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21. DRK-Kurs im Humanitären Völkerrecht

Berlin, 2. - 8. August 2015

Der Kurs richtet sich vorrangig an Jurastudierende höherer Semester, an Rechtsreferendare und andere junge Juristen, die ihre Kenntnisse im humanitären Völkerrecht vertiefen möchten. Unter entsprechenden Voraussetzungen sind auch Studierende und junge Absolventen anderer Fachbereiche herzlich willkommen. Da einzelne Kursteile in englischer Sprache stattfinden, sind gute Englischkenntnisse die Bedingung für eine Teilnahme. Der Kurs beinhaltet Vorlesungen und Gruppenarbeiten zu den grundsätzlichen und aktuellen Themenstellungen des humanitären Völkerrechts.

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Editorial

Das erste Heft der HuV-I im Jahr 2015 gibt einen Überblick über neueste Entwicklungen und Debatten aus dem Bereich des humanitären Völkerrechts und seiner Nebengebiete. Hierzu zählen im vorliegenden Heft private Militär- und Sicherheitskräfte, die Unterdrückung von Oppositionsbewegungen, Schadensersatzforderungen vor nationalen Gerichten aufgrund von Verletzungen des humanitären Völkerrechts sowie die Auseinandersetzung mit der Ukraine-Krise aus nationaler Sicht.

Shlomit Stein und Felix Petersen eröffnen das Heft mit einem Beitrag zu Protestbewegungen in den besetzten Palästinensergebieten und der Türkei in vergleichender Form. Die Legitimität staatlichen Eingreifens wird vor dem Hintergrund bestehender Gesetze und des Handels der Exekutive in beiden Gebieten untersucht.

Tassilo Singer richtet in seinem Beitrag unsere Aufmerksamkeit auf den rechtlichen Status von privaten Militär- und Sicherheitsfirmen auf Handelsschiffen. Insbesondere ihr Einsatz bei der Bekämpfung von Piraterie wird an den Maßstäben internationalen und nationalen Rechts gemessen und hier kritisch beleuchtet.

Die Ukraine-Krise und ihre rechtlichen Fragestellungen wurden bereits in den vergangenen Ausgaben der HuV-I im Jahr 2014 in unserer Kategorie Fallstudien in den Fokus gerückt. Stan Starygin analysiert die Ereignisse erneut, jedoch stellt er die Militäreinsätze und Anti-Terror-Operationen auf den Prüfstand nationalen Rechts.

In unserer Rubrik Urteilsbesprechungen untersucht Nele Achten das Urteil des Landgerichts Bonn zur Entschädigung von Personen im Zusammenhang mit der Kunduz-Affäre. Das Urteil und seine Bedeutung für Schadensersatzforderungen für Verletzungen des humanitären Völkerrechts dienen dabei als Fallbeispiel, um in einem zweiten Schritt die Rechtsgrundlage für Entschädigungen im nationalen und internationalen Recht zu behandeln.

Konferenzberichte zu verschiedenen Tagungen aus dem Jahr 2014 liefern einen Einblick in die aktuellen Debatten und Fragestellungen der Wissenschaft. Yaroslavna Sychenkova und Simon Rau berichten von der Tagung des DRK-Landesverbandes in Berlin, Kerstin Rosenow-Williams gibt Eindrücke aus dem COST Workshop zu Umweltmigration wieder und Christian Schad berichtet über die Zusammenhänge von Verbreitungsarbeit und Rotkreuzmuseen.

Mit der Buchrezension von Stephan Hobes „Einführung in das Völkerrecht“, 2014, schließt Manuel Brunner das erste Heft des Jahres 2015.

Die Redaktion schließt mit dem Hinweis, dass die Inhalte der Beiträge nicht notwendigerweise die Meinung der Redaktion widerspiegeln.

Wir wünschen Ihnen interessante Einblicke und viel Freude bei der Lektüre.

Charlotte Lülf
Stellv. Chefredakteurin

Protest and its Suppression in the Occupied Palestinian Territories and in Turkey

Shlomit Stein / Felix Petersen*

Der folgende Beitrag untersucht die rechtliche Rahmung und exekutives Umgehen mit Protest in kritischen und konflikthaften Situationen. Im Zentrum der Analyse stehen die Gesetze und das tatsächliche Handeln der Exekutive in der Protestunterbindung und Strafverfolgung in den israelisch besetzten Gebieten und in der Türkei. Beide Fälle kennzeichnet ein extrem striktes staatliches Umgehen mit Protest. Sie verweisen somit auf die Grenzen der Legitimität staatlichen Handels in diesem Bereich. Grundsätzlich zeigt die vergleichende Analyse, dass problematische Formen der Unterdrückung von Protest daran zu erkennen sind, dass Recht hier instrumentalisiert wird, um künstliche Grenzen zwischen erlaubtem und unerlaubtem Dissens zu ziehen. Darüber hinaus veranschaulicht der Beitrag die Konsequenzen einer Normalität außerordentlicher Mittel zur Aufrechterhaltung der öffentlichen Ordnung, wo Sicherheitsinteressen das Recht, zu protestieren, fortlaufend ausstechen.

This article provides an analysis of the legal framework and executive treatment of protest in contested social and political settings. In particular, it focuses on protest policing in the Occupied Palestinian Territories and inquiries into policing and prosecution of protest in Turkey. Both cases display extreme forms of state action against protest. Precisely because of their extreme nature, these cases shed light on the legitimate limits of state action in this respect. In short, the comparative analysis shows that problematic forms of protest control are those which utilize law in order to draw artificial lines distinguishing between legitimate and illegitimate dissent. It further illustrates the political consequences of a normalization of the use of extraordinary means to maintain public order, ultimately leading to the continuous trumping of the right to protest in favour of security interests.

