in 1950 in the draft of the Convention on the International Status of Refugees.²⁵ While the first draft of the proposed provision enshrined the absolute notion²⁶ of the non-refoulement principle, the 1951 Conference of Plenipotentiaries²⁷ softened the absolute nature of the non-refoulement principle by incorporating exceptions relating to public order and national security.²⁸

Nevertheless, as Lauterpacht and Bethlehem noted, the consideration of the unique circumstances in article 33(2) did not grant states an unlimited degree of discretion in limiting the application of the non-refoulement rule, as the potential

20 Ibid.

21 Jaeger, 2001, pp. 843, 723.

22 Goodwin-Gill and McAdam, 2007, p. 203.

23 Grenville, 2005, p. 310.

24 UNGA, Res 8 (I), 1946.

25 UNESC Res 248 (IX)B, 1949; UNGA Res 429(V), 1950; UNGA, CSR, 1951, p. 137.

26 UN, Report of the Ad Hoc Committee on Refugees and Stateless Persons, 1950.

27 Goodwin-Gill and McAdam, 2007, p. 204.

28 UNGA, CSR, 1951, p. 137, art. 33:2.

individual impacts of refoulement should be evaluated.²⁹ Thus, it was understood that a deviation from the non-refoulement principle was acceptable only when there were “reasonable grounds” to believe that a very specific level of potential danger to national security or public order existed.³⁰ Ultimately, Article 33 of the 1951 Refugee Convention was adopted with established restrictions, along with Article 42(1), which disallowed any reservations to the rule.³¹

1.3. The Principle of Non-Refoulement in Article 33 of the 1951 Refugee Convention

The 1951 Refugee Convention was adopted on July 28th 1951, and became effective in 1954. As of January 2025, there are 146 state parties to the Convention. Article 1(A) of the Convention provides a definition of the term “refugee”, which includes several fundamental criteria: there must be a well-founded fear of persecution, which should be based on race, religion, nationality, membership of a particular social group or political opinion; the individual must be outside their country of origin; they must be unable or unwilling to seek the protection of that country; and they must also be unable or unwilling to return to it.

The 1951 Refugee Convention provides a non-refoulement provision in Article 33(1) establishing the prohibition of expelling or returning a refugee to the borders of those countries where their life or freedom may be jeopardised due to their race, religion, nationality, affiliation with a specific social group, or political beliefs.³²

1.3.1. “Contracting State” as the Main Guarantor of the Protection of the Non-Refoulement Rule

The Convention refers to the entities that are subject to the prohibition on refoulement as the “Contracting State”, which encompasses all States that are parties to the 1951 Convention. Furthermore, in accordance with Article I(1) of the 1967 Protocol, it also includes all States that are parties to the 1967 Protocol, regardless of their status concerning the 1951 Convention.³³

Generally States bear responsibility for actions concerning individuals who are subject to or within their jurisdiction.³⁴ Consequently, an individual’s status as being under a State’s jurisdiction is determined not by their physical presence within that State’s territory, but rather by whether they were under the effective control of, or impacted by representatives acting on behalf of that State in relation to the alleged conduct. Therefore the liability of the Contracting State for its actions, and those of

29 Lauterpacht and Bethlehem, 2003, pp. 168, 169.

30 Ibid.

31 CSR, art. 42:1.

32 Ibid., art. 33.

33 Lauterpacht and Bethlehem, 2003, p. 108.

34 See, e.g., ICCPR, art. 2:1; Optional Protocol to the ICCPR, 1966, art. 1 ; UNGA Res. 2200A (XXI); art. 1 of the ECHR; ACHR, art. 1:1.

individuals operating under its authority extends beyond the confines of its territory and ultimately depends on the ability to attribute the relevant actions to that State.³⁵

1.3.2. *Prohibited Conduct Under the Non-Refoulement Rule*

The phrase “in any manner whatsoever” in article 33(1) of the 1951 Refugee Convention clearly suggests that the primary intention was to forbid any action of removal or rejection that could endanger the individual involved, whether it be expulsion, deportation, return, rejection, or others.³⁶ The 1951 Convention and international law imply that States possess the unrestricted authority to deny entry to individuals who have a legitimate fear of persecution. Rather it indicates that when States are unwilling to provide asylum to those with a well-founded fear of persecution, they are obligated to pursue actions that do not constitute refoulement. Such actions may include transferring individuals to a safe third country or implementing alternative measures such as temporary protection or refuge.³⁷

1.3.3. *Protected Persons Under the Non-Refoulement Rule*

It is claimed that the principle of non-refoulement is applicable exclusively to those individuals who have been formally acknowledged as refugees. This claim is based on the understanding that refugee status is conferred under domestic law once it is established that an asylum seeker fulfils the requirements of a “refugee” as specified in Article 1A(2) of the 1951 Convention. Nevertheless, there are several compelling reasons to challenge the legitimacy of this position. Article 1A(2) of the 1951 Convention states that the term encompasses any individual who, due to a well-founded fear of persecution, meets the criteria outlined. Thus, within the context of the 1951 Convention and the 1967 Protocol, an individual who fulfils the requirements of Article 1A(2) qualifies as a refugee, irrespective of whether they have received formal recognition through a domestic legal procedure.³⁸

The Handbook on Procedures and Criteria for Determining Refugee Status, prepared by the *UNHCR*, provides an authoritative discussion on the matter, pointing out that a person qualify as a refugee under the 1951 Convention as soon as they meet the criteria outlined in the definition. The *UNHCR* explains that this qualification occurs prior to the formal determination of their refugee status.³⁹ Consequently, the non-refoulement rule applies not only to recognised refugees but to the asylum seekers as well, persons who are outside the country of their origin and are applying for the need of international protection.

A different approach would greatly compromise the effectiveness and utility of the protective measures established by the Convention, as it would allow States to

35 Lauterpacht and Bethlehem, 2003, p. 110.

36 Ibid., p. 112.

37 Ibid., p. 113.

38 *UNHCR*, Note on Non-refoulement, 1977, p. 116.

39 *UNHCR*, Handbook on Procedures and Criteria for Determining Refugee Status.

circumvent the Convention's provisions by denying formal refugee status to individuals who fulfil the criteria outlined in Article 1A:2.

1.3.4. Exceptions from the Non-Refoulement Rule

Article 33 enshrines the principle that no state is permitted to expel or return refugees to a location where their life or freedom may be jeopardised due to their race, religion, nationality, membership to a particular social group, or political beliefs. Nonetheless, it is crucial to acknowledge that there are specific situations in which states may attempt to exclude individuals from the protections afforded by the principle of non-refoulement.

The Refugee Convention itself provides for certain exceptions to this principle, under particular circumstances. These exceptions are predominantly grounded in considerations pertaining to national security and public order. The expulsion clause outlined in article 33(2) states that the prohibition against refoulement may be set aside under specific conditions. Under article 33(2), a refugee cannot assert the advantage of the regulation prohibiting refoulement if there are reasonable grounds to consider them as a threat to the security of the host country, or if they have been convicted by a final judgment of a particularly serious offense, thereby posing a risk to the community of that nation.

Therefore, the Convention acknowledges that individuals who have engaged in serious criminal activities or who present a threat to the security of the host country may be excluded from the protections afforded by the principle of non-refoulement. Article 33(2) includes two exceptions to the principle of non-refoulement: the public order exception and the national security exception. It is crucial to emphasise that despite the existence of exceptions to non-refoulement, the right to seek asylum and the imperative to safeguard individuals from persecution remain fundamental. These exceptions should be interpreted narrowly, and states are required to reconcile their legitimate security interests with their responsibilities to protect those in need.⁴⁰

1.3.4.1. National Security Exception

The notion of national security can be deduced from the principle that each State has the autonomy to freely determine its political, economic, social, and cultural systems. This is further supported by the State's *prima facie* exclusive authority in the *domaine reservée* and its entitlement to employ force in self-defence.⁴¹ Within this context, States are afforded a degree of discretion.⁴²

The exception, from a textual interpretation standpoint, is evidently intended for prospective application. This implies that it pertains to potential threats to a nation's security moving forward, rather than those that have occurred in the past. Although previous actions may be pertinent in evaluating whether there are justifiable reasons

40 Syahrin, 2017, pp. 168–178.

41 Goodwin-Gill and McAdam, 2007, pp. 235–236.

42 Zimmermann, Machts, and Dörschner, 2011, p. 1415.

to consider the refugee a future risk to the country, the primary focus remains on the potential danger to national security.⁴³

Article 33(2) of 1951 Refugee Convention does not specify the types of actions that would activate the national security exception. Additionally, it does not clarify what constitutes adequate evidence of a threat to the nation's security. This is a domain where States typically have a margin of appreciation. This margin of appreciation is, nonetheless, constrained in its extent. Firstly, there must be "reasonable grounds" to consider a refugee as a threat to the security of the host country. Consequently, the State in question cannot act in an arbitrary or capricious manner. The appropriate authorities are required to specifically evaluate the potential for future risk, and their determination must be substantiated by evidence.

This evaluation is supported by the provisions of Article 1F of the 1951 Refugee Convention which stipulates that the Convention does not apply in cases where there are substantial grounds for believing that the individual in question has, among other things, committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime, or actions that contravene the aims and principles of the United Nations. These actions are of an exceptionally serious nature. Given that the threshold for potential danger outlined in Article 33(2) is more stringent than that in Article 1F, it would be inconsistent with the overall framework of the Convention to interpret the term "danger" in Article 33(2) as encompassing anything less than a very serious threat.⁴⁴

In consideration of the constraints surrounding the application of the exceptions outlined in Article 33(2), a State intending to deport a refugee or asylum seeker to their country of origin must carefully evaluate the specific risks faced by the individual in question. Certain types of risk will categorically prevent refoulement, without exception. This is particularly relevant in situations where there is a threat of torture or other forms of cruel, inhuman, or degrading treatment or punishment. Consequently, prior to invoking an exception under Article 33(2), a State must undertake all reasonable measures to ensure that the individual would not be subjected to such dangers or any comparable threats as previously mentioned. Furthermore, the principle of proportionality must be upheld, assessing whether the risks posed to the refugee by expulsion or return outweigh potential threats to public security that would result from allowing them to remain.⁴⁵

1.3.4.2. Danger to the Community Exception

Article 33(2) of the 1951 Refugee Convention provides that the prohibition of refoulement cannot be claimed by a refugee who has been definitively convicted of a particularly serious crime poses a threat to the safety of the community in that country. Numerous elements that have been previously discussed regarding the interpretation

43 Lauterpacht and Bethlehem, 2003, p.135.

44 Lauterpacht and Bethlehem, 2003, p. 136; Grahl-Madsen, 1997, pp. 235–236.

45 Weis, 1990, p. 342.

of the national security exception will similarly apply, with necessary adjustments, to the interpretation and application of the “danger to the community” exception. Additional factors relevant to the national security exception that also pertain to the “danger to the community” exception include the necessity to evaluate individual circumstances, as well as the principles of proportionality and the balancing of the interests of the State against those of the individual involved.

Furthermore, while the assessment of danger to the community grants the State of refuge a margin of appreciation, this discretion is not without limits and is more narrowly defined than in the context of the national security exception.⁴⁶ Specifically, the implementation of the danger to the community exception mandates that the refugee must have been (a) convicted by a final judgment, and (b) of a particularly serious crime. In the absence of these criteria, the question of whether the individual poses a future risk to the community of the relevant country does not warrant consideration.⁴⁷

In conclusion, the principle of non-refoulement, enshrined in Article 33 of the 1951 Refugee Convention, is a fundamental pillar of international refugee law. Its evolution from ancient practices to its codification in modern international law underscores the international community’s commitment to protecting individuals from persecution and harm. The principle’s application extends to both recognised refugees and asylum seekers, emphasising the importance of safeguarding those fleeing violence, oppression, and human rights abuses.

The exceptions to non-refoulement, particularly those related to national security and danger to the community, are narrowly defined and subject to stringent criteria. States are required to carefully balance their security interests with their obligations to protect individuals from persecution and harm. The principle of proportionality and the need for evidence-based decision-making are crucial in this regard.

Ultimately, the principle of non-refoulement remains a cornerstone of international protection, and its effective implementation is essential in ensuring the safety and dignity of refugees and asylum seekers worldwide. As the global refugee crisis continues to evolve, it is imperative that states uphold their commitments to non-refoulement and work towards finding durable solutions for those in need of protection.

2. The Principle of Non-Refoulement in the Case Law of UN Bodies

2.1. Introduction

The principle of non-refoulement, a cornerstone of international refugee law, has been extensively interpreted and applied by various UN bodies, including the UN High Commissioner for Refugees (UNHCR), judicial and quasi-judicial bodies, and

⁴⁶ See also, Zimmermann, Machts, and Dörschner, 2011, pp. 1421–1422.

⁴⁷ Lauterpacht and Bethlehem, 2003, p. 138.

other international organisations. This chapter examines the practice of these bodies in relation to the principle of non-refoulement, highlighting its scope, limitations, and application in different contexts.

UN judicial and quasi-judicial bodies, such as the Human Rights Committee and the Committee against Torture, have also contributed to the development of the principle of non-refoulement. These bodies have confirmed that the principle is applicable not only to refugees but also to individuals who may face serious human rights abuses, including torture and cruel, inhuman, or degrading treatment.

This chapter also explores the application of the principle of non-refoulement in situations of mass influx, where the scale and suddenness of arrivals can pose significant challenges to states. The UNHCR and other international organisations have emphasised that the principle of non-refoulement remains applicable in such situations, and that states have a responsibility to protect individuals from return to danger, regardless of the circumstances.

Finally, this chapter discusses the formation of customary international law on non-refoulement, highlighting the widespread acceptance and practice of the principle among states. This chapter concludes that the principle of non-refoulement has become a fundamental principle of international law, applicable to all states, regardless of their treaty obligations.

2.2. The Practice of the UNHCR Regarding the Interpretation of the Non-Refoulement Rule

The discussion surrounding the extent of states' obligations concerning non-refoulement persisted shortly after the 1951 Refugee Convention was adopted. This debate primarily focused on whether this principle solely safeguarded refugees who were already within the territory of the receiving state or if it also extended to those at the borders. There was uncertainty regarding whether it implied a "no duty to admit" policy for states or conversely, suggested an obligation to provide asylum – an interpretation that was largely unwelcomed by most states.⁴⁸ The UNHCR, in its Advisory Opinion, clearly stated that the principle of non-refoulement is applicable to all forms of forcible removal. This includes deportation, expulsion, extradition, informal transfers, renditions, and non-admission at the border.⁴⁹ The UNHCR affirmed⁵⁰ that individuals who have not had their status officially declared are also protected from refoulement under Article 33(1).⁵¹ For asylum-seekers, the non-refoulement principle is especially important. Since these individuals might be refugees,

48 UN, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting, 1951; Weis, 1953, pp. 478, 482, 487.

49 UNHCR, Advisory Opinion, 2007, p. 7.

50 Ibid., pp. 2–3.

51 E.g., UNHCR Conclusion No. 6, 1977, para. (c).

it is a well-established principle of international refugee law that they should not be sent back or expelled until their status has been decided.⁵²

The UNHCR stated⁵³ that the ban on refoulement to a risk of persecution under international refugee law applies to all types of forced removal, as shown by the language of Article 33(1) of the 1951 Convention, which discusses expulsion or return (refoulement) “in any manner whatsoever”. It is applicable not only regarding return to the country of origin or for a stateless individual, the country of previous habitual residence, but also to any other location where a person has cause to fear threats to his or her life or freedom related to one or more of the grounds outlined in the 1951 Convention, or from where he or she could be sent to such a threat.⁵⁴ According to the Advisory Opinion,⁵⁵ the 1951 Convention article 33(1) principle of non-refoulement does not by itself grant a person the right to asylum in a specific state. Key principles like non-refoulement (article 33) and non-penalisation of entry (article 31) are established by the 1951 Convention and the 1967 Protocol, which also specify who is eligible for international protection. They do not, however, specify how to determine someone’s status as a refugee. States must choose a course of action that does not lead to their direct or indirect removal to a location where their lives or freedom would be in danger because of their race, religion, nationality, membership in a specific social group, or political beliefs when they are unwilling to grant asylum to individuals seeking international protection on their soil.⁵⁶ This could entail, for instance, relocation to a secure third nation or, in some cases, another remedy like temporary safety or sanctuary.

With regards to the limitations to the principle of non-refoulement outlined in article 33(2), the Advisory Opinion concluded that the enforcement of this provision necessitates a personalised assessment by the country where the refugee is located to determine whether he or she falls under one of the two categories. The UNHCR emphasises that the ban on refoulement to a nation where the individual in question would confront a genuine risk of irreversible harm, such as breaches of the right to life or the right to be protected from torture or cruel, inhuman, or degrading treatment or punishment, applies to all individuals who might be located within a State’s territory or under its jurisdiction, including asylum seekers and refugees, and is relevant to the country from which removal is to take place or any other nation to which the individual may later be sent. It is non-derogable and is applicable in every situation, including in the context of efforts to fight terrorism, and in times of armed conflict.⁵⁷ As a result, States are required to ensure, before executing any removal action that the individual they plan to deport from their territory or jurisdiction would not face a

52 See: UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, 1979, 1992, para. 28.

53 UNHCR, Advisory Opinion, 2007, pp. 2–3.

54 See: UNHCR, Note on Non-Refoulement, 1977, para. 4; See also Weis, 1995, p. 341.

55 UNHCR, Advisory Opinion, 2007, pp. 2–3.

56 See: Lauterpacht and Bethlehem, 2003, para. 76.

57 UNHCR, Advisory Opinion, 2007, p. 10.

threat of serious human rights violations like those indicated earlier. If there is such a risk, the State is prohibited from forcibly deporting the individual in question.⁵⁸

In UNHCR's opinion, a thorough examination of the *travaux préparatoires* affirms the primary humanitarian objective and aim of the Convention and offers substantial evidence that the non-refoulement clause in article 33(1) was designed to prevent any actions or inactions by a Contracting State that would result in sending a refugee back to regions where he or she may encounter persecution or threats to life or freedom.⁵⁹ Consequently, the UNHCR asserts that the critical factor is not whether those individuals are physically present within the State's borders, but rather if they fall under the effective control and jurisdiction of that State.⁶⁰

Similarly, the UNHCR Executive Committee (the ExCom) has repeatedly confirmed the "fundamental significance" of the non-refoulement principle.⁶¹ With the unprecedented rise in forced displacement, international instruments,⁶² UNHCR Executive Committee conclusions,⁶³ state practices,⁶⁴ and scholarly opinions⁶⁵ over time have clarified⁶⁶ article 33 of the Refugee Convention, now covering both non-return and non-rejection,⁶⁷ regardless of where an asylum-seeker presents themselves for entry, whether within a state or at its border.⁶⁸

Since 1977 the UNHCR ExCom has addressed the non-refoulement principle numerous times.⁶⁹ The Committee has conveyed significant concern that, although the principle of non-refoulement is largely adhered to in practice, this principle has been ignored in certain instances. Therefore, the ExCom has repeatedly reaffirmed the vital significance of adhering to the principle of non-refoulement – both at the border and within the territory of a State for individuals who may face persecution if returned to their country of origin, regardless of whether they have been officially acknowledged as refugees.⁷⁰ The Committee has emphasised that any action that forces a refugee to return or sends him to a nation where he has valid grounds to

58 Ibid., p. 11.

59 UNHCR, Advisory Opinion, 2007, pp. 12–14.

60 Ibid., p. 19.

61 UNHCR ExCom Conclusions: No. 68, 1992, para. (f); No. 71, 1993, para. (g); No. 74, 1994, para. (g); No. 79, 1996, para. (j); No. 81, 1997, para. (i); No. 82, 1997, para. (i).