1. Introduction

The past decade has seen a significant increase of protest and social unrest across the globe. Anti-austerity protests challenging the legitimacy of the economic order emerged in the West following the 2008 economic crisis; the 'Arab Spring' openly questioned the legitimacy of authoritarianism in North Africa; protests urging political regime change broke out in Ukraine and Hong Kong; and recently the United States experienced massive protest against police violence towards African-Americans. A study covering 843 protests in 87 countries shows that between 2006 and 2013 the quantity of protests has almost doubled.[1]

Political participation, among others by protest, is constitutive of a functional democratic regime.[2] It is even described as the epiphany of democracy.[3] Therefore, protest is not 'problematic' for democracy but for the stability and certainty of the state. For this reason, the aforementioned displays of social unrest have been met by state suppression to differing extents. Accordingly, the state's conduct in dealing with political protest is a litmus test for all regimes aspiring democratic and inclusive politics. In this respect, the key question is: to what extent can the state control protest and still maintain its democratic integrity? We address this question from a socio-legal perspective, asking how law is utilized and according to what paradigms it is applied in the context of protest.

Our inquiry focuses on the policing of protest under the Israeli military regime in the Occupied Territories and under the strict executive regime governing protest in Turkey. These cases exemplify extreme curtailment of the right to protest in a social setting of constant unrest. Such restrictions are justified by interpreting the concepts of 'public order' and 'security' in an overly broad and inflationary manner and by tackling protest with a form of 'military policing'. Precisely because of their extreme character, these cases shed light on the legitimate limits of state action against protest.

In the context of occupation, the right to protest is analysed along the three relevant normative frameworks, i.e., administrative orders issued under the military commander (contrasted to Israeli penal law), International Humanitarian Law (IHL) provisions which Israel applies *de-facto* without affirming the status of the area as an 'occupied territory' *de-jure*, and international human rights law. The part concludes that by applying distinct legal regimes to control of protests within the state of Israel and in the Occupied Territories and by suppressing protests in the latter through a 'conduct of hostilities' paradigm; the protected civilians' right to protest is ultimately non-existent. In the Turkey case, we analyse the domestic legal framework and underscore in particular anti-terror legislation. The anlysis demonstrates that by applying existing anti-terror laws and by proposing new strict security amendments, the right to protest is under grave threat in

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1 I. Ortiz / S. Burke / M. Berrada / H. Cortes, World Protests 2006-2013, New York 2013. This study defines four categories of grievance that motivated the recent protests: economic justice and anti-austerity, failure of political representation and political systems, global justice, and rights of people, pp. 14-30. The study furthermore indicates a significant increase of protest, from 59 per year in 2006 to 112 until mid-2013 and compares the present period to eras of great transformation and change, e.g. 1848, 1917 and 1968, p. 5.

2 J. Habermas, Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats, Frankfurt am Main 1998; J. Cohen / A. Arato, Civil Society and Political Theory, Cambridge / Massachusetts 1992.

3 Henry David Thoreau even spoke of the duty of civil disobedience, see H. D. Thoreau, On the Duty of Civil Disobedience, Chicago 1849. See also J. Rancière, Ten Theses on Politics, in: Theory and Event 5 (2001).

Turkey. Finally, the conclusive comparison sets out to deduce how the analysis of the two cases contributes to the study of protest and its policing in an era marked by the dialectics of freedom and security.

2. The Law on Protest in the Occupied Palestinian Territories

2.1. Introduction

The fifty days of Operation Protective Edge[4] took a heavy toll on the lives of citizens in the Gaza strip. Less mention has been made of the loss of civilian lives in the West Bank. During the operation Palestinians held strikes, rallies, processions and at times violent protests in support of the residents of Gaza and to protest against Israel's actions.[5] According to B'Tselem, during the operation thirteen Palestinian were killed by security forces in the West Bank, most of them due to excessive force used to suppress demonstrations.[6]

These events call attention to the right to protest in the Occupied Palestinian Territories (OPT). Whereas in a functioning democratic setting, civilians have a right to protest, in the OPT it is questionable if such a right exists. Even if in principle it does, it is undeniably construed in a narrow manner that makes it negligible in practice. Both as a matter of law and fact, attempts of occupied civilians to protest are labeled as a 'threat to public order', a category which justifies the denial of the right to protest.[7] This is accomplished by applying a different legal regime to Palestinian protests held within the OPT than that applied within the borders of the State of Israel[8] and to Israeli citizens residing inside the OTP.

In Israel, protests are governed by a 'law enforcement' normative framework under the Israeli penal law. At first glance, it would seem that the right to protest in the OPT is also restricted by a 'law and order' framework, through penal measures set out by the relevant military order and supported by the occupying power's obligation to maintain public order. However, when placed within the context of IHL's lack of affirmative acknowledgment of the right to protest, the 'threat to public order' allegedly posed by protesting civilians is easily labeled a security threat. This allows for the application of the relevant military order guiding protest according to a 'conduct of hostilities' paradigm[9] where security needs enjoy paramount consideration.

True, the administrative legal regime is subject to review by the Israeli Supreme Court[10] and is normatively subordinated to international law, first and foremost to IHL and, to some extent, to International Human Rights Law (IHRL). However, by not providing a definitive right to protest to occupied civilians, IHL — which can be seen as the designated rule of law in occupied territories — makes deprivation of the right through harsh penal restrictions and fierce crowd control methods the norm.

2.2. The Legal Framework

The immediate law governing civil life in the OPT is composed of a patchwork of military orders legislated by the Israeli military since the beginning of the occupation in 1967.[11] These laws are administered by the military, applied by military courts[12] and are subject to review by the Israeli Supreme Court.[13] The right of Palestinian civilians[14] to protest in the OPT is governed by Military Order No. 101 (Order Regarding Prohibition of Incitement and Hostile Propaganda Actions) (the Order).[15] Issued in 1967 and still in effect today, the order prohibits Palestinian congregations of more than ten people around activities concerning political affairs or activities that are considered political, without obtaining permission from the Military Commander of the area.[16] This prohibition applies to public and private spheres.[17]

The Order prohibits waving of flags or political symbols without prior permission of the military commander.[18] It also forbids the printing or publicizing of any document 'having a political significance' without obtaining a prior license.[19]

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4 The operation was launched by the state of Israel on 8 July 2014 and came to an end with the announcement of an open-ended cease fire on 26 August 2014.

5 At some events, Palestinian protestors threw stones and Molotov cocktails at security forces and burned tires. At one demonstration, held in Qalandiya, protestors fired live ammunition. See B'Tselem, 13 Palestinians Killed by Israeli Security Forces in West Bank since Operation Protective Edge Began: Excessive Use of Live Fire Suspected, 29 July 2014, http://www.btselem.org/press_releases/20140729_13_palestinian_fatalities_since_gaza_operation_begun (all accessed on 11 January 2015).

6 *Ibid*.

7 R. Jaraisy / T. Feldman, Protesting for Human Rights in the Occupied Palestinian Territory: Assessing the Challenges and Revisiting the Human Rights Defender Framework, in: Journal of Human Rights Practice 5 (2013), p. 423.

8 We are referring to what is known as the '67 border', including East Jerusalem and The Golan Heights which Israel has annexed and to which domestic law (in contradiction to International Law) applies.

9 We explicitly use the term 'paradigm' to stress that we are not claiming that Israel strictly applies IHL provisions to policing of protests in the OPT, but rather that it implicitly deals with them with rhetoric and means taken from a conduct of hostilities legal framework.

10 D. Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, New York 2002.

11 The documentary film "The Law in These Parts" by Ra'anan Alexandrowic gives a thorough account of the Administrative Military regime established in the OPT, https://www.thelawfilm.com/eng#!/the-film.

12 For a critique of the inefficiency of the judicial review conducted by the military courts in respect to the military's response to protests in the OPT, see R. Jaraisy / T. Feldman, *supra* note 7, p. 424.

13 D. Kretzmer, *supra* note 10.

14 When discussing the right to protest in the OPT, it is crucial to stress both the space of the protest (the OPT) and the identity of the protestors (the Palestinian population) as contrast to the right of the Israeli population residing in the OPT. The latter are subject to Israeli law in all matters, including the right to protests. For the application of law in the OPT according to the subject's identity, see M. Karayanni, The Quest for Creative Jurisdiction: The Evolution of Personal Jurisdiction Doctrine of Israeli Courts towards the Palestinian Territories, in: Michigan Journal of International Law 29 (2008), pp. 665-721.

15 Military Order No. 101, Order Regarding Prohibition of Incitement and Hostile Propaganda Actions, 27 August 1967, http://www.btselem.org/download/19670827_order_regarding_prohibition_of_incitement_and_hostile_propaganda.pdf.

16 *Id*., Article 1.

17 For example, the home or a private establishment such as a coffee shop, see *id*., Article 4.

18 *Id*., Article 5.

19 *Id*., Article 6.

Incitement to violating the Order is defined as an attempt 'to influence public opinion in the region in a manner that is liable to harm public safety or public order'.[20] Offences under the Order are liable to up to ten years of imprisonment or a fine or both.[21]

What is evidentially missing in the Order is the recognition of an affirmative right to protest. Regardless of their nature, demonstrations in the OPT are almost always illegal.[22] Even more to the point is a claim made by the Military Prosecution in a case concerning violations of the Order that 'the residents of the Area are not at all entitled to the right to demonstrate'.[23] The court left the question as 'requiring review'.[24]

The right to protest in the OPT is further infringed by the Military commander's power to declare an area as a 'closed military zone'. This is authorized 'when security needs, or the need to maintain public order requires the closing of the area. This strategy is frequently employed to disperse protests held against the construction of the separation barrier.[25]

In stark contrast, The Police Act [New Version] 5731-1971 (the Police Act), which consolidates the main part of the provisions concerning the right to demonstrate within the State of Israel, allows and protects freedom of protest. As a rule, assemblies do not require prior authorization. A permit is required only when an assembly is held in a public space, has fifty or more participants and includes a political speech or movement from one place to another.[26] The provisions of the Police Act differ substantially from those of the Order. According to the latter, 'demonstration' is defined in much broader terms. Furthermore, the maximum penalty for unauthorized protest according to the Police Act is one year of imprisonment, compared to ten years afforded by the Order.[27]

Although formally, the Police Act's applicability was not extended to Israeli citizens in the OTP; in practice, Israeli citizens holding unauthorized demonstrations in the OTP are brought to trial before Israeli courts according to the Israeli penal code.[28]

In practice, the Order is not systematically implemented. As a matter of policy, the Military permits non-violent demonstrations that do not disrupt public order or pose a security threat.[29] However, this maintains a reality of uncertainty regarding the manner in which the law is implemented and in what circumstances. Furthermore, such practice provides the military commander with a wide margin of discretion to decide in each event what is deemed to be a threat to public order.[30] In this respect, one cannot overlook the problematic situation: the authority addressed through protest is the same authority that has the power to authorize or deny the request.

Considering the several problematic aspects of the Order, we will proceed to evaluate it according to IHL obligations on the occupying power. Although Israel does not acknowledge its occupation of the OPT, it selectively applies IHL provisions from the Hague Regulations of 1907 and the Geneva Conventions of 1949 in the area. IHL does not address the right to protest. Though resistance and protest should be distinguished, it would be of help to interpret IHL's stand concerning the occupied population's right to resist occupation in order to draw conclusions regarding the right to protest.

IHL also does not include a right to resist occupation. One could argue that this is due to the temporary character of occupation envisioned by IHL drafters and not to a deliberate exclusion. However, certain IHL provisions can actually be interpreted as precluding a right to resist occupation. For example, IHL gives an occupying power not only the right but the obligation to ensure public order, and it authorizes an extraordinarily wide range of powers to do so – including the right to detain people indefinitely without trial.[31] Under occupation, civilians can be prosecuted for acts of resistance deemed disruptive to the security of the military administration.[32]

Furthermore, as the right to self-determination, upon which the right to resist is usually justified, is not among the non-derogable rights listed in Article 4 (2) of the International Covenant on Civil and Political Rights (ICCPR), it could be argued that the military commander's right to ensure public order overrides the right of self-determination and subsequently the right to resist in its name. Thus, it seems that the only way for resisters to enjoy the protection of IHL is if their acts of resistance excel to the intensity of an armed conflict.[33]

Considering that the sphere of resistance is construed as a dichotomy according to which there is either no right to

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20 *Id*., Article 7A.

21 *Id*., Article 10.

22 R. Jaraisy / T. Feldman, *supra* note 7, p. 428.

23 L. Yehuda *et al*., One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank, October 2014, p. 88.

24 *Ibid*.

25 *Id*., p. 86.

26 *Id*., p. 82; The Police Act [New Version] 5731-1971, Articles 83-84.