62 OAU Convention, art. II(3); CoE Committee of Ministers Resolution 67, 1967; Declaration on Territorial Asylum, art. 3(1); AALCO, "1966 Bangkok Principles on the Status and Treatment of Refugees" 2001, art. III; Council Directive 2004/83/EC, 2004, art. 21; Council Directive 2005/85/EC, 2006, art. 3(1); Council Directive 2011/95/EU, 2011, art. 21.

63 UNHCR ExCom Conclusions: No. 6, 1977, para. (c); No. 22, 1981, para. II(A)(2); No. 81, 1997, para. (h); No. 82, 1997, para. d(iii).

64 Collins, 1971, pp. 67–77.

65 Hurwitz, 2009, p. 176; Goodwin-Gill and McAdam, 2007, p. 207; Hailbronner, 1988, pp. 123, 128; Grahl-Madsen, 1972, p. 94.

66 Cf. VCLT, 1969, arts. 31:1–2.

67 Goodwin-Gill and McAdam, 2007, p. 208.

68 *R. v Immigration Office at Prague Airport*, 2005, para. 26 (Lord Bingham).

69 See for example, UNHCR ExCom Conclusions: No. 68, 1992, para. (f); No. 71, 1993, para. (g); No. 74, 1994, para. (g); No. 79, 1996, para. (j); No. 81, 1997, para. (i); No. 82, 1997, para. (i).

70 UNHCR ExCom Conclusions: No. 6, 1977; No. 11, 1978; No. 14, 1979; No. 16, 1980.

fear persecution represents a serious breach of the acknowledged principle of non-refoulement.⁷¹

In its Conclusion 22 the ExCom clarified that in instances of significant influx, asylum-seekers ought to be accepted into the State where they initially seek asylum, and if that State is not capable of providing them with durable admission, it should still allow them entry at least temporarily and offer them protection in line with the principles established below. They should be accepted without any bias related to race, religion, political views, nationality, country of origin, or physical disability.⁷² The Committee has emphasised that the principle of non-refoulement ensures all asylum-seekers access to fair and effective procedures for evaluating their protection needs, as per the 1951 Convention and 1967 Protocol. It prohibits border rejections without these processes, mandates necessary support provision, and seeks solutions that respect human dignity. The ExCom has reiterated that the principle of non-refoulement also forbids returning refugees to areas where their safety is threatened due to race, religion, nationality, social group, or political beliefs, protecting those vulnerable to torture risks.⁷³

The Committee has vigorously condemned the ongoing occurrence and frequently tragic humanitarian outcomes of refoulement in every form, including through summary removals, sometimes *en masse*, and emphasises the necessity, in this context, to allow refugees into the territory of States, which encompasses no denial at borders without access to just and effective processes for assessing their status and protection requirements.⁷⁴ The Committee has additionally emphasised that applicable international treaty obligations that prohibit refoulement serve as significant protective mechanisms to meet the protection requirements of individuals who are beyond their country of origin and may be of interest to UNHCR but may not meet the refugee criteria outlined in the 1951 Convention and/or its 1967 Protocol.⁷⁵

2.3. Non-Refoulement in the Practice of the UN Judicial and Quasi-Judicial Bodies

The acceptance of agreements beyond international refugee law and the evolution of international legal principles regarding international protection have demonstrated the broader application of the non-refoulement principle beyond article 33 of the 1951 Refugee Convention.⁷⁶ The duty to refrain from returning a person to severe danger has been implicitly or explicitly outlined⁷⁷ in the case law of international human rights law, functioning as a *de facto* right to asylum.⁷⁸

71 UNHCR ExCom Conclusion No. 14, 1979.

72 UNHCR ExCom Conclusion No. 22, 1981.

73 UNHCR ExCom Conclusion No. 81, 1997.

74 UNHCR ExCom Conclusion No. 85, 1998.

75 UNHCR ExCom Conclusion No. 103, 2005.

76 Goodwin-Gill and McAdam, 2007, pp. 285, 310.

77 Ibid., pp. 285-286.

78 Suntinger, 1995, pp. 203, 224.

International human rights treaties established responsibilities for states to refrain from extraditing individuals to another nation where there is a risk of severe human rights abuses, including arbitrary loss of life, torture, or other cruel, inhuman, or degrading treatment.⁷⁹ For instance, Articles 6 and 7 of the ICCPR forbid the arbitrary taking of life, torture, and cruel, inhumane, or degrading treatment or punishment. The UN Human Rights Committee in its General Comments No 20 and No 31 has reaffirmed the non-derogable character⁸⁰ of Article 7, additionally confirming that the transfer of an individual to a location where he or she would confront a genuine risk (an unavoidable and predictable outcome) would result in a breach of the responsibilities placed on states under the ICCPR.⁸¹

The General Comment emphasises the established jurisprudence of the Human Rights Committee, which asserts that States may be held liable for violations of rights under the ICCPR committed by their agents within the territory of another State, regardless of whether such actions occur with the consent of that State's Government or against its will.⁸² Furthermore, it notes that under certain conditions, individuals may be considered subject to the jurisdiction of a State Party to the ICCPR even when they are located outside that State's territory.⁸³ The Human Rights Committee, in the cases of *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*, concluded that it would be utterly unacceptable to interpret the obligations under article 2 of the Covenant in a manner that would allow a State party to commit violations of the Covenant within the territory of another State, violations that it would be unable to carry out within its own borders.⁸⁴ The Human Rights Committee in *Pereira Montero v. Uruguay* provided the same reasoning.⁸⁵

Similarly, the Committee against Torture has confirmed that the non-refoulement obligation found in Article 3 of the Convention against Torture (the CAT) is relevant in any territory under a State party's jurisdiction. The CAT reaffirmed its earlier position, stating that this perspective includes all regions under the *de facto* effective control of the State party, irrespective of whether such control is exercised by military or civil authorities. Furthermore, it specified that these provisions are applicable to, and entirely accessible by, all individuals who are under the effective control of its authorities, regardless of their location.

2.4. The Existence and Scope of the Non-Refoulement Principle in Mass Influx Situations

The UN General Assembly and the UNHCR Executive Committee have reiterated several times that the principle of non-refoulement is applicable to asylum seekers as

79 Goodwin-Gill and McAdam, 2007, pp. 302, 308, 310–11, 316.

80 ICCPR, art. 4:2; UNHRC, CCPR General Comment No. 20, p. 3.

81 *GT v. Australia*, 1997, para. 8.1.

82 *Lopez Burgos v. Uruguay*, 1981, para. 12.3; *Celiberti de Casariego v. Uruguay*, 1981, para. 10.3.

83 See, e.g., Concluding Observations of the HRC, United States of America, 1995, para. 284.

84 *Lopez Burgos v. Uruguay*, 1981, para. 12.3; *Celiberti de Casariego v. Uruguay*, 1981, para. 10.3.

85 *Pereira Montero v. Uruguay*, 1983, para. 5.

well, and thus, the official acknowledgment of an individual as a refugee is in no way a prerequisite for enforcing the non-refoulement rule against him or her;⁸⁶ neither is it significant how an asylum seeker arrives in the territory of the state.⁸⁷

The existence and extent of the non-refoulement obligation in situations of mass influx has also been the subject of considerable debate, as the term mass influx is not directly stated in the 1951 Refugee Convention, the 1967 Protocol, or the jurisprudence of international refugee law.⁸⁸ Lauterpacht and Bethlehem contend that the principle of non-refoulement is relevant, irrespective of the scale and suddenness of the arrival of asylum-seekers, as the language of article 33(1) does not provide justification for excluding the principle in cases of mass influx.⁸⁹ This viewpoint is strongly endorsed by various international instruments, such as the OAU Convention, Cartagena Declaration, EU Temporary Protection Directive, and UNHCR conclusions.⁹⁰ There exists a widely accepted belief that the potential for a significant surge in refugees and asylum seekers reveals the constraints of the state's duty to refrain from returning or denying entry to refugees,⁹¹ considering the resources available to the receiving states. Durieux and McAdam note that a scenario involving a mass influx may result in a *de facto* suspension of all but the most immediate and compelling protections provided by the Convention, taking into account the resources accessible to the host states.⁹²

As a result, the continually rising displacement issues have ultimately affected the extent of refugee protection and altered both the substance and breadth of the non-refoulement principle, while amplifying worries about the effectiveness and implementation of the refugee protection framework.⁹³ Additionally, as Edwards correctly anticipated in 2005, it is at this point that human rights law has intervened to address the “grey areas”.⁹⁴

2.5. Forming a Customary Rule of Non-Refoulement

The establishment of non-refoulement as a customary obligation commands an undeniable importance in terms of its universal applicability to all nations, even those not constrained by treaty law. The principles of customary international law

86 UNHCR ExCom Conclusions: No. 6, 1977, para. (c); No. 79, 1996, para. (j); No. 81, 1997, para. (i); No. 82, 1997, paras. (d), (i); UNGA Res 52/103, 1998, para. (5).

87 Goodwin-Gill and McAdam, 2007, p. 233.

88 Gibney and Hansen, 2005, pp. 393, 394.

89 Lauterpacht and Bethlehem, 2003, p. 104.

90 OAU Convention, art. II(5); AALCO, Bangkok Principles, art. 3.4; Cartagena Declaration on Refugees, 1984, art. III(8); Council Directive 2001/55/EC, 2001; UNHCR ExCom Conclusions: No. 15, 1979, para. (f); No. 19, 1980, paras. (a), (b), (i); No. 22, 1981, paras. II(A)(1), II(A)(2); No. 4, 1994, para. (r); UNHCR, Protection of Refugees in Mass influx Situations: Overall Protection Framework, 2001, paras. (6), (13).

91 Goodwin-Gill and McAdam, 2007, pp. 243, 229–31.

92 Durieux and McAdam, 2004, pp. 4, 9, 13.

93 Goodwin-Gill, 2001, pp. 1–2.

94 Edwards, 2005, pp. 293, 295, see also Edwards, 2009, pp. 763, 792.

are particularly vital for the human rights protection framework in scenarios where treaty terms may not obligate several states, or when there is an immediate necessity for interpreting, enforcing, or altering pertinent treaty terms.⁹⁵

To be considered as an international customary rule, a consistent state practice must be accompanied by the conviction that following the rule is mandated by law.⁹⁶ At the UN Conference on the Status of Stateless Persons, the non-refoulement rule was declared as a general principle of international law, roughly three years after one of its initial conventional provisions in the 1951 Refugee Convention.⁹⁷ Although scholars have further evaluated this declaration as premature,⁹⁸ the principle of non-refoulement has progressed significantly over the past 60 years in both international practice and treaty law, alongside the acknowledgment of the right to asylum.⁹⁹ With 146 states now obligated by the conventional duty of non-refoulement, the norm-creating nature of this principle has been firmly established by international conventions,¹⁰⁰ the UNHCR Executive Committee Conclusions,¹⁰¹ the UN General Assembly Resolutions,¹⁰² and others.

States have international legal personality, and their actions can show the customary rule of non-refoulement. This rule involves the behaviour of their government branches and actions by private individuals and groups acting for them.¹⁰³ International organisations, NGOs, and individuals also impact this customary rule.¹⁰⁴ Evidence for the non-refoulement rule can come from various actions, including diplomatic communications, government branches' activities, treaties, and UN General Assembly resolutions.¹⁰⁵

The non-refoulement rule can be seen as a general practice if it meets two main requirements. Firstly it must be widely accepted by a sufficient number of states,

95 Byers, 2004, pp. 166–180.

96 ICJ Statute, 1945, art. 38:1 (b); *Asylum case* 1950; see also, *North Sea Continental Shelf cases*, 1969, para. 37; *Military and Paramilitary Activities in and against Nicaragua*, 1986, para. 98; *SS “Lotus”*, 1927.

97 Convention relating to the Status of Stateless Persons, 1960, see also, Convention Relating to the International Status of Refugees, 1933, art. 3.

98 Hurwitz, 2009, p. 204; Goodwin-Gill and McAdam, 2007, p. 345.

99 See: ECHR; ICCPR; UNCAT.; Hurwitz, 2009, p. 204; Goodwin-Gill and McAdam, 2007, p. 345; Zimmermann, Machts, Dörschner, 2011, p. 1411.

100 OAU Convention, art. II(3); Declaration on Territorial Asylum, art. 3(1); CoE Committee of Ministers Resolution 67, 1967; Cartagena Declaration on Refugees; AALCO, Bangkok Principles, arts. III.3, III.5; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 1949, art. 45.

101 UNHCR ExCom Conclusions: No. 6, 1977, para. (a); No. 17, 1980, para. (d); No. 68, 1992, para. (f); No. 71, 1993, para. (g); No. 74, 1994, para. (g); No. 79, 1996, para. (j); No. 81, 1997, para. (i); No. 99, 2004, para. (l); No. 103, 2005, para. (m).

102 Including: UNGA res 32/67, 1977, para. 5(c); UNGA res 33/26, 1978, para. 6; UNGA res 60/120, 2005, para. 3; UNGA res 60/129, 2006, para. 3; UNGA res 61/137, 2007, para. 3; UNGA res 62/124, 2008, para. 4.

103 ILC, 2018, p. 130; Mendelson, 1999, p. 198.

104 ILC, 2018, p. 130; Mendelson, 1999, p. 203.

105 ILC, 2018, p. 133.

though not necessarily all, who have had the chance to adopt it. Secondly there needs to be a consistent pattern in how states behave regarding this rule.¹⁰⁶ Similarly, based on the conclusions of the ICJ in the *Fisheries case* and the ILC draft Conclusions, the uniformity, or recognisable pattern of conduct of the states, necessitates significant rather than total consistency.¹⁰⁷ While total uniformity is not needed, having no cases of states claiming refoulement when expelling refugees suggests strong support for the non-refoulement rule.

State reports to the Human Rights Committee and the Committee against Torture show that expulsions, deportations, refusals of admittance, or removals are not usually seen as cases of refoulement.¹⁰⁸ This raises an important question about whether such actions affect the consistency of the customary rule. The ICJ in the *Asylum case* explained that absolute uniformity is not required to establish an international customary rule;¹⁰⁹ and it should align with consistent practice among states. This was further supported in the *North Sea Continental Shelf* and *Nicaragua cases*,¹¹⁰ where the ICJ stated that while states' practices should generally align with the rule, variations do not create a new rule but indicate the breach of an existing one, as states often justify their actions by citing exceptions within the rule.

To support the existence of the non-refoulement rule, both *opinio juris* and state practice must clearly be shown. While there exists no formal judicial declaration, the principle of non-refoulement has been widely accepted by UN member states as customary international law.¹¹¹ This acceptance is highlighted in key documents like the Global Consultations on International Protection,¹¹² the 2016 New York Declaration for Refugees and Migrants,¹¹³ and the 2018 Global Compact on Refugees.¹¹⁴

The International Law Commission (ILC) states that *opinio juris* can be shown through state actions such as public statements, positions at international events, actual conduct, treaty practices, legal opinions, diplomatic actions, and court decisions.¹¹⁵

Accession to treaties by states can also be regarded as an indication of *opinio juris*, as states act this way because they believe it is the correct course of action. The norm-generating nature of the principle of non-refoulement has also consistently been highlighted by UN General Assembly resolutions and the UNHCR. For instance, the ICJ has deduced the presence of *opinio juris* from the UN General Assembly

106 ILC, 2018, pp. 135–136.

107 *Fisheries case*, para. 131; Delimitation of the Maritime Boundary in the Gulf of Maine Area, paras. 81, 116, 131, 138.

108 Goodwin-Gill and McAdam, 2007, pp. 351–352.

109 *Asylum case*, paras. 276–277.

110 *North Sea Continental Shelf cases*, para. 43; *Nicaragua*, para. 186.

111 *Tehran case*, para. 88; See also Goodwin-Gill and McAdam, 2007, p. 346.

112 UNHCR, Declaration of States Parties to the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees, 2002, para. 4.

113 New York Declaration 2016, paras. 24, 58, 67.

114 Global Compact on Refugees, 2018, paras. 5, 87.

115 ILC, 2018, para. 140.

resolutions, its own or other tribunals' practices,¹¹⁶ as well as significant codification conventions¹¹⁷ and the efforts of the ILC.¹¹⁸ Similarly, states avoid expressing formal or informal opposition to the principle, while consistently recognising its normative nature regardless of being a state party to the 1951 Refugee Convention or 1967 Protocol.¹¹⁹

As a general principle, the creation of a customary non-refoulement rule ensures its clear application and consistent understanding across all nations, regardless of their commitment to treaty obligations.¹²⁰ Thus, the unrestricted enforcement of the non-refoulement rule should serve as a significant guarantee for upholding and implementing the right to asylum. Nevertheless, as previously demonstrated, the extent and details of the non-refoulement rule differ between customary and treaty law, resulting in a complex interpretation and application, particularly concerning refugee issues.

In conclusion, the principle of non-refoulement has been extensively interpreted and applied by various UN bodies, including the UNHCR, judicial and quasi-judicial bodies, and other international organisations. These bodies have consistently emphasised the importance of non-refoulement in protecting individuals from a return to danger, regardless of their nationality, location, or circumstances.

The practice of UN judicial and quasi-judicial bodies has further solidified the principle of non-refoulement, with the Human Rights Committee and the Committee against Torture confirming its applicability beyond the 1951 Refugee Convention. The principle of non-refoulement has also been recognised as a customary rule of international law, with its widespread acceptance and practice among states. This recognition underscores the importance of upholding the principle in all circumstances, including situations of mass influx and in the context of international human rights law.

Ultimately, the principle of non-refoulement remains a cornerstone of international protection, and its effective implementation is essential for ensuring the safety and dignity of refugees and asylum seekers worldwide. As the global refugee crisis continues to evolve, it is imperative that states and international organisations uphold their commitments to non-refoulement and work towards finding durable solutions for those in need of protection.

116 *North Sea Continental Shelf cases*, paras. 3, 44; *Gulf of Maine Area*, paras. 246, 293–294; *Nicaragua*, paras. 14, 108–109; *Nuclear Weapons*, paras. 226, 254–255; *Pulp Mills on the River Uruguay*, paras. 203–206.

117 See e.g. *North Sea Continental Shelf cases*, paras. 3, 28–32; *The Land and Maritime Boundary between Cameroon and Nigeria*, paras. 303, 429–30.

118 See e.g. *Gabcíkovo-Nagymaros case*, paras. 38–42, 46.

119 UNHCR, 1994, para. 5; see also, Goodwin-Gill and McAdam, 2007, p. 347.

120 Hurwitz, 2009, p. 207.

3. The Principle of Non-Refoulement in The Case Law of the ECtHR

3.1. Introduction

The principle of non-refoulement is a cornerstone of international human rights law, protecting individuals from being returned to countries where they may face serious harm or persecution. The European Court of Human Rights (ECtHR) has played a significant role in shaping this principle, particularly through its interpretation of Article 3 of the European Convention on Human Rights (ECHR). This Chapter explores the ECtHR's case law on non-refoulement, examining the scope of this principle, its application in various contexts, and the Court's approach to assessing the risk of ill-treatment.

3.2. The Scope of Non-Refoulement Under the ECHR

The principle of non-refoulement has become a well-established tenet of international law, with the 1951 Geneva Convention serving as the most comprehensive international instrument regarding its articulation. In relation to the obligation of non-refoulement, the European Convention on Human Rights (ECHR) acts as a supplementary instrument. The rights and responsibilities in question have arisen from the extensive jurisprudence of the European Court of Human Rights (ECtHR). The Court acknowledged that states have an indisputable authority to regulate the entry of foreign nationals into their territory, while it emphasised the importance for states to implement this right in alignment with the provisions of the ECHR.¹²¹

Under the ECHR, it is prohibited for states to deport individuals if such actions would infringe upon their rights as outlined in article 2 (right to life) and article 3 (prohibition of torture, inhuman or degrading treatment or punishment).¹²² Article 15 of the ECHR further emphasises that these rights are inviolable and cannot be suspended, even during emergencies. Additionally in certain exceptional circumstances, states are also barred from deporting individuals who would face a severe violation of their rights under article 5 (right to liberty) or article 6 (right to a fair trial) in the receiving country.¹²³

The ECHR stipulates in article 13 that states are obligated to conduct an independent and thorough examination of claims that present substantial grounds for fearing a genuine risk of torture, inhuman, or degrading treatment or punishment upon repatriation. If an individual possesses an “arguable complaint” indicating that their removal could subject them to treatment that violates articles 2 or 3 of the ECHR, they are entitled to an effective remedy that halts their removal, thereby ensuring an automatic suspensive effect. The ECHR collectively prevents the return of any

121 *Amuur v. France*, para. 41.

122 *Saadi v. Italy*.

123 *Harkins v. the United Kingdom*, paras. 62-65.

individual who would encounter a genuine risk of such treatment.¹²⁴ Furthermore, the principle of non-refoulement is relevant in situations involving non-admission and rejection at borders.¹²⁵

The above mentioned obligations extend to situations where an asylum seeker is returned to a transit country that may be designated as a “safe third country”, yet fails to provide adequate protections against refoulement. The state conducting the expulsion cannot simply presume that the individual will receive treatment in accordance with the ECHR standards in the receiving country. It is imperative for authorities to conduct a thorough and current evaluation, particularly regarding the accessibility and effectiveness of the asylum system in the receiving country and the practical safeguards in place.¹²⁶

Article 8 of the ECHR safeguards the right to private and family life, and its application is relative, necessitating a balance between the rights it protects and other values upheld by the state’s legal framework, such as national security and public order. The obligation of non-refoulement is significantly underscored by Protocols 4 and 7 of the Convention. Additional Protocol No. 4 explicitly prohibits the collective expulsion of aliens in its Article 4. Article 1 of Additional Protocol No. 7 addresses the rights of aliens who legally reside within a state’s territory in the context of expulsion measures. This Article guarantees that an alien cannot be expelled unless such action is executed in accordance with the law.

For an expulsion measure concerning a legally resident alien to be valid, it must adhere to legal standards. Consequently the alien must be afforded the opportunity to exercise their rights under article 6 of the ECHR, which pertains to the right to a fair trial. Nonetheless, the protections provided by this article are not absolute; the second paragraph stipulates that an alien may be expelled prior to the exercise of these rights if such action is justified by national security concerns or the public order interests of the expelling state.¹²⁷

3.3. The Scope of Non-Refoulement Under the Practice of the ECtHR on Article 3

Article 3 of the ECHR imposes an absolute prohibition of torture or inhuman or degrading treatment or punishment. Article 3 ECHR is unequivocal, and states cannot invoke any justification for breaching the principle of non-refoulement.¹²⁸ While this article does not explicitly mention the principle of non-refoulement, the ECtHR has

124 *M.A. v. France*; *Salah Sheekh v. the Netherlands*, para. 135; *Soering v. the United Kingdom*; *Vilvarajah and Others v. the United Kingdom*.

125 *N.D. and N.T. v. Spain*, para. 178.

126 *Ilias and Ahmed v. Hungary*, paras. 124–141.

127 *Furramani and Bushati*, 2022, p. 114.

128 *Soering v. UK*, para. 88; *Chahal v UK*, para. 78; *Ahmed v Austria*, para. 40; *Weissbrodt and Hörtreiter*, 1999, p. 36; *Goodwin-Gill and McAdam*, 2007, p. 311.

consistently interpreted it as being inherently included since the landmark case of *Soering v UK*.¹²⁹

The case of *Soering v United Kingdom* represents a significant ruling by the ECtHR. This judgment determined that the extradition of a German citizen to the United States to face allegations of capital murder, along with the associated risk of experiencing the death row phenomenon, constituted a violation of Article 3 of the ECHR, which protects individuals from inhumane and degrading treatment. Beyond the legal precedent set by this ruling, it also led to a commitment from both the United States and the State of Virginia to refrain from pursuing the death penalty against the German national implicated in the case, who was ultimately extradited to the United States.

The Court has addressed the issue of non-refoulement in its subsequent practice, and this provision is now firmly recognised as one of the most robust protective mechanisms within the Council of Europe.¹³⁰

Materially, it safeguards rights that are not explicitly enumerated within the Convention, while territorially it ensures the protection of individual rights against infringements by states that are not signatories. The complainant is not required to demonstrate an actual violation; rather, it suffices to establish that there are substantial grounds to believe that a real risk of such a violation exists.¹³¹

As the Court states in *Chahal v the United Kingdom*,¹³² The protection afforded by Article 3 is characterised by its absolute and obligatory nature, indicating that no exceptions are permissible, even if an individual poses a threat to the internal security of the state.

Chahal v United Kingdom is a 1996 ruling by the ECtHR that invoked Article 3 of the ECHR. This article prohibits the deportation of Sikh separatist Mr. Chahal to India due to the potential risk of violations of Article 3, specifically concerning torture or inhuman or degrading treatment or punishment. The judgment built upon the significant precedent set by *Soering v United Kingdom*. The Court underscored the essential nature of Article 3, asserting that the prohibition is stated in ‘absolute terms... irrespective of the victim’s conduct’.

It is evident that the safeguards provided by the ECHR regarding the principle of non-refoulement are broader than those outlined in the Geneva Convention. The latter confines its application to the notion of persecution, thereby linking it specifically to asylum seekers, whereas the ECHR applies this principle to any individual who may face treatment as described in Article 3.¹³³

A review of the ECtHR’s jurisprudence reveals that two key factors are pertinent in assessing the scope of non-refoulement under Article 3 ECHR: i) the intensity of

129 *Soering v. UK*, paras. 87, 88; *Cruz Varas v Sweden*, para. 99, *Vilvarajah and Others v UK*, para. 108; Weissbrodt and Hörtreiter, 1999, pp. 1–73, 27f.

130 Weissbrodt and Hörtreiter, 1999, 27f.

131 Julien-Lafferrière, 2006, p. 148.

132 *Chahal v. the United Kingdom*, para. 139.

133 Furrmani and Bushati, 2022, p. 113.

suffering associated with the treatment imposed, and ii) the genuine risk that such treatment would occur if the individual were to be deported.¹³⁴

3.3.1. *Ratione Personae Scope of Article 3 of the ECHR*

Article 1 of the ECHR obliges the member states to ensure to *everyone* within their jurisdiction the protection of the rights and freedoms provided for by this Convention. Therefore, it makes no distinction between nationals and non-nationals, unless provisions in the treaty explicitly provide for the lawfulness of such distinctions.

The principle of non-refoulement applies universally to all individuals within a state's jurisdiction. It imposes a significant limitation on the notion that the expulsion of an individual completely and permanently terminates the state's responsibility towards that person.¹³⁵ This is due to the obligation of states to ensure that individuals are not subjected to treatment that contravenes human rights law, regardless of whether such treatment occurs within the territory of a state party to the treaty or beyond its jurisdiction. Thus, when a state extradites or expels an individual to another country, this action is considered as part of a continuum of events that may lead to the risk of ill-treatment.¹³⁶

While the ECtHR has affirmed a state's right to control foreign entry and exit under international law, states party to the ECHR must however limit these rights in accordance with their obligations under the Convention.¹³⁷

3.3.2. *Threshold of Evidentiary Requirements for the Application of the Principle of Non-Refoulement Under Article 3 of the ECHR*

3.3.2.1. Minimum Level of Severity over a Mere Possibility of Ill Treatment

The threshold for inhuman treatment is higher than that for degrading treatment, yet in both instances; the severity of suffering remains the most significant consideration.¹³⁸ The Court noted in the case of *Peers v Greece*, that ill-treatment must evoke 'feelings of suffering and inferiority capable of humiliating and demeaning' the individual.¹³⁹ Consequently, the humiliating impact is crucial for determining the severity of degrading treatment. However, even in the absence of public awareness, treatment may still be considered degrading if the individual perceives it as humiliating.¹⁴⁰ Conversely, inhuman treatment – while often also degrading – primarily concerns the physical integrity of the individual and the bodily harm inflicted upon them.¹⁴¹

134 Flegar, 2016, pp. 148–169, 151.

135 Gibney and Hansen, 2005, p. 1.

136 Röhl, 2005, p. 7.

137 Ibid.

138 *Ireland v. UK*, para. 162; Weissbrodt and Hörtreiter, 1999, p. 30.

139 *Peers v. Greece*, para. 75; Röhl, 2005, p. 15.

140 *Tyrer v. UK*, para. 32; Weissbrodt and Hörtreiter, 1999, p. 31.

141 *Tyrer v. UK*, paras. 30, 32, 35; *Costello-Roberts v. UK*, paras. 8, 9, 31, 32; Weissbrodt and Hörtreiter, 1999, p. 31.

Furthermore the cases of *Tyrer v UK* and *Costello-Roberts v UK* indicate that the element of publicity is also a pertinent factor.¹⁴²

Nevertheless, the threshold for suffering does not provide clarity regarding the conditions under which an individual may or may not be returned in accordance with the non-refoulement principle. Therefore, it is essential to incorporate an additional criterion: the real risk threshold that will be discussed below.¹⁴³

3.3.2.2. Substantial Grounds for Believing

The assessment of non-refoulement concerning inhuman or degrading treatment necessitates a careful evaluation of the real risk involved, which is crucial in determining whether a state would breach its obligations under article 3 of the ECHR by repatriating an individual to their country of origin. The case law of the ECtHR has identified both temporal and personal scopes as essential criteria for this real risk assessment. In the landmark case of *Soering v. UK*, the Court established that article 3 ECHR mandates “substantial grounds for believing” that the individual in question faces “a real risk of exposure to inhuman or degrading treatment”.¹⁴⁴ Subsequent rulings, such as *Saadi v. Italy* further emphasised the significance of the real risk criterion.¹⁴⁵

The case of *Saadi v. Italy* was adjudicated by the ECtHR, where the Court unanimously reaffirmed and expanded upon the principles established in *Chahal v. United Kingdom* concerning the absolute nature of the non-refoulement principle and the obligations imposed on a state under Article 3 of the ECHR. In this case, the Court was tasked with determining whether there was a risk that Saadi would face torture or ill-treatment if he were deported to Tunisia. This inquiry differed from the standard of proof required for an event that had already taken place, as it necessitated an assessment of the likelihood of a future occurrence. The Court employed the test of ‘whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3’.

Regarding the temporal scope, the ECtHR, in *Chahal v. UK*, asserted that the real risk must be evaluated in a “rigorous” manner, indicating that ‘the present conditions are decisive’.¹⁴⁶ This interpretation was reinforced in *Jabari v. Turkey*, which highlighted the necessity for a ‘meaningful assessment of the applicant’s claim’ and the importance of considering any changes in circumstances.¹⁴⁷

142 Flegar, 2016, pp. 148-169, 152.

143 *Ireland v. UK*, para. 167; *Tyrer v. UK*, para. 30; Van Dijk and Van Hoof, 1998, p. 311; Röhl, 2005, p. 15; Flegar, 2016, pp. 148-169, 151.

144 *Soering v. UK*, para. 88; Weissbrodt and Hörtreiter, 1999, p. 34.

145 *Saadi v. Italy*, paras. 124-125.

146 *Chahal v. UK*, paras. 86, 96; See also, *Ahmed v. Austria*, para. 42f; Weissbrodt and Hörtreiter, 1999, p. 34.

147 *Jabari v. Turkey*, para. 40; See, for example, *Cruz Varas and Others v. Sweden*, para. 80. Weissbrodt and Hörtreiter, 1999, p. 34f.

However, in *Salah Sheekh v. the Netherlands*, the Court determined that establishing past persecution was not a prerequisite; rather it required a forward-looking assessment of risk, where past persecution could serve as an indicative factor but was not necessarily definitive.¹⁴⁸

In *Salah Sheekh v. the Netherlands* the Applicant was a Somali national who argued before the ECtHR that his deportation to Somalia would place him under genuine risk of experiencing treatment that violates Article 3 of the ECHR, considering his personal circumstances as a member of a minority amidst the broader human rights issues in Somalia. The Court concluded that the Applicant's expulsion to Somalia would contravene Article 3 of the Convention, since there was a significant risk that deportation to "relatively safe" areas in Somalia could lead to his transfer to unsafe regions, thus rendering the "internal flight alternative" unviable. The Court highlighted that even if ill-treatment occurs arbitrarily or is perceived as a result of the generally unstable situation, the asylum seeker would still be protected under Article 3, asserting that it would not be necessary for an applicant to demonstrate additional special distinguishing characteristics to prove that he or she would be personally at risk.

The ECtHR in the case of *Vilvarajah and Others v. UK* determined that, while widespread human rights violations in a country may suggest a genuine risk, they do not automatically warrant protection under article 3 of the ECHR.¹⁴⁹ The assessment of real risk must consider both general and individual circumstances, demonstrating that the individual would face a greater threat than the average person in a similar context.¹⁵⁰ Moreover, the mere potential for ill-treatment is insufficient to invoke protection under article 3 ECHR.¹⁵¹

In contrast, in *Salah Sheekh v. the Netherlands*, the ECtHR adopted a more collective perspective, indicating that an applicant need not demonstrate any "special distinguishing features" beyond being a member of a minority group to establish a real risk.¹⁵² In this instance, the mere possibility of ill-treatment was deemed adequate for protection under article 3 of the ECHR.¹⁵³ This indicates a gradual evolution in the ECtHR's approach, which has not yet reached definitive interpretative boundaries. The interpretation of article 3 of the ECHR remains flexible, with its application largely determined on a case-by-case basis. Previous analyses suggest that the criteria for identifying inhuman or degrading treatment are relative.¹⁵⁴

3.3.2.3. Real ("Foreseeable") Risk

A key factor in determining the extent of *non-refoulement* under Article 3 is the existence of a "real risk" of ill-treatment. In *Soering* the Court has firmly established that

148 *Salah Sheekh v. the Netherlands*, para. 136; Flegar, 2016, pp. 148-169, 152.

149 *Vilvarajah and Others v. UK*, paras. 9-66, 111; Weissbrodt and Hörtreiter, 1999, p. 35.

150 *Chahal v. UK*, para. 96; *Vilvarajah and Others v. UK*, para. 108.

151 *Ibid.*; Flegar, Vulnerability 2016, pp. 148-169, 152.

152 *Salah Sheekh v. the Netherlands*, para. 148.