27 For a complete analysis of the differences between the laws, see Military Order No. 101, *supra* note 15, pp. 84-85.

28 In an exceptional case, military law was applied to the Israeli organization 'Breaking the Silence' in order to prevent it from holding tours in Hebron, *id*., pp. 82-83, also fn. 165, 166 there. Israel's acknowledgment of the right to political protests of Israelis in the OTP is exemplified in an act passed in the Knesset subsequent to Israel's unilateral disengagement from the Gaza strip in 2010. The act brings to a halt the execution of judgments of those convicted with offenses 'related to opposing the Disengagement Plan', unless a prison sentence that was not converted into community service was imposed upon this person. It also instructs to delete the related criminal records. See Knesset, Termination of Proceedings and Deletion of Records Related to the Disengagement Plan, Act No. 5770-2010.

29 L. Yehuda *et al*., *supra* note 23, p. 89. The order was commonly applied during the First Intifada. Its application decreased following the initiation of the Oslo process but increases again since early 2010, p. 84, fn. 168 citing N. Baumgarten-Sharon, The Right to Demonstrate in the Occupied Territories, Position Paper, Jerusalem 2010.

30 L. Yehuda *et al*., *supra* note 23, pp. 89-90.

31 The right to detain people indefinitely without trial is subject to a right of appeal and periodic review. See Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 78.

32 *Id*., Article 64(3).

33 According to Article 4(A)(2) of the Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, members of 'organized resistance movements' connected with one of the parties to the conflict are entitled to prisoner of war status, meaning that they cannot be prosecuted merely for having participated in hostilities. However, Jean Pictet of the International Committee of the Red Cross clarifies that this provision grants protection to individuals belonging to one of the belligerent parties, but it does not confer a general right to resist, see J. Pictet, Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Geneva 1958.

resist or a right to be a 'resisting combatant', what can be concluded regarding protests which are not acts of resistance? For example, a protest held against seizure of private land, an executive act which is frequently carried out in the process of establishing the separation barrier.[34] Such protests occur often in democratic societies and are certainly not unique to the context of occupation. Since IHL is silent on the issue and considering that neither the right to self-determination nor the right to protest are among the non-derogable rights of IHRL,[35] it would seem that the occupying power's right to maintain public order trumps the right to protest as well. Hence, the Order does not seem to be fundamentally in contradiction with IHL.[36]

However, IHL is not the only international legal regime applicable to occupied territories and is not the only yardstick by which to evaluate the reasonableness of the Order. Although Israel denies the application of IHRL to the protected civilians of the OPT, the prevailing scholarly view holds that IHRL applies to times and zones of conflict, including belligerent occupation, along with IHL.[37] Thus, IHRL applies as a default, subject to the existence of a specific IHL norm governing the factual circumstances at hand.[38] Moreover, some hold that in situations of prolonged occupation, the role of IHRL becomes even more significant and should be interpreted as placing especially severe restrictions on the occupant's use of power.[39]

Accordingly, since there is no specific IHL provision on the right to protest, we should turn to IHRL. The right of peaceful assembly is prescribed in Article 21 of the ICCPR.[40] As it is one of the main fundaments of IHRL, the International Court of Justice has confirmed that the ICCPR's protections do not cease during wartime.[41]

However, there are several obstacles to implement human rights obligations in the OPT. First, Israel does not see itself obligated to extend the application of IHRL to the OPT.[42] Additionally, it is questionable if Israel's Basic Law: Human Dignity applies to the OTP.[43] Although the Supreme Court answered this question affirmatively in some cases, its rulings on the issue are inconsistent.[44] Anyway, the Basic Law does not include the right to protest.

Moreover, there seems to be an inherent weakness of IHRL discourse in its current proportionality dominated form. When calculated within proportionality tests, 'human rights are protected by the laws of armed conflict but not to their full scope.'[45] In respect to balancing the rights of the Palestinian population of the OPT, proportionality is said to be instrumentalized in order to 'regularize' restrictions on human rights due to security concerns. Ultimately, IHRL is far from providing an efficient counter weight opposing the occupier's security interests.[46]

2.3. Means of Protest Suppression

The means Israel's security forces use to suppress violent Palestinian protests in the OPT differ from those employed inside the state borders. For example, the Or Commission summoned after the October 2000 riots of Israeli Arab citizens prohibited the use of rubber coated bullets against violent protestors only within the borders of Israel.[47] The commission took a different stand concerning protests in the OPT: 'The activity of the police is inside the borders of the state directed to its citizens, and no comparison can be made between here and there. Indeed, a large part of the activity in Judia and Samaria and the Gaza Strip is undertaken by the IDF in difficult circumstances, which more than once amount to war conditions. We mention this in order to clarify and underscore that not everything that is permitted in the context of military action is permitted in the context of maintenance of public order and disassembly of rioters.'[48]

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34 I. Blank, Legalizing the Barrier: The Legality and Materiality of the Israel / Palestine Separation Barrier, in: Texas International Law Journal 46 (2011), pp. 309-343.

35 J. Waldron, Post Bellum Aspects of the Laws of Armed Conflict, Loyola of Los Angeles International and Comparative Law Review 31 (2009), pp. 35-36.

36 An argument could be made that public order should be maintained first and foremost for the benefit of the occupied population. Since it could be argued that resisters do not necessarily represent public interest, they are not only a threat to the occupying power but also to the general population, and thus there is more justification to suppress them in the name of maintaining public order than there is justification to suppress protesters. For a discussion about the diversity of forms of resistance, see K. Watkin, Use of Force during Occupation: Law Enforcement and Conduct of Hostilities, in: International Review of the Red Cross 94 (2012), pp. 267-315.

37 Whereas in the past, IHL and IHRL were perceived to be mutually exclusive legal regimes – IHRL applying in times of peace and IHL in times of hostilities –, it is currently held that the two legal regimes are complementary. See O. Ben-Naftali, Introduction: Pas de Deux, in: O. Ben-Naftali (ed.), International Humanitarian Law and International Human Rights Law, New York 2011, pp. 3-13.

38 This approach was affirmed by the International Court of Justice, thus acknowledging that the ICCPR is applicable outside of a state's territory to acts of an occupying state committed in the exercise of its jurisdiction. See ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 104, 2004. See also ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep. 226, 1996. For a critique of the *lex specialis* principle's capacity to resolve conflicts between IHL and IHRL, see M. Milanović, Norm Conflicts, International Humanitarian Law and Human Rights Law, in: O. Ben-Naftali (ed.), *supra* note 37, pp. 95-129.