153 *Ibid.*

154 Van Dijk and van Hoof, 1998, p. 311. Röhl, 2005, p. 15.

there should be *substantial grounds* for believing that the person concerned, if extradited, would face a *real risk* of being subjected to torture or inhuman or degrading treatment in the requesting country.¹⁵⁵ The Court’s reasoning behind such a lowering of the standard of proof from certainty to risk is twofold. The grave and irreversible nature of the purported suffering at stake necessitates the implementation of preventive measures that should be interpreted broadly to guarantee the efficacy of the protection afforded by that Article.¹⁵⁶ Secondly, the Court has regularly stressed the absolute nature of the prohibition of treatment contrary to article 3 even in the most difficult of circumstances, such as the fight against terrorism or organised crime.¹⁵⁷ Thus an expulsion despite substantial grounds for believing that the person might subsequently be tortured or subjected to inhuman treatment would plainly be contrary to the spirit and intent of the article.¹⁵⁸ While certainty is not required, the Court has on the other hand held that ‘[a] mere possibility of ill-treatment [...] is not in itself sufficient to give rise to a breach of Article 3’.¹⁵⁹ Generalised violence, statistics of incidences of ill-treatment, or authoritative reports pointing to the vulnerability of certain groups of which the applicant might be a member, have been regarded as insufficient to engage Article 3 responsibility.¹⁶⁰

As the Court established in *Cruz Varas*, the “real risk” criterion needs to be assessed at the time of the final Court proceedings,¹⁶¹ and it is the probability of ill-treatment at that moment which should invoke the responsibility of the expelling state, not the actual occurrence of the article 3 violation before the individual’s flight or after their expulsion. In cases where immigrants have been the victim of torture prior to their flight, but where conditions in the country of origin have improved sufficiently, according to all available knowledge at the time, the person may, *mutatis mutandis*, be lawfully expelled. By analogy, if contrary to all available information at the time, it has been plausibly established that there was no real risk, and the person does indeed become subjected to ill-treatment upon return, the expelling state will not be held responsible.

3.4. Obligation of Non-Return Due to the Real Risk of Ill-Treatment Giving Rise to a Breach of Other Provisions of the Convention

One significant case concerning the criterion of exceptional circumstances is *D v. The United Kingdom (UK)*, where the Court recognised that, given the “exceptional circumstances” and the “critical stage” of the applicant’s illness, there was a genuine risk of him experiencing “inhuman treatment” in violation of article 3 ECHR upon return.¹⁶²

155 *Abdurrahim Incedursun v. The Netherlands*, paras. 27, 83.

156 *Soering*, para. 88.

157 *E.g. Dulas v. Turkey*, para. 52; *Denizci*, para. 383; *Ahmet Özkan*, paras. 334 et seq.

158 *Soering*, para. 88; Röhl, 2005, pp. 17–18.

159 *Vilvarajah and Others v. UK*, para. 111.

160 See: *H.L.R.*, para. 41; Röhl, 2005, p. 18.

161 *Cruz Varas and Others v. Sweden*, para. 76.

162 *D v. UK*, para. 53; *Stoyanova*, 2011, pp. 777–817, 799; *Flegar*, 2016, pp. 148–169, 154.

This conclusion was reached despite the fact that the conditions in St. Kitts did not inherently violate any prohibition against refoulement.¹⁶³ Another notable case that extensively addressed the threshold for exceptional circumstances was *Bensaid v. UK*, where the court ruled that the less favourable conditions in Algeria compared to the UK did not meet the threshold for “exceptional circumstances” as established in *D v. UK*.¹⁶⁴ In this instance, the Court considered the situation of an individual diagnosed with schizophrenia who faced deportation to Algeria, a country with limited treatment options and severe symptoms, including hallucinations.¹⁶⁵ The ECtHR did not identify a genuine risk of violating article 3 ECHR; instead it set a “high threshold” requiring a “sufficiently real risk” in cases where adverse conditions are not directly attributable to the country of origin.¹⁶⁶

The ECtHR reaffirmed its stringent stance in subsequent rulings, including *Arcila Henao v. the Netherlands*, *Ndangoya v. Sweden*, *Amegnigan v. the Netherlands*, and notably, *N v. UK*. Likewise, in the case of *Arcila Henao v. the Netherlands*, the Court differentiated between the applicant suffering from AIDS, whose condition had not progressed to a critical level, and the applicants in *D v. UK*. Similarly, in *Ndangoya v. Sweden*, and *Amegnigan v. the Netherlands* cases, the applicants could be sent back to their countries of origin since his AIDS condition had not reached a critical stage, and no exceptional circumstances were noted.¹⁶⁷

In the case of *N v. UK*, the Ugandan applicant was diagnosed with AIDS at a less advanced stage compared to that of the applicant in *D v. UK*.¹⁶⁸ The ECtHR asserted that medical treatment, categorised as an economic, social, and cultural right, does not fall under the purview of Article 3 of the ECHR.¹⁶⁹ Consequently, states are not obligated to provide medical treatment in accordance with the ECHR.¹⁷⁰ The Court determined that the applicant was not “critically ill at the present time”, and any future health conditions would be speculative, thus precluding the existence of exceptional circumstances. While earlier cases permitted some flexibility in interpreting exceptional circumstances, *N v. UK* establishes a significantly elevated threshold for article 3 of the ECHR.¹⁷¹

In the case of *MSS v. Belgium and Greece*, the Court adopted a more lenient standard of severity than in previous rulings, as it did not necessitate “exceptional circumstances”.¹⁷² Instead, it based its findings on the “general situation” to determine

163 *D v. UK*, para. 54.

164 *D v. UK*, para. 53; *Bensaid v. UK*, paras. 36–40; Stoyanova, 2011, p. 800.

165 *Bensaid v. UK*, paras. 7, 10, 19, 36–40, 41.

166 *Bensaid v. UK*, paras. 7, 10, 19, 40.

167 *Arcila Henao v. the Netherlands*; *Ndangoya v. Sweden*; *Amegnigan v. the Netherlands*; *N v. UK*, paras. 39–41; Flegar, 2016, pp. 148–169, 155.

168 *N v. UK*, paras. 8–14, 50–51.

169 *Ibid.*, paras. 8–14, 50–51, 44; Clayton, 2011, p. 768f.

170 *Ibid.*, paras. 8–14, 50–51.

171 Flegar, 2016, pp. 148–169, 155.

172 *MSS v. Belgium and Greece*, para. 324. Cf. *D v. UK*, para. 53; *Bensaid v. UK*, paras. 36–40; *N v. UK*, paras. 8–14, 50–51.

a violation of refoulement by Belgium. Furthermore, unlike in the cases of *D v. UK*, *Bensaid v. UK*, and *N v. UK*, the ECtHR did not limit its considerations to medical conditions; it also explicitly acknowledged the living conditions that MSS experienced.¹⁷³ In the same case, the ECtHR reiterated that a requisite level of severity must be present in all instances.¹⁷⁴ This principle aligns with the Court’s ruling in other cases, such as *Tyrer v. UK*, where it was established that a certain degree of humiliation must be evident in each individual case.¹⁷⁵

In the case of *Sufi and Elmi v. UK*, the Court highlighted the “dire” humanitarian conditions in Somalia, which posed a risk of ill-treatment in violation of Article 3 ECHR.¹⁷⁶ The Court referenced earlier cases, including *Salah Sheekh v. the Netherlands* and *N v. UK*, while contrasting them with *MSS v. Belgium and Greece*, ultimately deciding that the standard set by *MSS v. Belgium and Greece* was the appropriate one to apply in this case.¹⁷⁷

The European Court of Human Rights has established a robust framework for protecting individuals from refoulement under Article 3 of the European Convention on Human Rights. The Court’s jurisprudence emphasises the absolute nature of this principle, prohibiting states from deporting or extraditing individuals to countries where they may face a real risk of torture, inhuman or degrading treatment. The ECtHR’s approach to assessing risk considers both general and individual circumstances, and its case law highlights the importance of thorough evaluations and effective remedies in ensuring compliance with the Convention’s obligations. While the Court’s standards may evolve over time, its commitment to upholding the principle of non-refoulement remains a cornerstone of human rights protection in Europe.

4. The Principle of Non-Refoulement in the Case Law of Other Regional International Courts as Well as National Courts

4.1. Introduction

The Court of Justice of the European Union (CJEU) has played a significant role in shaping the principle of non-refoulement within the European Union. In its caselaw, the CJEU has established that the principle of non-refoulement requires EU Member States to thoroughly evaluate the risks faced by individuals before returning them

173 *MSS v. Belgium and Greece*, paras. 263, 367; *D v. UK*, paras. 49–54, *Bensaid v. UK*, para. 36, *N v. UK*, para. 50; Flegar, 2016, pp. 148–169, 156.

174 *MSS v. Belgium and Greece*, paras. 219, 254.

175 See: *Tyrer v. UK*, para. 32; *Peers v. Greece*, para. 74; *Pretty v. UK*, para. 52; *MSS v. Belgium and Greece*, para. 220; Van Dijk and van Hoof, 1998, p. 311; Röhl, 2005, p. 15; Flegar, 2016, pp. 148–169, 156.

176 *Sufi and Elmi v. UK*, paras. 11–21, 259.

177 *Sufi and Elmi v. UK*, paras. 278–283; Flegar, 2016, pp. 148–169, 157.

to another country. The CJEU has also emphasised the importance of considering the individual circumstances of each case and the potential risks of indirect refoulement.

The Inter-American Court of Human Rights has also contributed to the development of the principle of non-refoulement. The Court ruled that states have a duty to adequately consider asylum applications and uphold the principle of non-refoulement. The Court emphasised the importance of providing individuals with a fair opportunity to present their case, and ensuring that their rights are protected.

National courts have also played a crucial role in applying the principle of non-refoulement. The Courts have ruled that EU Member States must thoroughly evaluate all relevant factors when making decisions regarding Dublin transfers and return decisions.

4.2. The Practice of the Court of Justice of the European Union: Interrelation of the EU Acquis and the 1951 Refugee Convention

The principle of non-refoulement is enshrined in EU law in Article 78(1) TFEU and article 18 and 19 of the EU's Charter of Fundamental Rights. Article 78(1) TFEU provides in that regard that the Union shall develop a common policy on asylum, subsidiary protection and temporary protection while providing relevant international protection to any third-country national and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28th July 1951 and the Protocol of 31st January 1967, relating to the status of refugees, 'and other relevant treaties'.¹⁷⁸

The CJEU's authority to issue rulings on preliminary references under article 267 TFEU, along with its jurisdiction in other legal actions, significantly influences the definitional and interpretative framework of EU legislation regarding the return of irregular migrants.¹⁷⁹ The binding nature of the CJEU's judgments, which apply *erga omnes*, is particularly crucial, especially since EU law on returns explicitly references international human rights law.¹⁸⁰

The CJEU has also made significant contributions over the past decade regarding the adjudication of cases involving the expulsion of non-nationals.¹⁸¹ Therefore, Judgments of the CJEU have also consolidated the application of this principle in the EU.¹⁸² The case law established by the Court, which interprets the EU acquis concerning the "return of illegally staying third-country nationals", has seen a steady increase since its landmark decision in *Kadzoev*.¹⁸³

Under the Charter, the CJEU is required to consider the case law of the ECtHR when interpreting Charter rights that correspond to those enshrined in the ECHR,

178 UNHCR, 2015, p. 70.

179 See: TEU, arts. 19:1–3; TFEU, arts. 263, 267, 344.

180 Tamás, 2021, p. 261.

181 Taylor, 2015.

182 Saliba, 2015.

183 Case C-357/09 PPU, *Said Shamilovich Kadzoev*.

as outlined in article 52(3) of the Charter. The references to the ECHR and ECtHR case law vary widely, encompassing acknowledgments of states' sovereign rights to determine the admission and expulsion of non-nationals, as seen in the opinions of the Advocates General in *the Kadzoev*,¹⁸⁴ *El Dridi*,¹⁸⁵ and *Mahdi*¹⁸⁶ cases. Additionally, they include interpretations of the principle of non-refoulement as articulated in article 19(2) of the Charter, particularly concerning serious health issues, in line with the jurisprudence of the ECtHR, as demonstrated in the *Abdida* ruling.¹⁸⁷

In *Bundesrepublik Deutschland v. B and D*,¹⁸⁸ the CJEU highlighted that the provisions outlined in article 21(2) of the Qualification Directive (QD) correspond with those in article 33(2) of the 1951 Refugee Convention. The Court noted the necessity of considering any potential threat that a refugee may currently pose to the relevant Member State within the context of the QD. This consideration is particularly significant under article 21:2 of the Directive, which permits the host Member State to refoule a refugee if there are reasonable grounds to believe that the individual poses a threat to the security or community of that Member State, a right similarly conferred by article 33:2 of the 1951 Geneva Convention.¹⁸⁹

The Court examined the alignment of the *EU asylum acquis* with the Refugee Convention in the joined cases *C-391/16*, *C-77/17*, and *C-78/17*¹⁹⁰ concerning the revocation of refugee status. The CJEU established that despite the European Union not being a contracting party to the Geneva Convention, it possesses jurisdiction over the matter due to the obligations set forth in article 78:1 TFEU and article 18 of the Charter, which mandate the Union to adhere to the provisions of that convention. The Court concluded that EU law offers a broader scope of international protection for the refugees in question than that provided by the Geneva Convention. Consequently, even though there exists the possibility to revoke or deny the renewal of refugee status, EU law ensures a level of protection against refoulement that surpasses the safeguards outlined in the 1951 Geneva Convention. The Court noted that while refugee status may be revoked, individuals affected by article 14:6 retain various rights specified in the Geneva Convention which, as emphasised in the Advocate General's Opinion, affirms their status as refugees for the purposes of article 1(A) of that Convention, notwithstanding the revocation or refusal.

The CJEU's Judgement in *H. T. v. Land Baden-Württemberg*¹⁹¹ addresses the interpretation of Article 21 of Council Directive 2004/83/EC in relation to exceptions to the principle of non-refoulement and the potential revocation of a residence permit granted to a refugee under article 24 of the same Directive. Article 21:3 provides States with the

184 Ibid., para. 5.

185 Case 61/11 PPU, *Hassen El Dridi, alias Soufi Karim*, para. 29.

186 Case C-146/14 PPU, *Bashir Mohamed Ali Mahdi*, para. 45.

187 Case C-562/13 (*Abdida*), paras. 47, 51–52; Molnár, 2021, pp. 269, 280.

188 CJEU, *Bundesrepublik Deutschland v. B and D*.

189 Ibid., para. 101, see also, UNHCR, 2015, pp. 81–82.

190 CJEU – Joined Cases C-391/16, C-77/17 and C-78/17, Judgment 2019.

191 CJEU – Case C-373/13, *H. T. v Land Baden-Württemberg*, Judgment 2015.

authority to revoke a refugee's residence permit only if the criteria outlined in Article 21:2 are satisfied: specifically, that such action does not contravene their international obligations and that there are either valid reasons to believe the refugee poses a threat to national security or, following a final conviction for a particularly serious crime, poses a risk to the community. The Court emphasised that this provision is limited to cases of non-refoulement rather than expulsion to a third country.¹⁹² Furthermore, the language of Article 24:1 does not categorically exclude the possibility of revoking a residence permit when compelling national security or public order reasons necessitate such action.¹⁹³ The Court considered the principle of non-refoulement as established in EU primary law, and articulated in Article 21:1 of Directive 2004/83, which asserts that refugees are generally safeguarded against refoulement. It examined the exceptions outlined in these articles, which are intended to be applied only as a last resort. The Court determined that if a Member State revokes, terminates, or declines to renew the refugee status of an individual under Article 14:4 of the directive, that individual is entitled to the rights specified in Article 14:6 of the directive, including those in Articles 32 and 33 of the Geneva Convention. The implications of invoking the derogation in Article 21:2 of Directive 2004/83 for the affected refugee can be severe, as it may result in their return to a country where they face danger. Consequently, this provision imposes stringent conditions on the practice of refoulement, stipulating that only a refugee convicted by a final judgment of a "particularly serious crime" may be deemed a "danger to the community of that Member State" as defined by this provision. Furthermore, even if these conditions are met, the refoulement of the refugee remains one of several options available to Member States, which retain the discretion to pursue alternative, less severe measures.¹⁹⁴

In the Joined cases of *N.S. v. United Kingdom* and *M.E. v. Ireland*,¹⁹⁵ the CJEU determined that the article 4 of the Charter should be understood to imply that Member States are prohibited from transferring an asylum seeker to the Member State deemed responsible under the Regulation if they are aware of systemic deficiencies in that Member State's asylum procedures and reception conditions. Such deficiencies must be significant enough to raise substantial grounds in believing that the asylum seeker would be at a genuine risk of experiencing inhuman or degrading treatment as defined by the provision. The Court observed that the Common European Asylum System (CEAS) is designed under the assumption that all participating States, whether they are Member States or third countries, uphold fundamental rights, including those enshrined in the Geneva Convention, the 1967 Protocol, and the ECHR.¹⁹⁶ This framework allows Member States to trust one another in this respect. Nevertheless, the Court acknowledged the possibility that significant operational challenges

192 *H. T. v. Land Baden-Württemberg*, paras. 42–44.

193 *Ibid.*, paras. 48–55.

194 *Ibid.*, paras. 70–72.

195 CJEU, *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*.

196 CJEU, *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others*, para. 78.

could arise in a particular Member State, which could lead to a considerable risk that asylum seekers, upon being transferred to that State, might be treated in ways that violate their fundamental rights. The Court concluded that it cannot be assumed that any violation of fundamental rights would automatically impact the obligations of other Member States under the Dublin Regulation.¹⁹⁷

The prohibition will be activated only when the nature of the violation indicates a genuine risk that an asylum seeker may endure inhuman or degrading treatment as defined by Article 4 of the Charter. The Court clarified that systemic deficiencies in the asylum process and the conditions for receiving asylum seekers in the responsible Member State could create such a risk, thereby imposing a corresponding prohibition on transfer. Member States are prohibited from transferring an asylum seeker to a designated Member State under the Dublin II Regulation if they are aware of systemic shortcomings in that Member State's asylum procedures and reception conditions, which provide substantial grounds for believing that the asylum seeker would be at real risk of inhuman or degrading treatment, as outlined in Article 4 of the Charter of Fundamental Rights (CFR). The application of the Dublin II Regulation, based on an unqualified assumption that the fundamental rights of the asylum seeker will be upheld in the responsible Member State, contradicts the obligation of Member States to implement and interpret the Dublin II Regulation in alignment with fundamental rights. Member States cannot rely on an absolute presumption of adherence to fundamental rights;¹⁹⁸ rather, this presumption must be subject to challenge. The Court referenced the ruling in *M.S.S. v. Belgium and Greece* by the ECHR Grand Chamber, noting that the extent of the fundamental rights violations highlighted in that case demonstrated the existence of systemic deficiencies in Greece's asylum procedures and reception conditions at the time of transfer.