39 O. Ben-Naftali / Y. Shany, Living in Denial: The Application of Human Rights in the Occupied Territories, in: Israel Law Review 37 (2004), pp. 97, 105.

40 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series, vol. 999, p. 171, http://www.refworld.org/docid/3ae6b3aa0.html.

41 ICJ, Legality of the Threat or Use of Nuclear Weapons, *supra* note 38.

42 It should be mentioned that Israel is not alone in this approach. The US consistently argues that the ICCPR does not apply outside of the territory of a state party. This stands in contradiction with the UN Human Rights Committees stance on the issue, see K. J. Heller, Does the ICCPR Apply Extraterritorially?, http://opiniojuris.org/2006/07/18/does-the-iccpr-apply-extraterritorially.

43 For an analysis of the issue see Y. Ronen, Applicability of Basic Law: Human Dignity and Freedom in the West Bank, in: Israel Law Review 46 (2013), pp. 13-40, 135-165.

44 *Ibid*.

45 M. Koskenmiemi, Occupied Zone-A Zone of Reasonableness?, in: Israel Law Review 41 (2008), p. 36.

46 See Y. Shany, Forty Years After 1967: Reappraising the Role and Limits of the Legal Discourse on Occupation in the Israeli-Palestinian Context, in: Israel Law Review 41 (2008), p. 6.

47 Or Commission Report, Report of the State-Mandated Panel of Inquiry into the Clashes between Security Forces and Israeli Civilians in October 2000 (in Hebrew), http://elyon1.court.gov.il/heb/veadot/or/inside4.htm.

48 *Id*., Article 57.

The commission's recommendations were adopted by the government, for example the prohibition on the use of rubber coated bullets to suppress protests does not apply to the OPT.[49] This distinction stands to this day.[50] As matter of frequent practice, demonstrations in the OPT are dispersed with great force[51] and excessive use of force by soldiers is often not subjected to proper investigation or prosecution.[52]
Israel, therefore, employs different standards regarding protesters within its spatial and national borders and outside it,[53] grounded in the need to protect security forces in the OPT.[54] We argue that Israel adopts a predominantly 'law enforcement' paradigm toward protesters within its borders and a 'conduct of hostilities' paradigm toward Palestinian protesters in the OPT. The application of an IHL conduct of hostilities paradigm to Palestinian protests in the OPT is reflected in the perception that every demonstration (including non-violent) is, by default, outweighed by the need to protect the security forces. This allegedly legitimizes the adoption of a wider arsenal of restrictions on protestors than those that are permitted by human rights standards.[55]

Protection of police officers is observed in suppression of protests everywhere. It is not unique to the context of occupied territories. However, by enhancing the significance of the security of soldiers facing protests and by depicting policing of protests as a 'warlike' scenario, Israel habitually interprets 'public order' to the disadvantage of the civilians' welfare,[56] thus breaching the obligation of Article 43 of the Hague regulations and the notion of trust inherent in the law of occupation.[57]
It is argued that due to the complex security situation pertaining in occupied territories, the distinction between conduct of hostilities and enforcement of law and order is difficult to uphold.[58] However, protest does not necessarily equal resistance. By implementing a blanket restriction on all forms of protest, Israel pushes protestors into the category of illegal resisters, thus denying them the protection of IHL.

3. The Law on Protest in Turkey: Rigid Policing and Prosecution

3.1. Historical Context

Turkey has seen massive political protest in the past two years: In summer 2013 the Gezi demonstrations and protests, in May 2014 following the Mine accident in Soma and in October 2014 in Southeast Turkey as ISIS attacked the Kurdish Syrian city Kobanî. Initially, the latest protests were motivated by the reluctance of the Turkish government to support the Kurdish fighters in Syria. But the police's brutal suppression of the protests provoked even more unrest. According to news reports, more than 30 protesters were killed, more than 350 wounded and over 1000 persons detained for involvement in the protests.[59]
Several demonstrators of the Gezi protests 'face possible life imprisonment if convicted.'[60] In this regard, two trial proceedings opened recently against protesters: 35 members of the Beşiktaş Istanbul supporters Club 'Çarşı' stand trial for establishing a terrorist organization and planning a coup d'etat, and several members of the civil society network 'Taksim Solidarity' are charged with establishing a terrorist organization and refusing to disperse from an unauthorized demonstration.[61] These cases illustrate the state practice of handling social protest by anti-terrorist laws, a practice familiar from the prosecution of protest in the Kurdish regions.[62] However, only few police officers were investigated, less were prosecuted, and even those who were convicted received lenient sentences.
As a consequence of the public unrest that has swamped Turkey recently, the AKP government proposed amendments to a number of laws in order to control protest more efficiently. If passed, this amendment package could result in marginalization of the only challenging opposition: citizens that are not necessarily organized but willing to participate in politics.

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49 Association for Civil Rights in Israel and B'Tselem, Stop Firing Rubber Bullets at Protestors in the West Bank, 31 July 2013, http://www.btselem.org/press_releases/20130730_stop_using_rubber_coated_bullets_against_demonstrators.

50 *Ibid*.

51 L. Yehuda *et al*., *supra* note 23, pp. 90-91. For more information on the use of excessive force to suppress demonstrations in the OPT, see R. Jaraisy / T. Feldman, The Status of the Right to Demonstrate in the Occupied Territories, Position Paper, October 2014, pp. 36-38.

52 Some argue that sub-investigation and prosecution is a matter of state policy. See O. Ben-Naftali, PathoLAWgical Occupation: Normalizing the Exceptional Case of The Occupied Palestinian Territory and Other Legal Pathologies, in: O. Ben-Naftali (ed.), *supra* note 37, p. 132.

53 In this respect it must be mentioned that recent documented events point to the conclusion that although the prohibition on the use of rubber bullets also applies to East Jerusalem (since Israel formally annexed it and applies Israeli law to it), in reality, rubber balls are apparently used to suppress protests and riots held by Palestinians residing in East Jerusalem. Recent Cases where such use has been claimed are currently under investigation by the police. See G. Levy / A. Levac, Eyeless in the West Bank: When Palestinian Boys Play Cat and Mouse with Israeli Police, Haaretz, 3 January 2015, http://www.haaretz.com/weekend/twilight-zone/.premium-1.634943.