The CJEU has recently issued a pivotal ruling¹⁹⁹ *Joined Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21* concerning international protection. This judgment stems from a preliminary ruling addressing five Italian cases that shared similar circumstances. These cases involved international protection applicants in Italy who had previously submitted applications in other Member States and subsequently filed new applications in Italy. They were subjected to the "take back procedure" under the Dublin III Regulation, which mandates their return to the initial Member State.²⁰⁰ The Court concluded that since applicants are entitled to present evidence and arguments that could influence a transfer decision, they possess a right to information and should be granted access to a personal interview. A Member State's failure to provide this could lead a national court to annul transfer decisions.²⁰¹

197 Ibid., para. 82.

198 CJEU, *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others*, para. 100.

199 CJEU, *Joined Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21*, Judgement.

200 Ibid., paras. 40, 46, 52.

201 Ibid., paras. 107–128.

Furthermore, the Court clarified that the second Member State is not permitted to evaluate the risk of “indirect refoulement” by the first Member State in the context of a transfer decision unless there are systemic deficiencies in the asylum procedures and reception conditions of that first Member State. The principle of non-refoulement is a fundamental tenet of international refugee and human rights law, which prohibits states from returning individuals to countries or territories where they may face persecution, torture, inhumane or degrading treatment, or other violations of human rights.²⁰² This ruling elucidates the Dublin procedure for second Member States, particularly regarding the procedural safeguards for applicants facing transfer decisions and the assessment of “indirect refoulement” within this framework.²⁰³

4.3. The Practice of the Inter-American Court of Human Rights

On November 25th 2013, the Inter-American Court of Human Rights (IACtHR) issued its first ruling in *Pacheco Tineo case* regarding a state’s duty to adequately consider asylum applications and uphold the principle of non-refoulement. In this ruling, the IACtHR outlined a set of essential guarantees for asylum and expulsion processes as derived from the American Convention on Human Rights (ACHR).²⁰⁴

The Court determined that Bolivian authorities had hastily dismissed the asylum request of the Pacheco Tineo family, who were Peruvian nationals recognised as refugees by Chile. Their expulsion was carried out without an oral hearing or the opportunity for the family to present their case. This expulsion occurred within an unreasonably brief time period and lacked any evaluation of the risks the family would face upon return to their home country. Given the authorities’ awareness of the family’s refugee status in Chile, they bore a heightened responsibility to exercise care, diligence, and caution in handling the asylum request. Furthermore the family was not informed of the refusal decision, which hindered their ability to comprehend the rationale behind it and to pursue an appeal. In their home country, the parents had endured three years of imprisonment, with the father being a survivor of a massacre in a Peruvian prison. After their deportation to Peru, they were wrongfully imprisoned on charges of terrorism for four months. The Court ruled that the family’s expulsion violated their right to seek and obtain asylum as stipulated in Article 22(7) of the ACHR, the principle of non-refoulement under Article 22(8) of the ACHR, the right to a fair trial as outlined in Article 8 of the ACHR, and the right to judicial protection under Article 25 of the ACHR. Additionally, the arbitrary detention of the mother in Bolivia prior to their deportation, the withholding of documents, and the resulting state of severe uncertainty and distress, all constituted violations of the family’s right to mental and moral integrity as enshrined in Article 5 of the ACHR. Ultimately, the Court identified multiple violations of their rights.²⁰⁵

202 Ibid., paras. 129–142.

203 Ibid., paras. 136–149.

204 *The Pacheco Tineo Family v. Plurinational State of Bolivia*, 2013.

205 Ibid.

4.4. The Decisions of the National Courts

The Constitutional Court of the Republic of Slovenia established in its *judgment Up-613/16* that EU Member States are required to thoroughly evaluate all relevant factors pertaining to the principle of non-refoulement when making decisions regarding a Dublin transfer to a designated Member State. Given the absolute nature of the protection provided by the principle of non-refoulement, this evaluation must encompass all aspects of the specific case, including the applicant's individual circumstances in the country of transfer. Additionally, it is necessary to consider whether the mere act of transferring an individual to another country based on their health condition contravenes the obligations imposed by the principle of non-refoulement.²⁰⁶

The Civil Court of Italy, determined in the case: *Applicant v Ministry of the Interior, Ministry of Foreign Affairs, and Ministry of International Cooperation*, that refusing to allow entry to the Afghan unaccompanied minor constituted a violation of the principle of non-refoulement. The Tribunal of Rome ruled against the denial of access to the asylum procedure and mandated that the authorities permit the minor to enter and apply for protection.²⁰⁷

In *Applicant v Federal Republic of Germany* The Higher Administrative Court of Lower Saxony ruled that, despite the concerning humanitarian conditions reported in Ethiopia, the applicant did not provide sufficient evidence to demonstrate that any returnee would face a genuine risk of violating Article 3 of the ECHR. Consequently, the criteria for imposing a deportation ban on humanitarian grounds were not satisfied. As a result, the court dismissed the application for leave to appeal as both inadmissible and without merit.²⁰⁸

In *A.Y. v. Commander of the Border Guard*, the Supreme Administrative Court of Poland determined that the principle of non-refoulement must be taken into account when making return decisions for individuals apprehended after unlawfully crossing the border, irrespective of their asylum application status. The Court emphasised that the factual assessment of each case should be connected to the evaluation of the risk of refoulement, in accordance with Articles 3(a)(b) and 4 of the Schengen Regulation, Article 4:4 (b) of the Return Directive, and the stipulations outlined in the 1951 Refugee Convention. Furthermore, the court highlighted the obligation of Member States to ensure that affected individuals can effectively exercise their right to apply for international protection.²⁰⁹

In conclusion, the principle of non-refoulement stands as a fundamental tenet of international refugee and human rights law, which forbids states from returning individuals to nations or regions where they may encounter persecution, torture, or other violations of human rights. The jurisprudence of regional international courts,

206 The Constitutional Court of the Republic of Slovenia, judgment on the case N: Up-613/16, 2016.

207 *Applicant v. Ministry of the Interior, Ministry of Foreign Affairs, and Ministry of International Cooperation*, Civil Court, N.R.G. 21667/2023, 2023.

208 *Applicant v. Federal Republic of Germany*, 2023.

209 *A.Y. v Commander of the Border Guard*, II OSK 1735/22, 2023.

including the Court of Justice of the European Union and the Inter-American Court of Human Rights, along with national courts, has consistently underscored the significance of maintaining this principle.

The CJEU has developed a comprehensive framework for safeguarding asylum seekers and refugees, highlighting the necessity for detailed assessments of individual situations and risks, as well as the critical nature of procedural protections. The Inter-American Court of Human Rights has similarly emphasised the obligation of states to thoroughly evaluate asylum requests and uphold the principle of non-refoulement.

National courts have also played an essential role in enforcing the principle of non-refoulement, stressing the importance of meticulous evaluations and consideration of individual circumstances. These rulings reflect the continuous efforts to ensure that states adhere to their international responsibilities to shield individuals from persecution, torture, and other human rights abuses.

Ultimately, the principle of non-refoulement continues to be a fundamental aspect of international protection, and its application in case law acts as a crucial safeguard for individuals seeking refuge from harm.

5. Conclusion

The principle of non-refoulement is a cornerstone of international refugee and human rights law, protecting individuals from being returned to countries where they may face serious harm or persecution. The extensive interpretation and application of this principle by various international bodies, including the UNHCR, ECtHR, CJEU, and Inter-American Court of Human Rights, as well as national courts, underscore its importance and universality.

The jurisprudence of these bodies has consistently emphasised the absolute nature of the principle, prohibiting states from deporting or extraditing individuals to countries where they may face a real risk of torture, inhuman or degrading treatment. The principle's application extends to both recognised refugees and asylum seekers, and its effective implementation is essential for ensuring the safety and dignity of individuals seeking refuge.

As the global refugee crisis continues to evolve, it is imperative that states and international organisations uphold their commitments to non-refoulement and work towards finding durable solutions for those in need of protection. The principle of non-refoulement remains a fundamental aspect of international protection, and its application in case law acts as a crucial safeguard for individuals seeking refuge from harm. Ultimately, the continued adherence to and development of this principle are vital for protecting human rights and preventing harm to vulnerable individuals worldwide.

List of Keywords/Abbreviation

art.	article
et al.	and others
etc.	and so on
vol. / vols.	volume / volumes
c.	approximately
ms.	manuscript
edn.	edition
ed. / eds.	editor / editors
p. / pp.	page / pages
para. / paras.	paragraph / paragraphs
e.g.	for example
pt. / pts.	part / parts
cf.	compare
ibid.	at the same place
ip.	in press
UNHCR	UN High Commissioner for Refugees
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNESC	United Nations Economic and Social Council
Res	Resolution
CSR	1951 Convention Relating to the Status of Refugees
ICCPR	International Covenant on Civil and Political Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICJ	International Court of Justice
ACHR	African Charter of Human Rights
ExCom	Executive Committee
OAU	Organisation of African Unity
CoE	Council of Europe
AALCO	Asian-African Legal Consultative Organization
VCLT	Vienna Convention on the Law of Treaties
HRC	Human Rights Committee
CAT	Committee of Torture
UNCAT	United Nations Convention on Torture

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Perspectives of Certain Central and Eastern European States Related to International Criminal Law, International Humanitarian Law and International Refugee Law

Marcin RAU

ABSTRACT

This chapter investigates the uneasy relationship between universal international legal norms and the historically shaped realities of Central and Eastern Europe. Through a comparative analysis of selected states, it traces how International Criminal Law, International Humanitarian Law, and International Refugee Law are interpreted, resisted, or adapted in contexts marked by communist legacies, post-conflict transitions, and contemporary geopolitical crises. The discussion moves across three interconnected fields: cooperation with the ICTY in the former Yugoslavia, the legal qualification of communist-era violence in Poland and Hungary, and the divergent responses of Central European states to Ukrainian refugee flows after 2022. Despite formal commitments to international standards and EU frameworks, the chapter shows that legal practice remains deeply contingent on national narratives of victimhood, sovereignty, and historical responsibility. The comparison reveals striking contrasts: from reluctant engagement with war crimes accountability to selective humanitarian openness shaped by cultural proximity. Rather than depicting the region as norm-resistant, the chapter argues that Central and Eastern Europe illustrates a broader truth about international law itself – its effectiveness depends on social legitimacy and contextual resonance. By foregrounding these tensions, the chapter invites a more nuanced understanding of how international law functions beyond textbooks, in societies where law, memory, and politics remain inseparable.

KEYWORDS

international law in CEE, transitional justice, war crimes, communist crimes, humanitarian protection, post-communist states, Poland, Hungary, Ukrainian refugees, EU conditionality

1. Introduction

Chapters 1 through 11 of this publication have provided the reader with a robust theoretical foundation, outlining the historical processes and doctrinal debates that have

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led to the emergence of International Criminal Law (ICL) and International Humanitarian Law (IHL). These earlier sections detail the gradual evolution of legal norms in response to major geopolitical events, offering insights into the origins of the legal mechanisms and institutions that form the backbone of modern international justice systems. Yet they do something more as well: they underscore the intricate ways in which ideology, power structures, and political will have historically shaped our collective notion of accountability.

The final chapter – Chapter 12 – deviates in character from its predecessors by shifting the focus from foundational theory to pragmatic reality. It thus reveals a “clash” between the prescriptive letter of international law and the unique social, political, and historical realities of Central and Eastern European (CEE) countries. Why is this tension so pronounced in the CEE region? Montesquieu’s principle of the “spirit of the law” offers a guiding perspective: the law should be adapted to the spirit of a given society. If law cannot be wholly universal in its application, then to what extent must it be recalibrated to align with specific historical legacies and contemporary exigencies? This question lies at the heart of the following analysis.

Certainly, the material discussed herein could fill the pages of another entire volume. Rather than serving as a comprehensive compendium, this chapter seeks primarily to illuminate the problems faced by CEE countries in operationalising ICL, IHL, IRL and their adjunct frameworks. It also aims to spur further inquiry, encouraging readers – whether practitioners, scholars, or students – to pursue additional literature and debate these pressing issues in more depth.¹ The examples, drawn from selected states in the region, are by no means exhaustive, yet they clearly convey the sociopolitical and historical underpinnings that define contemporary legal challenges.

1.1. Contextual Overview

The geopolitical and historical context of Central and Eastern Europe is pivotal to understanding the region’s current engagement with ICL, IHL, and IRL. For decades, communist rule across much of the region shaped legal institutions and civil society, leaving a legacy of authoritarian structures that often stifled critical debate about war crimes, human rights, and political freedoms.² This legacy was subsequently compounded by the conflicts of the 1990s in the former Yugoslavia, which tested the efficacy of international criminal tribunals and highlighted the complexities of transitioning from command economies to liberal democracies.³ In more recent years, the Russian-Ukrainian conflict has further strained these legal mechanisms, creating new waves of refugees, new challenges, and renewed debates over sovereignty and collective security.⁴ Against this backdrop, CEE states find themselves balancing the

1 See: Fletcher and Ohlin, 2013; Pintsch and Rabinovych, 2025.

2 See: Stan and Nedelsky, 2015; Faix and Svaček, 2016.

3 Baker, 2014, p. 121.

4 Malanchuk, 2023, p. 245.

normative demands of international law with the persistent pull of national politics, historical memory, and populist sentiments. As this chapter will demonstrate, the interplay between such factors has led to dynamic, and often inconsistent, approaches to ICL, IHL, and IRL. While EU integration and international legal obligations encourage normative convergence, persistent political, social, and historical factors create significant divergence in their actual implementation and attitudes. These discrepancies illustrate why the law cannot remain merely an abstract ideal but must instead contend with the “spirit” of its social and cultural milieu – just as Montesquieu theorised centuries ago.

1.2. Research Questions

Central to exploring the nexus of law, history, and politics in CEE states are the following guiding research questions:

1. Does it show that certain states have unique approaches, or is there an overarching regional pattern? Despite similarities across CEE (such as post-communist transformations) can we still identify distinctive trajectories in legal reform and enforcement based on factors like ethnic composition, EU membership, or the degree of conflict exposure?
2. Which historical, social, or political factors most strongly influence each state’s stance and implementation of international legal obligations? How do the respective national discourses on sovereignty, memory, and identity feed into debates on war crimes prosecutions, transitional justice, or refugee acceptance?
3. How have recent crises, especially the Russian-Ukrainian war, tested the limits of regional and international frameworks? In what ways do new waves of displacement, allegations of war crimes, and shifting alliances either reinforce or undermine the role of international legal standards within these countries?

To address these questions systematically, this chapter will proceed as follows:

- Section 2: ICL with Special Regard to the ICTY Examines how CEE states either directly involved in the 1990s Balkan conflicts or indirectly engaged through broader international obligations responded to the establishment and rulings of the ICTY.
- Section 3: IHL with Special Regard to War Crimes under Communist Regimes Explores how IHL applies to communist-era atrocities, using case studies from Poland, Hungary, and Czechoslovakia to illustrate the crucial distinction between war crimes and other human rights violations.
- Section 4: IRL with Special Regard to the Russian-Ukrainian Refugee Flows Addresses the humanitarian and legal challenges faced by CEE countries in managing unprecedented displacement flows. Special attention is paid to the interplay between EU-directed asylum standards and domestic political

narratives, sometimes more receptive to refugees from culturally or geographically proximate regions.

Such a chapter structure, it is hoped, will not merely inform, but also provoke further reflection on what it takes to adapt universal legal doctrines to the particular realities of individual states. After all, can any legal norm flourish if it is divorced from the spirit of the society it aims to regulate?

1.3. Methodology

The methodology adopted in this study combines a comparative approach with polemical engagement involving scholars from Central and Eastern Europe. Its primary focus lies on Poland, Hungary, and the former Yugoslav states, although the GDR (East Germany) periodically appears as a benchmark to sharpen our understanding of how historical context shapes contemporary choices. The decision to employ debate-like discussions with experts from these countries was intentional: the author sought to encourage readers to form their own opinions, not merely to memorise formal provisions. Since Chapters 1–11 already equip readers with a solid theoretical foundation, this segment narrows attention to the main discussion points in each state, enabling readers to compare legal theory with on-the-ground realities. Limited editorial space, rather than a lack of interest, explains why certain countries are omitted. By selectively focusing on pivotal cases, the study highlights shared legal aspirations and lingering societal tensions, while clarifying that no single blueprint for international law implementation can fully capture the region's diversity. Ultimately, this approach underscores that law is not just a matter of texts and codes – it is also an evolving dialogue shaped by local experiences, political pressures, and cultural values.

2. CEE States and International Criminal Law With Special Regard to the ICTY

2.1. The Yugoslav Conflict: Causes, Course and Effects

At the very beginning of our considerations, it will be appropriate to briefly recall what took place in the Balkans in the 1990s, when the disintegration of the Socialist Federal Republic of Yugoslavia (SFRY) was precipitated by a confluence of political, economic, and ethnic tensions. After the death of Josip Broz Tito in 1980, the federal structure of Yugoslavia began to weaken due to competing nationalist aspirations among its republics – Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Macedonia (now North Macedonia), and Montenegro.⁵ Economic disparities and debates over resource distribution exacerbated these emerging rifts. Additionally, the decline of

⁵ Baker, 2014, p. 8.

communism in Eastern Europe and the weakening grip of the Soviet Union created an international environment more permissive of secessionist movements.⁶

The interplay of these factors – economic crisis, the rise of nationalist politics, and the erosion of a centralised authority – drove the constituent republics toward declarations of independence. This, in turn, triggered a complex series of conflicts among various ethnic and national groups who contested territorial control and sovereignty.⁷ In particular, the question of Serbian dominance and the push for a “Greater Serbia” under Slobodan Milošević’s leadership fuelled the outbreak of violence in Croatia (1991–1995) and, most dramatically, in Bosnia and Herzegovina (1992–1995). The wars in the former Yugoslavia unfolded along multiple fronts. Slovenia experienced a relatively short, ten-day conflict (June–July 1991), while Croatia endured a protracted war resulting in widespread displacement and destruction (1991–1995). Bosnia and Herzegovina’s multi-ethnic composition made it the epicentre of the bloodiest confrontations, including the siege of Sarajevo and the Srebrenica massacre (1995), which the International Court of Justice (ICJ) later deemed an act of genocide.⁸ Throughout these wars, grave violations of international humanitarian law were reported: mass killings, ethnic cleansing, sexual violence, and the deliberate targeting of civilians. The involvement of external actors – whether in the form of economic sanctions, peacekeeping missions, or diplomatic interventions – complicated efforts to achieve a stable resolution.⁹ The conflicts gradually ended through agreements such as the Dayton Peace Accords (1995) for Bosnia and Herzegovina, though tensions persisted well into the following decades. The wars in the Balkans caused extensive human suffering, resulting in hundreds of thousands of fatalities and the displacement of millions, with war crimes leaving lasting psychological wounds. In political terms, the dissolution of Yugoslavia led to the emergence of multiple independent states, each contending with democracy-building, economic reconstruction, and reconciliation efforts.¹⁰ Legally, the atrocities committed reinvigorated global interest in criminal accountability, prompting the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) as a systematic response to gross breaches of international humanitarian law.