54 Or Commission Report, *supra* note 47, Article 57.

55 M. Sassòli, Legislation and Maintenance of Public Order and Civil Life by Occupying Powers, in: European Journal of International Law 16 (2005), pp. 663, 665; S. Bazrgan, Proportionality, Territorial Occupation, and Enabled Terrorism, in: Law and Philosophy 32 (2013), pp. 435-457.

56 This is not a new trend in Israel's interpretation of its obligations according to IHL. The Supreme Court affirmed that when taking under consideration the civilians interests in the OPT, the Military Commander is entitled to weigh also the interests of Israeli civilians living in the area. See, for example, Israeli High Court of Justice, Yoav Hess *et al*. v. The Commander of IDF Forces in the Judea and Samaria *et al*., 2004, HCJ 10356/02, 58(3) PD, p. 443; Israeli High Court of Justice, Bethlehem Municipality *et al*., v. Ministry of Defence *et al*., 2005, HCJ 1890/03, 59(4) PD, p. 736.

57 O. Ben-Naftali, *supra* note 37, p. 145.

58 K. Watkin, *supra* note 36, p. 295.

59 See for example L. Kemal, Situation in Southeast Appears to Be Out of Everyone's Hands, Today's Zaman, 1 January 2015, http://www.todayszaman.com/newsDetail.action;jsessionid=+SaoWsldrnHk7dhLOshl6K+X?newsId=368623&columnistId=0.

60 Human Rights Watch (HRW), Turkey's Human Rights Rollback, September 2014, pp. 25-26.

61 Amnesty International, Çarşı on trial, http://humanrightsturkey.org/2014/12/16/carsi-on-trial-turkeys-war-on-dissent-takes-a-tragicomic-turn (accessed on 11 January 2015).

62 HRW, Protesting as a Terrorist Offense, The Arbitrary Use of Terrorism Laws to Prosecute and Incarcerate Demonstrators in Turkey, November 2010.

Turkey's political history throughout the 20th century has been violent. Following extreme political fights in the 1970s, the Military assumed power in 1980.[63] In the 1990s, public order was on the verge of breakdown as the Kurdish party Partiya Karkerên Kurdistani and its independence project were developing into a problem for society. At present, unresolved social conflict and deep fragmentation still characterize Turkish society.[64] This can account for the fact that state institutions and political organs are consistently occupied with maintaining public order, and it further suggests an explanation for their willingness to employ extraordinary means to control social order.

Upon this backdrop, the recent state violence and harsh prosecution of protesters should be understood as a continuity of state action. Even though Turkey has a constitutional tradition, every group that comes to power aims at controlling the state. Institutions are utilized in the interests of the ruling group, opposition is silenced and society patronized. Turkuler Isiksel has described the political system as 'authoritarian constitutionalism'.[65]

Our assessment might be understood best if the top-down revolution and modernization of Turkey is put into perspective. Similar to the Bolshevik Revolution, Atatürk's modernization of the Turkish nation was organized by the elite.[66] The secularization of society, to point out one example, was a struggle against the majority Muslim identity. To this day, political conflict emerges around the constitutional principle of laiklik (laïcité).[67] The majority identity created with the revolution is 'Turkishness', and until its amendment in 2008, the Turkish Criminal Code (TCK) even penalized offences against 'Turkishness'.[68] The utilization of legal means to sanction actions and identities that fall outside the majority shows that 'othering', and the binary construction of identity (insiders v. outsiders), is facilitated in Turkey by law.[69]

Generally speaking, law has an inherent tendency to create strict distinctions (right / wrong, legal / illegal).[70] But with a functioning separation of powers and rule of law regime, the hegemonic character of law can be restrained to some extent. In Turkey, the rule of law regime seems to be extremely flawed concerning the ability to encompass protest that threatens the hegemony.

3.2. The Legal Framework

The Constitution of 1982 grants Turkish citizens 'rights and freedoms to assembly'.[71] Similar to other constitutional regimes, the particularities are further stipulated by law.[72] In addition, the TCK includes offenses against public peace and offenses against constitutional order and operation of constitutional rules.[73] The actions of executive organs are regulated by the laws on the police.[74]

As a rule, people are allowed to organize in protest, subject to prior registration and announcement to the relevant authorities. Often, the executive can decide whether or not a protest may be held. Even though in most states, executive agents, for example the police president, the city council, or Major, have the right to grant and decline permission for protest, in Turkey the situation seems to be more problematic, for the executive traditionally has a great margin of discretion.

Due to the conflict around the Kurdish self-determination project, we can describe a tradition of dealing with dissent in terms of terrorism.[75] In 1991, the Parliament enacted the Law on Fight against Terrorism.[76] In order to grasp the wide margin of discretion, this law opens for prosecution of basically

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63 F. Tschau / M. Heper, The State, Politics, and the Military in Turkey, in: Comparative Politics 16 (1983), pp. 17 f.

64 B. Kanra, Islam, Democracy and Dialogue in Turkey: Deliberating in Divided Societies, Farnham 2009.

65 T. Isiksel, Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism, in: International Journal of Constitutional Law 11 (2013), p. 725.

66 J. W. Müller, Contesting Democracy: Political Ideas in Twentieth-Century Europe, New York 2011, p. 43 f.

67 Laiklik is the Turkish concept of secularism, i.e. the strict separation of religious and state affairs. To date, the Constitutional Court annulled all laws or amendments aiming at abolishing the headscarf ban, e.g. Anayasa Mahkemesi, 'Headscarf Ruling' E. 2008/16 – K. 2008/116, Resmi Gazete 27032, 22 October 2008. See S. Benhabib, The Return of Political Theology: The Scarf Affair in Comparative Constitutional Perspective in France, Germany and Turkey, in: Philosophy & Social Criticism 34 (2010), pp. 451-471. In addition, a number of political parties were closed by the Court for violating the laicism principle, e.g. Anayasa Mahkemesi, 'The AKP Case' E. 2008/1 – K. 2008/2, Resmi Gazete 27053, 13 November 2008; O. Celeb, The Political Causes of Party Closures in Turkey, in: Parliamentary Affairs 67 (2014), pp. 371-390.