2.2. The International Criminal Tribunal for the Former Yugoslavia (ICTY)

The United Nations Security Council established the ICTY in 1993 through Resolution 827, responding to reports of egregious war crimes, crimes against humanity, and acts of genocide in the territory of the former Yugoslavia. The Tribunal’s mandate was to prosecute individuals, regardless of their rank or affiliation, who bore the greatest responsibility for such crimes. Headquartered in The Hague, the ICTY was the first international war crimes tribunal since the Nuremberg and Tokyo trials in

6 Ibid., p. 38.

7 Baker, 2014, p. 22.

8 ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007.

9 Baker, 2014, p. 59.

10 Ibid., p. 89.

the aftermath of World War II. The ICTY had jurisdiction over events in the former Yugoslavia from 1991 onwards. Its main functions involved investigating war crimes, crimes against humanity, and genocide; conducting fair trials to ensure individual accountability; safeguarding witnesses and victims through specialised support measures; and contributing to broader reconciliation by shaping international criminal jurisprudence.¹¹ During its operation from 1993 to 2017, the ICTY indicted 161 individuals, including high-ranking military and political figures such as Slobodan Milošević, Radovan Karadžić, and Ratko Mladić.¹² By establishing precedents in the prosecution of crimes like genocide, systematic sexual violence, and ethnic cleansing, the ICTY contributed significantly to the evolution of international criminal jurisprudence.¹³ However, its effectiveness has been the subject of debate. Critics argue that trials were lengthy and expensive, and that the ICTY struggled to gain consistent cooperation from local authorities in Serbia, Bosnia and Herzegovina, and Croatia – leading to delays and difficulties in witness protection.¹⁴ Some local populations viewed the tribunal as biased or politically motivated, thereby limiting its impact on reconciliation.¹⁵ On the other hand, proponents highlight its achievements in promoting the principle of individual criminal responsibility, inspiring the creation of the ICC, and contributing to the field's growing body of jurisprudence.¹⁶ In sum, the ICTY's legacy is mixed but undeniably important. It demonstrated that international institutions could, in principle, hold powerful leaders accountable and cultivate a record of atrocities that might otherwise have been denied or forgotten.¹⁷

2.3. Focusing on Serbia and Croatia: Rationale for Case Selection

Why devote such attention to Serbia and Croatia, rather than the many other Central and Eastern European states affected by the wars in the former Yugoslavia? It is worth emphasising that these two countries played significant roles in the conflicts, making them prime examples of how the ICTY collided with domestic politics.¹⁸ One cannot forget that both nations were compelled to confront intense scrutiny from The Hague – not simply because of legal or moral imperatives, but also under the looming pressure of conditionalities tied to eventual EU membership. Indeed, Orentlicher underscores that cooperation with the ICTY became a litmus test for broader European integration, forcing political elites in Belgrade and Zagreb to navigate fraught public sentiment, especially when extraditing prominent military figures once hailed as national heroes.¹⁹

11 Ibid., p. 100.

12 Ibid.

13 Ibid., p. 109.

14 Peskin, 2008, p. 213.

15 Ibid., p. 200.

16 Stojanovic, 2009, p. 47.

17 Hartmann, 2009, p. 67.

18 Stojanovic, 2009, pp. 211–212; Hartmann, 2009, p. 67.

19 Orentlicher, 2018, pp. 60–65.

Meanwhile, states such as Poland or Hungary perceived the tribunal as an instrument for stabilising the Balkans, with little direct impact on their judicial frameworks. Their legislative efforts chiefly revolved around aligning national codes with EU requirements, rather than undertaking prosecutions of their own. Serbia and Croatia, by contrast, were drawn into a complex interplay of external and internal pressures – balancing EU accession incentives against deep-rooted nationalist legacies.²⁰ As both countries (especially Croatia) moved closer to Europe, the tribunal's demands gained added weight, compelling them to develop institutional mechanisms for surrendering or prosecuting alleged war criminals. It also bears mentioning that the European Union, in the aftermath of the 1990s upheaval, emerged as the driving force behind political and economic rehabilitation in the Western Balkans.²¹ In exchange for access to the single market, development funds, and greater diplomatic recognition, Serbia and Croatia accepted a set of stringent conditions, including robust cooperation with the ICTY. This conditionality mechanism proved potent: the EU withheld financial support and delayed accession talks when either state faltered on arrests or delayed reforms. For countries eager to avoid isolation – and to leverage the benefits of Europe's economic and political community – meeting these requirements became a strategic necessity as much as a moral one. Consequently, Serbia and Croatia emerged as exemplary case studies of how international criminal law shapes, and is shaped by, domestic transitions.

2.4. Internal Political Factors in Croatia and Serbia

The histories of Serbia and Croatia exemplify how cooperation with ICTY became inextricably tied to the broader process of European integration. Both countries initially stood at comparably early stages in their relationship with the EU yet diverged in their pace of ICTY cooperation due to a variety of domestic political, social, and historical pressures.²² This section examines how EU conditionality influenced the policies of these two states, and how internal political dynamics either enabled or hindered progress.

From the late 1990s onward, the EU exercised political conditionality – commonly referred to as the “carrot and stick” approach – by making full cooperation with the ICTY a prerequisite for advancing Stabilisation and Association Agreements (SAP), and eventual EU membership negotiations.²³ In both Serbia and Croatia, this conditionality manifested in concrete demands to arrest and extradite indicted war criminals, including high-profile figures such as Slobodan Milošević, Ante Gotovina, and Ratko Mladić. The EU repeatedly underscored that integration milestones would only be granted once specific, verifiable steps had been taken to meet the tribunal's

20 Stojanovic, 2009, pp. 98–101; Hartmann, 2009, pp. 69–74.

21 Orentlicher, 2018, p. 70.

22 Stojanovic, 2009, pp. 257–258.

23 Ibid., p. 257; Hartmann, 2009, p. 67.

requirements.²⁴ Although the EU's conditionality framework proved instrumental in spurring both Belgrade and Zagreb to act, the delayed nature of rewards sometimes weakened Brussels' leverage.²⁵ For instance, after Serbia extradited Milošević in 2001 – a momentous step catalysed by threatened cuts to financial aid from the United States – domestic expectations of immediate EU concessions went largely unmet.²⁶ This fed into a broader perception among Serbian elites that international demands were disproportionately burdensome and offered insufficient short-term benefits. Over time, such perceptions eroded trust in the EU's conditionality mechanism, creating a cycle of partial compliance followed by periods of domestic backlash.

Croatia's initial reluctance to cooperate with the ICTY was closely linked to the authoritarian legacy of President Franjo Tuđman, whose nationalist rhetoric framed war crimes charges against Croatian generals as attempts to delegitimise Croatia's struggle for independence.²⁷ Following Tuđman's death in 1999, successive centre-left governments – most notably under Prime Minister Ivica Račan – signalled greater openness toward the tribunal. In 2001, the Croatian Parliament passed a cooperation law, although it still faced considerable domestic resistance. The turning point arrived with the 2005 arrest of General Ante Gotovina in Spain, which had a direct and positive effect on Croatia's EU negotiations.²⁸ While many Croats initially regarded Gotovina's extradition as a national betrayal, the ensuing momentum for accession discussions quelled some domestic opposition, reinforcing the notion that EU membership held tangible advantages.²⁹ Serbia, in contrast, grappled with entrenched nationalist sentiment and influential veto players, such as the Serbian Radical Party, which portrayed extradition as a betrayal of national interests.³⁰ Immediately after the fall of Milošević, Prime Minister Zoran Đinđić's reformist government sought closer ties with the West, including cooperation with the ICTY. Yet, Đinđić's willingness to extradite Milošević in 2001 provoked acute political turbulence.³¹ His assassination in 2003 dealt a severe blow to pro-European reforms, leading to subsequent slowdowns in Serbia's compliance with the tribunal.³² Throughout these years, the security apparatus and certain political factions remained unreformed, allowing indicted figures like Ratko Mladić to evade capture.³³ In both Croatia and Serbia, cooperation with the ICTY was only as robust as the governing coalition's capacity to overcome internal fragmentation³⁴. The existence of strong veto players – whether in parliament, the security services, or nationalist groups – could stall or dilute extradition policies. For

24 Orentlicher, 2018, p. 60.

25 Stojanovic, 2009, pp. 101, 126–127.

26 Orentlicher, 2018, pp. 64–65.

27 Stojanovic, 2009, pp. 211–212.

28 Hartmann, 2009, p. 70.

29 Stojanovic, 2009, pp. 257–258.

30 Ibid., pp. 101–112.

31 Orentlicher, 2018, pp. 63–65.

32 Stojanovic, 2009, pp. 112–124.

33 Orentlicher, 2018, pp. 69–70.

34 Stojanovic, 2009, pp. 112–124.

Croatia, the move from Tudman's presidency to Račan's coalition government made it possible to pass legislation supportive of the tribunal. Meanwhile, Serbia's oscillation between reformist and nationalist blocs, culminating in the political turmoil after Dindić's death, exemplified the fragility of pro-ICTY consensus.

For all the initial hostility toward ICTY cooperation, Croatia ultimately reaped the benefits of its compliance, racing toward EU membership by 2013.³⁵ Although nationalist rhetoric never entirely vanished from public discourse, successive governments – from Ivica Račan's administration onward – adeptly leveraged the EU's conditionality. By extraditing key war crimes suspects in defiance of local protests, Zagreb gained substantial international credibility, a currency that streamlined its accession negotiations and bolstered its image as a reform-minded actor on the European stage.

Serbia's path, on the other hand, has been noticeably more fraught.³⁶ While Belgrade did, in the end, hand over pivotal figures – most notably Ratko Mladić in 2011 – the unresolved status of Kosovo and lingering doubts about the rule of law continue to loom large. Critics argue that the EU's reluctance to enforce its standards consistently, especially during Serbia's bouts of political turbulence, has sown perceptions of a double standard.³⁷ Yet these intermittent concessions from Brussels did not obscure the essential driver of Serbian cooperation: a steadfast aspiration to join the EU, however long and convoluted that journey might prove.

2.5. A Summary of Direct Involvement

In both Serbia and Croatia, cooperation with the ICTY was intimately bound to the prospect of EU integration, reflecting the careful calibration of domestic politics and international pressures. EU conditionality – though occasionally inconsistent in its application – proved central to spurring progress, as states weighed the tangible benefits of EU accession against the political cost of surrendering war crimes suspects. Croatia, benefiting from a consolidated reformist bloc post-2000, managed to expedite its path to membership once General Gotovina was apprehended. Serbia, hindered by deeper internal divisions and nationalist factions, exhibited a more uneven compliance trajectory, with each extradition marking a contentious milestone on the road to EU candidacy. Yet can conditionality alone cement genuine reconciliation and the robust rule of law in a region still grappling with historical grievances? The record of these two countries suggests that while political pressures can compel states to comply with international norms, the roots of durable transformation lie in sustained institutional reforms and shifts in public discourse – processes that unfold over the long term.

35 Hartmann, 2009, p. 70.

36 Orentlicher, 2018, p. 70.

37 Hartmann, 2009, pp. 67, 74.

2.6. Comparison of Bosnia and Herzegovina, Montenegro, and Kosovo

It is worth noting that an expanded view of EU conditionality and ICTY cooperation encompasses Bosnia and Herzegovina, Montenegro, and Kosovo, revealing how these dynamics influenced each country's journey toward European integration.³⁸ In Bosnia and Herzegovina, the internally divided political framework resulted in variable levels of engagement with the Tribunal: The Federation of Bosnia and Herzegovina largely endorsed ICTY directives, whereas the Republika Srpska's persistent refusal to cooperate delayed progress in critical areas such as policing and governance. Even so, incremental steps – like apprehending specific war crimes suspects – ultimately opened the door to signing a Stabilisation and Association Agreement (SAA) in 2008. Montenegro, having separated from Serbia in 2006, found itself less burdened by major war crimes allegations but demonstrated readiness to fulfil EU expectations by supplying evidence and witnesses, culminating in its own SAA in 2007.³⁹ Kosovo, on the other hand, grappled with the complexities of disputed status, overshadowing any consistent collaboration with the ICTY.⁴⁰ Some might argue that although EU pressure did yield a measure of compliance, genuine progress also demanded profound structural reforms – especially in Bosnia – and occasional instances of conditionality “softening” for political convenience seemingly undermined the overall credibility of Brussels' approach.⁴¹ One could agree that these nuances highlight both the effectiveness and the limitations of the EU's strategy in fostering accountability across the Balkans. These dynamics illustrate both the promise and the inherent constraints of the EU's strategy for promoting accountability in the region. If robust structural reforms continue and conditionality is applied in a transparent, consistent manner, the region may attain a more enduring alignment with international criminal justice standards.

2.7. Embedding ICL in Divided Societies

The application of international criminal law by the ICTY elicited markedly different reactions depending on whether the defendants belonged to an “in-group” or an “out-group.” As Roman David points out, Croatian society tended to accept international prosecutions more readily when the accused were Serbs yet grew decidedly less supportive when local war heroes faced charges.⁴² Is this not a testament to the potent interplay between national identity and justice, where notions of sovereignty and collective memory shape public attitudes toward international tribunals? Indeed, the 2005 arrest of General Ante Gotovina – celebrated by many Croats as a symbol

38 Hartmann, 2009, pp. 76–77.

39 Ibid., p. 76.

40 Ibid., p. 75.

41 Ibid., pp. 76–81.

42 David, 2014, p. 490.

of national defence – triggered widespread protests and accusations of betrayal.⁴³ A similar pattern emerged in Serbia, where figures such as Ratko Mladić were revered by certain segments of the public as protectors of national interests, thus complicating the process of securing societal acceptance of ICL principles.

Compounding these tensions was a pervasive neglect of war crimes prosecution by local courts in the Western Balkans prior to the ICTY's establishment. Hartmann underscores the reluctance of national judiciaries – often hamstrung by political interference and limited judicial independence – to pursue cases involving serious breaches of international humanitarian law.⁴⁴ Serbia, for instance, witnessed the ascendancy of nationalist governments that effectively stifled efforts to bring war criminals to trial, creating an atmosphere of impunity. In Bosnia and Herzegovina, the Republika Srpska repeatedly declined to apprehend individuals indicted by the ICTY, citing insufficient political will and institutional capacity. Can meaningful progress in post-conflict accountability truly be expected when domestic courts remain subject to such constraints? One of the ICTY's responses to these shortcomings was to transfer lower-profile cases to national jurisdictions, accompanied by the creation of specialised war crimes chambers within domestic judicial frameworks. Bosnia and Herzegovina's War Crimes Chamber, for example, was entrusted with applying ICL standards in proceedings referred by The Hague, thereby illustrating the potential for greater local ownership of war crimes trials.⁴⁵ Yet this laudable initiative encountered its share of hurdles: many judges and prosecutors lacked direct experience with international law; courts were beset by funding shortfalls; and political pressures persisted, threatening the impartiality and timeliness of judicial processes. Are such obstacles not in fact, a reminder that embedding ICL principles in post-conflict societies demands more than mere institutional tinkering? Unless political elites and civil society leaders cultivate a genuine commitment to accountability and reconciliation, even the most robust legal mechanisms risk falling short.

Taken together, these experiences underscore the formidable challenges of fostering genuine justice in deeply divided societies. On the one hand, the ICTY succeeded in demonstrating that high-level perpetrators could be held to account before an international forum. On the other hand, its efforts also highlight the limitations of international mandates, lack of local support, and robust national reforms. Moving forward, the region's most pressing task may well be to consolidate these specialised war crimes chambers, deepen legal expertise, and kindle broader societal support for the principle that no individual, no matter how venerated, stands above the rule of law.

43 In December 2005, after four years in hiding, he was apprehended in the Canary Islands. Gotovina was sentenced to 24 years in jail on April 15, 2011, after being found guilty on 8 of the 9 counts in the indictment. On 16 November 2012, Gotovina's convictions were overturned by an appeals panel at the ICTY and he was released from custody.