68 The first TCK regulated 'insulting Turkishness' in Article 159, (TBMM, Türk Ceza Kanunu, Kanun No. 765, Resmi Gazete 320, 13 March 1926). In the new TCK it is regulated under Article 301 (TBMM, Türk Ceza Kanunu, Kanun No. 5327 Resmi Gazete 25611, 12 October 2004. Until amendment in 2008, this article stipulated: "Public denigration of Turkishness (…) shall be punishable by imprisonment of between six month and three years." The amendment "Turkishness" was replaced with "the Turkish Nation" and the maximum penalty was reduced to two years.

69 J. Butler, Gender Trouble: Feminism and the Subversion of Identity, New York 1990; Z. Bauman, Modernity and Ambivalence, Oxford 1993; S. Hall, Representation: Cultural Representations and Signifying Practices, London 1997.

70 D. Litowitz, Gramsci, Hegemony, and the Law, in: Brigham Young University Law Review 2 (2000), pp. 515-551.

71 The Constitution of 1982 regulates the relevant rights in Article 33, i.e. freedom of association, and Article 34, i.e. the right to hold meetings and demonstration marches (TBMM, Türkiye Cumhuriyeti Anayası 1982, Kanun No. 2709, Resmi Gazete 17844, 18 October 1982). Both former Constitutions also rendered protest and demonstration: the Constitution of 1924 together with freedom of speech, press and other fundamental rights in Article 70 (TBMM, 1924 Anayası, Kanun No. 491, Resmi Gazete 71 24 May 1924); the Constitution of 1961 in Article 28, i.e. the right to congregate and march in demonstration, and Article 29, i.e. the right to form associations (TBMM, Türkiye Cumhuriyeti Anayası, Kanunu, Kanun No. 334, Resmi Gazete 10859, 9 July 1961).

72 The right to protest was specified under the Constitution of 1961 in Law No. 171 (TBMM, Toplantı ve Gösteri Yürüyüşü Hürriyetti Hakkında Kanun, Kanun No. 171, Resmi Gazete 11337, 18 February 1963); it is governed under the Constitution of 1982 in Law No. 2911 (Toplantı ve gösteri Yürüyüşleri Kanunu, Kanun No. 2911, Resmi Gazete 18185, 8 October 1983).

73 TCK, Section 5: Offenses against Public Peace (Article 213-222), and Section 15: Offenses against Constitutional Order and Operation of Constitutional Rules (Article 307-336). HRW recommended to abolish Article 220 (6)-(7), which enables prosecution of people supposedly supporting criminal acts, for these paragraphs are mainly applied to prosecute Kurdish protest as a terrorist activity, HRW, *supra* note 62, pp. 7-8.

74 Law No. 2559 on the Duties and Powers of the Police regulates the conduct of the Turkish police, 4 July 1934 (TBMM, Polis Vazife ve Salâhiyet Kanunu, Kanun No. 2559, Resmi Gazete 2751).

75 HRW, *supra* note 62, p. 7.

76 This is the Law on Fight against Terrorism, 2 April 1991 (TBMM, Terörle Mücadele Kanunu, Kanun No. 3713, Resmi Gazete No. 20843).

any kind of organized 'crime', it is enough to inquire into the first two articles defining 'terrorism' and 'terrorist'.
'Terrorism' is defined as any criminal action by an organization aiming: to change the basic principles of Turkey, for example republicanism, laicism, nation without division; to overthrow the government; to eliminate basic rights or to damage security, public order and health. 'Terrorists' are people belonging to an organization trying to realize the aims through criminal acts, regardless if they themselves commit the terrorist crime or are only members of the organization. In addition, people committing crimes in the name of an organization are also terrorist offenders. Consequently, once people damage security or public order, they are deemed terrorists. Further, it is sufficient that a crime is undertaken in association with the aims of an organization deemed to be of terrorist kind in order for the crime itself to fall under the heading of a terror act.[77] Apart from the striking over-inclusiveness of these definitions, in practice, a protester speaking out his opinion against the state and in case of clashes with the police acts to defend himself, is vulnerable to charges of terrorist crimes as the events can easily be termed 'threatening to public order'.
The aforementioned amendment package demonstrates continuity of strict legal regulation of protest.[78] The key amendments will increase the power of the state to control protest and diminish the already limited rights of protesters. Among others, they enlarge the regional governors' and the Ministry of Interior Affairs' margin of discretion to define emergency situations. In such situations, the governors will be authorized to oversee and control operations of the police, which were previously overseen by the judiciary. Hence, the amendment shifts the review of police operation from the judiciary to the executive. The amendment further stipulates that the police shall have the power to detain people without prior authorization of a prosecutor or judge, that the police may hold people in custody for 48 hours and extend the period up to four days with permission of a governor. Viewed from this point, the amendment is troubling, for it aims to reinstall the power of the police to detain, which was abolished in 2004.
Furthermore, sentences for protesters, including the penalty for destruction of private and public property (one to six years at present), will be increased dramatically. The draft law foresees severe punishment up to twelve years for Molotov cocktail throwers and up to three years for protestors using fireworks. Interestingly, Molotov cocktails shall be explicitly defined as weapons according to law, thus enabling police forces to shoot once they are attacked by them without a prior warning shot.[79]

3.3. Policing and Prosecution of Protest

In the early days of the Republic under Atatürk, the army and not the police were responsible for internal security issues. It was not until the 1980s that the police was professionalized as a civilian force. The Kurdish insurgency in the southeastern part of the county and a sudden rise in terrorist attacks at that time 'provided the opportunity for the police's cooperation with the army, whose strict military professionalism kept it from deploying troops where it was not legally sanctioned after the termination of martial law and emergency rule.'[80] The tight historical ties between the police and the military are crucial for understanding why the executive security regime in Turkey is especially rigid.
The European Court of Human Rights has commented that the Turkish police are unable to handle protest situations without violence. This general remark was made in the Izci v. Turkey case.[81] The plaintiff in the case argued that, following the dispersal of a demonstration, she was beaten up by police forces, leaving her severely injured and semi-conscious.[82] The government objected to the claims of the plaintiff, arguing that the security forces acted in accordance with the legal framework in order to maintain public order.[83] The Court rejected the government's claims, ruling that the use of force was disproportionate.[84] Furthermore, it found that at the time of the event the police forces were not guided by explicit regulations on how to use tear gas without harming protestors.
The policing of the Gezi protests reveals a similar modus operandi. Human Rights Watch reported that during the protests, there was 'widespread excessive use of force by police against demonstrators and improper firing of teargas canisters directly at protesters, leading to scores of protesters receiving serious head injuries and eleven being blinded.'[85] The report further found that 'one year on from the Gezi protests, very few police officers have been investigated for excessive use of force or improper firing of teargas.' Furthermore, it concluded that 'there have been numerous flaws in the trials of police accused of killing three of the demonstrators who died.'[86]
These findings are not surprising. Prosecution and trial of state agents have been a central problem in Turkey;[87] but by not holding police officers accountable for the use of excessive force, they are implicitly granted a wider margin of dis-

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77 *Ibid*.