44 Hartmann 2009, p. 78.

45 Ibid., p. 79.

3. Central and Eastern European States and International Humanitarian Law (IHL) With Special Regard to Crimes under Communist Regimes

3.1. Theoretical Outline: Defining the Legal Battlefield

How should international law classify the vast spectrum of atrocities committed by, and under communist regimes in Central and Eastern Europe? Were the mass deportations, political show trials, and brutal suppression of dissent exclusively matters of domestic tyranny, governed only by the nascent standards of human rights law? Answering this question is not merely an academic exercise – it is fundamental to correctly identifying the nature of the crimes committed and the legal responsibility of their perpetrators. The essential legal framework for this inquiry is International Humanitarian Law, a term used interchangeably in academic literature with the “law of armed conflict” or, more traditionally in military circles, the “laws of war”.⁴⁶ This body of rules is built upon a foundational distinction that separates the justification for conflict from the conduct within it. IHL is concerned not with why wars are fought – the domain of *ius ad bellum* (the law on the use of force) – but exclusively with how they are fought. This is the realm of *ius in bello* (the law in war), which applies equally to all parties in a conflict, regardless of which side initiated hostilities or whether their cause is considered just.⁴⁷ At its core, IHL has a dual humanitarian mandate:

1. Protecting persons who are not, or are no longer, directly participating in the hostilities, such as civilians, medical personnel, and prisoners of war.⁴⁸
2. Restricting the means and methods of warfare, such as prohibiting weapons that cause superfluous injury and forbidding tactics that do not distinguish between military and civilian targets.⁴⁹

To illustrate the profound implications of this distinction, this chapter will frame its analysis around two starkly different historical events, each of which tests the boundaries and application of IHL in the context of communist state violence. The first is a paradigm case of a war crime: the Katyn Massacre of 1940. In that year, the Soviet NKVD executed approximately 22 000 captured Polish military officers.⁵⁰ Committed within the clear context of an ongoing international armed conflict (the Second World War), this act was a flagrant violation of the laws of war applicable at the time, specifically the 1929 Geneva Convention Relative to the Treatment of Prisoners

46 Fleck, 2021, pp. 13–16.

47 Dinstein, 2016, pp. 5–7.

48 Fleck, 2021, pp. 701–703.

49 See: Additional Protocol I to the Geneva Conventions, 1977, art. 35 (Basic rules) and art. 51 (Protection of the civilian population).

50 Cienfiala, Lebedeva and Materski, 2007, pp. 219–240.

of War, which unequivocally protected captured soldiers from violence and murder.⁵¹ The status of the victims as prisoners of war and the timing of the massacre during an interstate war leave no doubt as to its classification as a war crime. The second case, the Hungarian Uprising of 1956, presents a far more complex legal puzzle. What began as a revolt against the communist government escalated dramatically with the armed intervention of the Soviet Army, leading to intense street fighting in Budapest and widespread bloodshed.⁵² By contrasting the unambiguous war crime of Katyn with the legally contentious case of the Hungarian Uprising, this chapter will demonstrate how the presence or absence of an armed conflict fundamentally alters the legal analysis of state atrocities. It is this critical determination that dictates whether an act of brutality is a violation of human rights, a crime against humanity, or a war crime.

3.2. The Temporal Scope of IHL: A Critical Distinction From Human Rights Law

Before delving into the specific cases of Central and Eastern Europe, it is essential to establish a foundational legal distinction concerning the applicability of IHL. In legal terms it possesses a specific *temporal scope*: it applies exclusively during an armed conflict. This principle, while seemingly straightforward, carries profound theoretical and practical consequences that are central to the analysis of state-sponsored atrocities. The relationship between IHL and IHRL is best understood through the principle of *lex specialis derogat legi generali* – the special law overrides the general law. IHRL applies at all times, in peace and in war, but during an armed conflict, IHL serves as the more specific set of rules governing the conduct of hostilities and the protection of victims.

This distinction has two immediate implications for our analysis. Firstly it clarifies that not every violation of human rights during a period of violence constitutes a violation of IHL. Secondly and more critically, it establishes that war crimes, which are serious violations of IHL, can only be committed when there is a sufficient nexus to an armed conflict. In the absence of such a conflict, an act, no matter how cruel, cannot be legally classified as a war crime. A practical example illustrates this critical divide: If an authoritarian state's security forces violently suppress a peaceful civilian demonstration, resulting in hundreds of deaths, this act constitutes a flagrant violation of fundamental human rights – most notably the right to life, freedom of assembly, and freedom of expression. If this attack is part of a widespread or systematic policy directed against a civilian population, it may also qualify as a crime against humanity. However, it does not constitute a war crime. The crucial element of an armed conflict is missing. The state is not engaged in hostilities against an organised armed group but is suppressing internal dissent. Such atrocities fall

51 Convention relative to the Treatment of Prisoners of War, 27 July 1929, art. 2. This article stipulated: 'Prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them. They must at all times be humanely treated and protected, particularly against acts of violence...'

52 Kramer, 1998, pp. 163–170.

squarely within the purview of IHRL and the international criminal law concerning crimes against humanity, which explicitly delinks it from the requirement of an armed conflict.⁵³ Conversely, once the threshold of an armed conflict is crossed, IHL applies to all parties involved, including non-state actors. This is a cornerstone of modern IHL, applicable to both international armed conflicts (IACs) between states and non-international armed conflicts (NIACs) within a state. In a civil war between a government and a rebel group for instance, both sides are bound by the fundamental rules of IHL, such as the prohibition of torture and the humane treatment of captured persons. While enforcement remains a significant challenge, the legal obligation is unequivocal. The determination of what constitutes an armed conflict, particularly a NIAC, is therefore paramount. Contemporary international law has moved away from the need for a formal declaration of war, focusing instead on the factual reality of the situation. A NIAC is generally understood to exist when there is protracted armed violence between governmental authorities and organised armed groups, or between such groups within a state.⁵⁴ The jurisprudence of international tribunals has established two key criteria for this assessment: a minimum level of intensity of the violence and a minimum degree of organisation of the non-state party.⁵⁵ This threshold distinguishes an armed conflict from mere internal disturbances, riots, or isolated acts of banditry.

This legal framework is essential for re-evaluating historical events in Central and Eastern Europe under communist rule. The armed resistance against nascent communist authorities in states like Poland – personified by the so-called “Cursed Soldiers” (pol. *Żołnierze Wyklęci*) presents a compelling case study. From an IHL perspective, this struggle could arguably be classified as a non-international armed conflict, given the organisation of the partisan units and the intensity of hostilities over a prolonged period. If this classification is accepted, then the foundational rules of IHL, particularly Common Article 3 of the Geneva Conventions, would have applied. Consequently, acts such as the summary execution of a captured partisan by state security forces would constitute a war crime – a grave breach of the prohibition against ‘the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court’.

However, the communist regimes systematically rejected this legal framework. A recurring pattern across the region was the deliberate political and legal classification of armed opponents not as combatants in a conflict, but as “bandits”, “terrorists” or “criminals”⁵⁶. This was a calculated strategy to deny them any protection under the Geneva Conventions and to legitimise their liquidation under the guise of domestic law enforcement. By framing organised resistance as simple criminality, the state sought to strip its actions of any international legal scrutiny related to the laws of war.

53 Fleck, 2021, pp. 147–150.

54 Ibid., pp. 1213–1215.

55 *Prosecutor v. Tadić*, 1995, para. 70.

56 Clapham, 2014, pp. 493–495.

Therefore, a modern legal analysis of this period must contend with the stark divergence between the state's official narrative and potential reality, as defined by IHL.⁵⁷ The critical distinction between a peacetime atrocity and a wartime crime is thus not merely an academic exercise. It is the central question in the legal and historical reckoning with the crimes of Europe's communist regimes.

3.3. Peacetime Repression vs. Wartime Crimes: A Legal Classification

After 1945, the states of Central and Eastern Europe fell under the dominion of communist regimes that frequently dealt with any opposition with ruthless efficiency. A crucial question thus arises for our analysis is: can the systematic repression carried out by these regimes be classified as war crimes? From a strictly legal standpoint, the answer is generally negative. As previously established, the application of IHL is contingent upon the existence of an armed conflict. However the majority of political repressions during this era, occurred under conditions of formal peace. This means that acts such as political executions, the torture of prisoners of conscience, or the violent suppression of peaceful protests, while constituting grave violations of human rights, do not fall within the purview of IHL and are therefore not war crimes. The following examples will serve to illuminate this critical distinction.

3.3.1. The "Quiet War" on the Inner-German Border

The German Democratic Republic provides a compelling case study of state-sponsored crimes committed in the absence of an armed conflict. The regime's brutality was most visibly embodied in its security service *Stasi* but also in the infamous "shoot to kill" (*Schiessbefehl*) policy along the border that divided the nation, which resulted in the deaths of hundreds of citizens attempting to flee.⁵⁸ Following Germany's reunification, it became one of the few post-communist states to successfully prosecute former regime officials.

The trials of GDR officials, from border guards to the last East German leader, Egon Krenz, were not conducted under the laws of war.⁵⁹ There was no armed conflict – the violence was exclusively one-sided, directed by the state against its own unarmed civilian population. Consequently, the German courts anchored their legal reasoning in international human rights law.⁶⁰ They determined that the GDR's domestic laws, which permitted such lethal force, were in gross violation of fundamental human rights (principally the right to life) and were therefore void. This reasoning was famously upheld by the European Court of Human Rights, which rejected the defendants' plea that they were merely following national law.⁶¹ As Faix and Svaček

57 Fleck, 2021, pp. 301–303.

58 Faix and Svaček, 2016, pp. 31–35.

59 Szanajda, 2013, p. 240.

60 Ibid., pp. 241–274.

61 ECHR, *Streletz, Kessler and Krenz v. Germany*, 2001. The Court held that the GDR's state practice was a 'flagrant violation of the human rights' and the prosecution did not contravene Article 7 of the European Convention on Human Rights (no punishment without law).

note, the German judiciary effectively argued that any adherence to national laws which blatantly violate universal human rights standards does not grant immunity from criminal responsibility.⁶² The acts were thus prosecuted as domestic crimes (homicide) interpreted through the lens of IHRL, and in some analyses could be classified as crimes against humanity due to their systematic nature as part of a state policy to attack a civilian population.⁶³ The legal framework of IHL was, quite simply, irrelevant.

3.3.2. *The 1968 Invasion of Czechoslovakia: An Armed Conflict by Any Other Name*

From the quiet war on the German border, we turn to a more overt act of aggression: the 1968 Warsaw Pact invasion of Czechoslovakia. Officially framed as “fraternal assistance” it was in fact, the armed invasion and occupation of a sovereign state – an act constituting an international armed conflict under IHL.⁶⁴ Though armed resistance by the Czechoslovak army was minimal, confrontations occurred, and over one hundred civilians were killed by the invading forces.

Did the actions of the interventionist troops constitute war crimes? The moment the invasion began, the entirety of IHL, including the four Geneva Conventions of 1949, became applicable. The principle of distinction, a cornerstone of IHL, prohibits attacks directed against civilians. Therefore, any deliberate shooting of unarmed protestors would undoubtedly constitute a war crime. The legal terrain however, is complicated by doctrinal debates on the threshold for prosecution. The Geneva Conventions establish a special category of the most serious violations, termed “grave breaches” which trigger universal jurisdiction and an obligation to prosecute.⁶⁵ A key criterion for many of these breaches is that they are committed on a “large scale” or as part of a plan or policy. The civilian casualties in Czechoslovakia, while tragic, were relatively limited compared to traditional warfare, and the violence was arguably more a result of individual excesses than a systematic policy of extermination.

Here, it is vital to distinguish between state responsibility and individual criminal responsibility. As Ariel Zemach argues in his seminal work on the law of occupation, the illegality of an occupation (a matter of state responsibility for violating *ius ad bellum*) does not automatically render every soldier on the ground criminally liable for war crimes.⁶⁶ David Hughes similarly contends that a separate analysis of specific acts is required to establish individual culpability under *ius in bello*.⁶⁷ In practice, no member of the invading forces was ever held criminally accountable on an international level. It was only after 1989 that Czech and Slovak historians and lawyers could

62 Faix and Svaček, 2016, pp. 31–35.

63 Ibid., p. 34.

64 See: Commentary on the First Geneva Convention, 2016, paras. 238–245. The commentary on Common Article 2 confirms that IHL applies in any case of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

65 Henckaerts, 2021, pp. 604–607.

66 Zemach, 2015, pp. 313–350.

67 Hughes, 2020, pp. 1087–1103.

openly classify these acts as crimes violating the laws of war, but by then the political and legal obstacles to prosecution were immense.

3.3.3. Poland: Martial Law as a State of Emergency, Not a State of War

In post-war Poland, the closest the nation came to a widespread internal conflict was the imposition of Martial Law in 1981–1983, when the communist regime deployed the army against the “Solidarity” (*Solidarność*) movement. However despite the military’s presence, the situation did not transform into a non-international armed conflict (NIAC). For an NIAC to exist, there must be a sufficient degree of both intensity of violence and organisation of the non-state party⁶⁸. The *Solidarność* movement was overwhelmingly non-violent, and its resistance was characterised by strikes and protests, not by armed struggle. Consequently, the regime’s most brutal acts during this period, such as the killing of nine protesting miners during the “pacification” of the *Wujek Coal Mine*, cannot be legally classified as war crimes. They were crimes committed in peacetime, later defined under Polish domestic law as “communist crimes” and, by their nature, as crimes against humanity, constituting a widespread attack on a civilian population for political reasons.⁶⁹ The Polish legislator explicitly equated the non-applicability of the statute of limitations for communist crimes with that for war crimes and crimes against humanity, yet this does not merge their legal definitions.⁷⁰ Most communist repressions in Poland and elsewhere elude the definition of war crimes precisely because they were instruments of internal control in the absence of a battlefield. While they are undoubtedly international crimes, they belong to a different legal category.

3.4. The Katyn Massacre: A Textbook War Crime

For international readers, the Katyn massacre of 1940 serves as a clear and tragic example of a major war crime. It is not just a painful chapter in Polish history but also a case study that demonstrates the fundamental purpose of IHL. The crime was not a spontaneous act of battlefield violence. It was the calculated, state-organised murder of thousands of protected persons, planned and executed far from the front lines. The legal context is essential to understanding why Katyn was a war crime. When the Soviet Union invaded Poland on 17th September 1939, an international armed conflict began between the two states. According to the laws of war, the Polish soldiers captured by the Red Army were prisoners of war (POWs).⁷¹ This status granted them specific protections under international law. The most fundamental of these protections is the absolute prohibition against killing or harming captured enemy soldiers. Once a soldier is captured, they are considered “outside the fight” (*hors de combat*) and must be treated humanely.⁷²

68 *Prosecutor v. Tadić*, 1995, para. 70.

69 Lachowski, 2022, p. 156.

70 *Ibid.*, p. 145.

71 Henckaerts, 2005, p. 451.

72 *Ibid.*, p. 164.

A key legal point is that these rules were binding on the Soviet Union, even though it had not signed the 1929 Geneva Convention on Prisoners of War. The core principles of humane treatment for captives were not just based on that specific treaty. They were already widely recognised as part of customary international law. These are unwritten rules that are binding on all states because they reflect the established and accepted practice of nations in wartime.⁷³ Therefore, the Soviet Union had a clear legal duty to protect the Polish prisoners it held. No state could simply opt out of the basic obligation to treat prisoners humanely. Instead of upholding this duty, the Soviet leadership made a deliberate decision to violate it. In March 1940, the highest level of the Soviet government (*Politburo*) approved a secret order from the NKVD to execute nearly 22,000 Polish nationals. The majority of the victims were the captured military officers held in camps at Kozelsk, Starobelsk, and Ostashkov.⁷⁴ They were systematically transported to execution sites like the Katyń Forest and murdered with a shot to the back of the head. This was a direct and total breach of their protected status as prisoners of war. In summary, the Katyń massacre is a textbook example of a war crime for several clear reasons:

1. It occurred during an international armed conflict between Poland and the USSR.
2. The victims were protected persons under international law, primarily prisoners of war.
3. The act itself – the wilful killing of these prisoners – is one of the most serious possible violations of the laws of war.

The event underscores the central purpose of IHL: to place limits on wartime conduct and to protect the defenceless, especially those who have been captured. The calculated nature of the Katyń crime serves as a permanent reminder of why these laws exist and why their violation constitutes one of the gravest offenses in international law.

The legacy of this war crime has been shaped by a decades-long struggle for truth against a backdrop of systematic denial. For half a century, the Soviet Union falsely blamed Nazi Germany for the massacre. This official lie was only retracted in 1990 when Soviet leader Mikhail Gorbachev publicly acknowledged NKVD responsibility and released key documents proving it.⁷⁵ However, this admission did not lead to full legal accountability. The subsequent Russian investigation was terminated in 2004 without classifying the event as a war crime.⁷⁶ In response, Polish institutions, particularly the Institute of National Remembrance (IPN), have conducted their own legal and historical inquiries, unequivocally defining the massacre as a war crime.⁷⁷ The victims' families continued this fight for justice, taking their case to the European Court of Human Rights. In the landmark *Janowiec and Others v. Russia* case, while the

73 Ibid., p. 163.

74 Cienciala, Lebedeva and Materski, 2007, p. 148.

75 Ibid., p. 253.

76 Institute of National Remembrance, 2020, p. 32.

77 Ibid.

Court could not judge the 1940 events directly, it found modern Russia responsible for failing to provide the families with adequate information about the fate of their relatives.⁷⁸ This legal and diplomatic struggle reflects the consensus in Polish historiography, which views the Katyn massacre not only as a national tragedy but as a foundational example of a war crime committed against the Polish nation.⁷⁹ Ultimately, the enduring battle over the legal classification and memory of Katyn underscores the profound importance of IHL. Insisting on the term war crime is not just a historical debate – it is an affirmation that the rules protecting the defenceless in wartime are universal, non-negotiable, and their violation demands truth and accountability, no matter how much time has passed.

3.5. The 1956 Hungarian Uprising: An International Armed Conflict and the Pursuit of Justice

The Hungarian Uprising of 23rd October 1956 began as a nationwide revolt against the country's Soviet-imposed communist government, rapidly transforming from student demonstrations into a widespread armed struggle for national sovereignty.⁸⁰ The decisive moment, both historically and legally, arrived on 4th November 1956, when the Soviet Red Army launched a massive military intervention to crush the revolution. This act is fundamental to the situation's analysis under IHL, as it unequivocally triggered an IAC. At the time, both Hungary and the USSR were High Contracting Parties to the 1949 Geneva Conventions.⁸¹ Common Article 2 of the Conventions states that they apply to 'any armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'. The Soviet cross-border invasion fits this definition precisely, meaning the conduct of Soviet forces fell squarely under the discipline of the Geneva Conventions, particularly the Fourth Convention on the protection of civilians.⁸²

Within this legal framework, one of IHL's most fundamental rules is the principle of distinction, which obligates parties to a conflict to distinguish at all times, between combatants and civilians and to direct attacks only against military objectives. The record of Soviet units and their aligned Hungarian militias reveals repeated and flagrant violations of this principle. Eyewitness accounts and later investigations documented intentional attacks on unarmed civilians, which constitute clear war crimes. Mass shootings of demonstrators at Salgótarján and near Budapest's Nyugati railway station in December 1956, which killed dozens, lacked any conceivable military necessity and served instead as acts of terror against the civilian population.⁸³

78 ECHR, *Janowiec and Others v. Russia*, 2013.

79 Davies, 2005, pp. 448–450.

80 Granville, 2004, p. 37.

81 ICRC Treaties Database, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 1949.

82 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949, 75 UNTS 287, art. 2.

83 Molnár, 2001, pp. 317–321.

Furthermore, the reprisals that followed the uprising's suppression fall into the category of "grave breaches" enumerated in Article 147 of the Fourth Geneva Convention. These most serious war crimes include the wilful killing, torture, inhuman treatment, and wilfully depriving a protected person of the right to a fair and regular trial.⁸⁴ The post-conflict crackdown fits these legal categories with troubling precision. Thousands were detained and tortured, while hundreds were convicted in show trials devoid of due process.⁸⁵ The secret trial and execution in 1958 of Prime Minister Imre Nagy and Defence Minister Pál Maléter was a blatant violation of fair trial rights and a chilling example of such a grave breach.⁸⁶

For decades, the perpetrators of these crimes enjoyed total impunity. Only after the fall of communism did a narrow path to accountability open, best illustrated by the case of Béla Biszku. A central figure in the post-1956 repression, Biszku was a member of the Soviet-installed committee that authorised the use of live fire against demonstrators and later served as Minister of the Interior, overseeing the security apparatus responsible for the brutal reprisals.⁸⁷ A 2011 Hungarian law, dubbed "Lex Biszku" removed the statute of limitations for war crimes, making his prosecution possible.⁸⁸ His trial in 2014 was the first and only time such a high-ranking communist official in Hungary faced charges for these events. The case, however, exposed the profound challenges of transitional justice. While the indictment itself was a landmark victory for accountability, the immense evidentiary burden of linking high-level orders to specific killings decades later proved formidable. Ultimately, the conviction was softened on appeal, underscoring how faded memories and degraded archives can frustrate justice even when the political will to pursue it exists.⁸⁹

In conclusion, the 1956 Hungarian Uprising is best understood in legal terms as an international armed conflict initiated by the Soviet invasion. While the fighting on the ground had complex features, this classification activates the full protective regime of the Geneva Conventions. The intentional killing of civilians and the systematic denial of fair trials to political opponents were not merely acts of political repression; they were war crimes. The difficult pursuit of justice in the Biszku case does not diminish this legal reality. Rather, it demonstrates why applying IHL to such historical events is essential. It is the necessary legal tool to resist the euphemisms of authoritarian regimes and to affirm that the principle of humanity is not optional – it binds all parties, at all times, during an armed conflict.

84 Fleck, 2021.

85 Granville, 2004, pp. 152–154.

86 Hoffmann, 2022, p. 47.

87 Ibid., p. 48.

88 Hoffmann, 2022.

89 Ibid., p. 50.

4. Central and Eastern European States and International Refugee Law (IRL) With Special Regard to Refugee Flows Brought About by the Russian-Ukrainian War

4.1. Theoretical Outline and Criteria for Grouping

How does the EU structure its refugee policy, and why do member states respond so differently to sudden mass influxes of people in need of international protection? At the legal core lies a complex framework of asylum directives, including the Qualification Directive (2011/95/EU) and the Asylum Procedures Directive (2013/32/EU). These instruments aim to harmonise standards across the Union, but they leave ample room for national discretion. One particularly notable piece of legislation is Council Directive 2001/55/EC on Temporary Protection, crafted to offer immediate, short-term safeguards to persons fleeing large-scale conflicts. Although it existed for more than two decades, this directive's real-world activation came only in 2022, in response to the war in Ukraine. In 2015, millions of refugees – predominantly from Syria – arrived in Europe, testing the EU's capacity for solidarity. Several CEE states, including Hungary and Poland, strongly opposed the proposed relocation scheme, a mechanism intended to distribute asylum seekers more evenly within the EU. Despite unprecedented numbers at Europe's borders, the Temporary Protection Directive (2001/55/EC) was never invoked. Could this have prevented the disarray and political rifts that emerged across member states? Critics suggest it might have at least provided a structured approach to burden-sharing. Instead, national governments often hardened their stances, implementing *ad hoc* border controls or rejecting mandatory quotas outright.

4.2. Context of the 2022 Russian-Ukrainian War

When Russia invaded Ukraine in early 2022, millions of Ukrainians fled westward, seeking refuge in neighbouring countries such as Poland, Slovakia, Hungary, and beyond.⁹⁰ In a stark departure from 2015, the EU unanimously decided to activate the Temporary Protection Directive, granting immediate and simplified procedures for residence, social benefits, and access to the labour market.⁹¹ This decision marked a dramatic shift in collective EU policy, yet it has also prompted accusations of double standards – why was this mechanism not deployed for refugees from conflict zones outside Europe?

90 The author points out that at the time of writing this chapter, the Ukrainian-Russian conflict was still ongoing. Despite the utmost care, some facts (although outlined in a broad perspective) may have changed. Therefore, the reader is advised to read it with reflection.

91 Ineli-Ciger, 2023, p. 78.

4.2.1. *Criteria for Grouping*

For clarity, this chapter will focus on how select EU states in the region approached Ukrainian arrivals in 2022, highlighting the disparities in their strategic responses:

1. Germany – Widely regarded as experienced in large-scale integration following the 2015 crisis, Germany has developed extensive support structures, including language training and social housing programs.
2. Poland – It opened its borders to the largest numbers of Ukrainian refugees in 2022, yet critics point to a lack of longer-term planning or robust integration policies. Will Poland's initial humanitarian stance translate into meaningful, sustained measures for these newcomers?
3. Hungary – Not traditionally a primary destination for migrants, Hungary's position remains cautious. Though it admitted significant numbers of Ukrainians, its historical reluctance toward EU-wide burden-sharing and refugees from non-European conflict zones suggests a reactive rather than proactive approach.
4. Other CEE Countries – Smaller states in Central and Eastern Europe also welcomed fleeing Ukrainians, but most served more as transit corridors than final destinations. Their cautious policies reflect limited resources and political ambivalence about long-term integration.

This varied spectrum of responses influences refugee decisions about where to settle. Migrants naturally weigh factors such as language proximity, job opportunities, welfare provisions, and social acceptance. In doing so, they may bypass countries that lack robust support systems in favour of those offering clearer integration pathways. Such patterns confirm that EU law alone cannot guarantee uniform outcomes; national politics, institutional preparedness, and public opinion all shape the actual reception of people in flight from war.

4.3. *Attitudes and Legal Frameworks in Selected EU States: Germany, Poland, Hungary and Others*

What truly shapes a country's approach to incoming refugees? Are legal frameworks enough to ensure uniform protection, or do national politics, social perceptions, and resource constraints ultimately dictate the outcomes? These questions lie at the heart of contemporary EU asylum debates, particularly as Europe confronts the largest displacement on its soil since the Second World War. It is worth noting that Dražanová and Geddes highlight a persistent imbalance in how states handle refugee populations from different regions.⁹² On one side, Ukrainians benefit from comparatively favourable treatment, while on the other, non-European asylum seekers frequently face stricter controls and limited access to support. This duality underscores the importance of a more cohesive and rights-based solidarity that transcends purely national interests. Equally significant is the call for institutionalised relocation

92 Dražanová and Geddes, 2023, p. 141.

mechanisms, which could prevent the abrupt political upheavals that often arise in moments of crisis. One cannot ignore the legal complexities surrounding many Ukrainian refugees, who do not always meet the 1951 Geneva Convention definition of persecution. Is this narrow interpretation still appropriate for conflicts of the 21st century? Malanchuk contends that the Temporary Protection Directive (TPD) of 2001 fills a crucial gap by granting immediate access to the labour market, education, and healthcare.⁹³ However, the extent of its actual implementation varies tremendously across Europe.

There is no doubt that Poland's legislative response garnered particular praise because the Polish government swiftly established a simplified registration system, flexible employment options, and special measures to accommodate Ukrainian healthcare professionals.⁹⁴ Such agility prevented procedural bottlenecks and reflected a pragmatic understanding of on-the-ground realities. Nonetheless, it should be stressed that Poland's long-term integration frameworks remain underdeveloped, prompting concerns about future social cohesion.

Attention should also be given to Germany, which relies on §24 *Aufenthaltsgesetz*⁹⁵ to operationalize the TPD.⁹⁶ This legal foundation grants Ukrainian refugees broad protective status, although it restricts their mobility within the country. Germany's approach, honed through its 2015 experiences, often appears well-organised but can be perceived as overly rigid. Even so, Lazarenko and Rabinovych emphasise Germany's emphasis on structured integration pathways – language classes, vocational training, and immediate access to the labour market – which many argue provides a more comprehensive footing for long-term settlement.⁹⁷

4.4. The Polish and German Approaches in Contrast

Poland and Germany represent contrasting models of crisis management. In Poland, a spontaneous influx of 2.8 million Ukrainians in the initial weeks of the war challenged local infrastructures yet also revealed remarkable societal mobilisation.⁹⁸ Authorities offered provisional accommodation and financial assistance but did not embed these measures within a wider strategy for integration. Lazarenko and Rabinovych underscore Poland's efficiency in the earliest phases of the crisis but caution that limited budgets and escalating costs of collective accommodation may eventually strain social support systems.⁹⁹ Germany, by comparison, applied its established legal frameworks with methodical precision. It is evident that while German regulations can be stringent, they frequently deliver consistent coverage, including robust

93 Malanchuk, 2023, pp. 233–234.

94 Ibid., pp. 238–239.

95 Residence Act (*Aufenthaltsgesetz – AufenthG*), Germany.

96 Malanchuk, 2023, p. 239.

97 Lazarenko and Rabinovych, 2025, pp. 102–105.

98 Dražanová and Geddes, 2023, p. 140.

99 Lazarenko and Rabinovych, 2025, p. 110.

language and job-placement programs.¹⁰⁰ Critics do voice concerns about bureaucratic hurdles and the possibility of fostering dependency on social benefits, yet the consistency of these policies often outweighs sporadic inefficiencies.¹⁰¹

4.5. Hungary's Ambivalent Position

Hungary's stance toward the ongoing crisis involving Ukrainian refugees reflects both adaptability and caution. Although the government officially adopted the Temporary Protection Directive (TPD) for Ukrainians, reservations persist regarding broader migrant influxes, particularly those originating from regions outside Europe. One explanation for this guarded approach lies in the country's relatively limited historical experience with large-scale immigration, as well as an emphasis on cultural continuity. In the specific context of Ukrainian arrivals, individuals of Hungarian ancestry from Zakarpattia often receive targeted support, including financial aid and educational programs, given the longstanding view in Hungarian society that it holds a special obligation to assist its "brothers" in the region.¹⁰² This perspective, which resonates with the current administration's policy framework, does not negate Hungary's overall willingness to provide humanitarian assistance: during the initial months of the war, both government-led and grassroots efforts demonstrated solidarity and mobilised significant resources for Ukrainians seeking refuge. Nonetheless, there have been indications that, over time, the public's readiness to sustain these efforts may have diminished, partly due to concerns about resource allocation and perceived "refugee fatigue".¹⁰³ For some Ukrainians, these shifts prompted either a return home or onward movement to other EU destinations. Even so, it is important to recognise that Hungary's multifaceted response – rooted in historical ties, domestic priorities, and broader European commitments – continues to evolve as the situation unfolds.

4.6. Synthesis

A number of additional EU member states complement this picture. Spain, for instance, permits flexible mobility but offers less generous financial assistance, thereby encouraging further movement to countries with better support systems.¹⁰⁴ France and Italy, similarly, have transposed the TPD into national law, but their implementation is often reactionary, lacking the level of organisational structure found in Germany or even Poland. One might ask: Does this reflect limited resources, divergent political cultures, or both? The question points to a reality in which the TPD alone cannot deliver uniform refugee protection. Indeed, many Ukrainians ultimately base their migration decisions on each state's specific combination of legal rights,

100 Malanchuk, 2023, p. 240.

101 Lazarenko and Rabinovych, 2025, p. 105.

102 Nagy, 2023, p. 148.

103 Ibid., p. 154.

104 Malanchuk, 2023, p. 240.

material support, and social acceptance.¹⁰⁵ Evidently, the EU's first-ever activation of the Temporary Protection Directive stands as a milestone of collective will, though its on-the-ground outcomes vastly differ. Poland championed a rapid legislative response but has yet to articulate comprehensive integration strategies. Germany, more versed in large-scale migration, offers a clearer path to long-term inclusion at the cost of certain mobility constraints. Hungary continues to fulfil its formal commitments toward Ukrainian refugees while pursuing a more cautious migration policy in relation to other groups. Meanwhile, numerous EU states oscillate between humanitarian gestures and practical limitations, prompting refugees to engage in secondary migration in search of better conditions.

Perhaps the central takeaway is that despite the newfound reliance on TPD provisions, a patchwork of historical legacies, legal frameworks, and societal attitudes continues to dictate how individuals fleeing war are received. It is difficult to deny that deeper harmonisation – both in law and in practice – remains an elusive goal. Ultimately, whether the EU can extend this spirit of solidarity beyond the Ukrainian case may well define the future shape of its asylum system and its commitment to equitable treatment for all refugees.

5. Conclusions

Throughout the preceding sections, this chapter has illustrated how Central and Eastern European countries – despite their shared legacies of communist rule, EU aspirations, and proximity to regional conflicts – have followed contrasting trajectories in their engagement with international criminal law, international humanitarian law, and international refugee law. On one level, certain points of convergence are clear: the historical experiences of authoritarianism and war has fostered an awareness of the need for accountability; membership or candidacy for EU accession has presented a catalyst for legal reforms; and the Russian-Ukrainian conflict underscored the humanitarian imperative for unified crisis response. Yet these broad parallels have scarcely yielded uniform practices, as revealed in the stark differences among the former Yugoslav states in coping with ICTY mandates, the varying degrees of reckoning with communist-era crimes, and the heterogeneous reception policies for Ukrainian refugees in 2022.

One might ask how well these observations respond to the guiding research questions. When viewed through the lens of ICL – especially the work of the ICTY – countries directly entangled in the Balkans' 1990s wars were inevitably compelled to undertake more extensive prosecutions and reforms. However, their readiness to comply varied according to domestic political shifts, pressure for EU accession, and public sentiment shaped by nationalist narratives. In other words, where strong reformist coalitions emerged, we saw greater alignment with international standards; where nationalist

105 Dražanová and Geddes, 2023, p. 141.

or post-communist elites retained power, implementation lagged. Moving to IHL, the prosecution of communist crimes is fraught with challenges. Poland confronts Russia's refusal to classify Katyn as a war crime. Hungary faces the passage of time, making trials like Biszku's largely symbolic due to evidentiary issues. Meanwhile, the Czech and Slovak cases highlight interpretive hurdles in defining isolated acts during the 1968 invasion as systematic war crimes, complicating accountability. Finally with regard to IRL and the recent inflow of Ukrainian refugees, CEE nations have displayed a patchwork of policy innovations and improvisations, from Poland's open doors and rapid legislation to Hungary's more guarded stance. Although the EU's Temporary Protection Directive offered a semblance of collective resolve, each state's domestic priorities, financial resources, and social attitudes ultimately determined the scope and quality of assistance.

Taken together, these patterns suggest that where historical wounds are deep or ethnic tensions remain unresolved, progress on international legal commitments may stall, no matter how robustly the EU encourages harmonisation. At the same time, it would be unfair to dismiss the tangible achievements that have been realised whenever political leaders and civil society organisations embraced shared responsibilities. The willingness of post-war Croatia and Serbia to hand over key indicted figures, albeit under international pressure, has illustrated that concerted efforts can meet ICL obligations. Similarly, Poland's dramatic admission of millions of Ukrainian refugees, in tandem with an array of legal adaptations, highlights how acute crises can galvanise humanitarian instincts – even when long-term integration frameworks lag behind. Meanwhile, states that have adopted a more measured approach to migration, including Hungary, illustrate the delicate balance between safeguarding national interests and upholding the broader principle of European solidarity, with legitimate domestic considerations often informing their stance.

This chapter argues that the differences noted across ICL/ICTY, IHL/communist crimes, and IRL/refugee flows reflect the interplay of historical legacies, political will, and institutional capacity. While all these countries are bound by a common regional identity and have participated in various international bodies, the degree to which external norms permeate domestic practice still depends on local contingencies.

It would be easy to criticise the EU for its institutional flaws and inconsistent enforcement of solidarity. Is the Union a “perfect” organisation? Certainly not. But one cannot ignore that, for all its imperfections, Europe remains the destination of choice for those fleeing war, violence, and repression. The enthusiastic drive of Balkan nations to join this shared project attests to the EU's power of attraction; and in the face of crises, there is indeed potential to achieve far more by working together. How else can one explain why refugees from Ukraine look to Poland, Germany, or the Czech Republic first, rather than risking longer, more perilous journeys elsewhere? Naturally, a united Europe requires better leadership and respect for national interests – yet it must also preserve a sense of collective identity. When Europe stands firm and avoids the divisions of the past, it emerges stronger and safer. A robust EU can channel the principles of ICL, IHL, and IRL far more effectively than any single

country acting alone. However, implementing these principles in practice is no easy feat when states cling to old resentments or resist deeper cooperation. Hence, the primary lesson of this chapter is that crises – whether sparked by armed conflict or large-scale displacement – reveal both the weaknesses and the latent strengths of the European project. Is it truly feasible to rely on individual states' *ad hoc* responses in the long run? Perhaps not. Genuine progress arises through dialogue, education, and respect – as states that trust one another can coordinate, pool resources, and share burdens more equitably.

Finally, it bears repeating that the EU is not some impersonal “them”. Rather, it is an evolving community of “us”, shaped by the interplay of diverse national voices. To see it in this light is to acknowledge that citizens, governments, and institutions each hold agency in forming the Union's policies. Indeed, once we realise that we ourselves are Europe, the impetus to refine its laws and structures feels all the more urgent – and the potential for meaningful, collective achievements becomes that much greater.

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