78 The amendment package has been accepted by the Commission of Interior Affairs of the Turkish Grand National Assembly. Now it has to be submitted to approval of the General Assembly and must go through the normal legislative implementation process. The amendments have not been enacted yet, but the draft is available, 24 November 2014 (Türkiye Büyük Milletli Meclise Baskanlığına, Kanun Tasarısı 'Draft Proposal' No. 31853594-101-1051-4665). General assembly debates were opened on February 17, 2015. As of March 13, 2015, sixty-seven articles were approved by parliament.

79 *Ibid*; for the proposal is not available in English, see G. Üstüntağ, Gov't-led Security Package Creates Fears of Police State, Today's Zaman, 12 October 2014, http://www.todayszaman.com/national_govt-led-security-package-creates-fears-of-police-state_361398.html; see also A. Albayrak, Opposition Slams Security Bill that Will Put Turkey under State of Emergency-type Regime, Today's Zaman, 9 January 2015, http://www.todayszaman.com/newsDetail.action;jsessionid=O8p+zdNome5pJEOnqgNPNy58?newsId=369387&columnistId=0.

80 L. Piran, Institutional Change in Turkey: The Impact of European Union Reforms on Human Rights and Policing, New York 2013, p. 4.

81 European Court of Human Rights, İzci v. Turkey, Application No. 42606/05, 23 July 2013, para. 67.

82 *Id*., para. 8.

83 *Id*., para. 52.

84 *Id*., para. 56.

85 HRW, *supra* note 60, p. 25.

86 *Id*., p. 26.

87 C. Belge, Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey, in: Law & Society Review 40 (2006), pp. 653-692.

cretion in maintaining public order. However, the strict prosecution of protesters reveals where the motivation of the state lays in respect to rights protection. In the prosecution of protest in relation to the Kurdish self-determination project, terrorist charges are often employed to bring protesters to trial.[88] The aforementioned trials against citizens involved in the Gezi-Protest show that this practice is now transferred to other groups and identities dissenting from the majority construction of society.

During the 2014 protests in Southeast Turkey, citizens and police officers died but the number of casualties was much higher on the side of protestors and rioters. It is too soon to draw conclusions concerning prosecution for these events. However, many citizens have been detained, meaning that several trials may follow. In this regard, on 8 January 2014, the Van Juvenile Court accepted a case against fifteen children who participated in the protests; the prosecutor is seeking for juvenile prison sentences up to six years.[89]

The parliamentary opposition has already announced that the amendment package will be submitted to constitutional review. But can the Court act as a guardian of fundamental rights? The case law of the Court shows that both laws of assembly were already subject to review. In 1977, it annulled legislation that granted the executive authorities too much power to decide about the holding of demonstrations. In 2008, it rejected the judicial referral of a lower court asking for review of the law on assembly on the grounds that protest could be prosecuted to easily as a criminal act.[90] The Court recently took a rights-protecting stance, for example by ruling the deactivation of Twitter and YouTube as unconstitutional in early 2014. Ceren Belge shows in her study of the Turkish Court that during the 1970s, the court demonstrated judicial activism and applied counter-weight to balance executive power by protecting fundamental rights.[91] Given the recent activism of the court, those opposing the strict legislation against the right to assembly in Turkey may hope that the court acts as a guardian.

4. Comparative Conclusion

Dissent and protest can be strong driving forces of democratic change. Due to the crucial role protest plays, its restriction ought to be construed in a minimalistic manner. IHRL and laws of democratic states respect and protect the right to protest and the rights related to it, primarily freedom of speech, expression and assembly. To a limited extent, they also acknowledge the suspension of these rights in times of exceptional circumstances and for a limited period.

Curtailment of protest is usually done in the name of maintenance of public order. At times, it is also coupled with the need to guard the polity from an external threat posed to its security. Following 9/11, the 'security paradigm' was frequently called to the flag to legitimize infringement on rights and play down its devastating effects on personal liberties.[92] Concerning the right to protest, security is much more than a rhetorical device. Protesters taking part in the 2011 'Occupy Wallstreet' demonstrations, where subjected to anti-terror methods and intelligence surveillance by a security alliance consisting of the FBI, Homeland Security, local police and private security contractors.[93]

IHRL conforms to the liberal conceptualization that there exists an inherent tension between public order and security on one hand, and personal liberties and rights, on the other hand. Accordingly, a legitimate sphere of protest is demarked by striking a balance between the two competing interests. Yet, the relation between security and liberty is not a zero-sum game.[94] Surprisingly, an historical account of the binary conceptualization of security v. liberties reveals that liberalists have consistently given up the defense of liberties in favor of a 'society of security'. What stands at the heart of liberalism according to this account is not liberty, but rather security.[95]

By systematically subordinating the right to protest to internal/external security needs, the Israeli and the Turkish cases lift the veil over this "balancing myth".[96] This is not to say that balancing is always analogous to drawing a circle around the target after the arrow has already been shot. However, recent years have shown that all over the world states that define themselves as democracies committed to human rights (and that act as democracies in most respects) override the right to protest based on public order and security needs. In this respect, they are not so far apart from the pathological treatment of protest in Turkey.

Although the Military administrative regime governing the OPT does not conform to democratic principles, within its recognized borders, Israel, as a rule, conforms to democratic standards. As such, it can be expected to comply with IHRL in respect to all those under its direct effective control, including Palestinian civilians in the OPT. Yet, for reasons that can be explained along several lines, Israel does not do so. What is more important for our current purpose is Israel's capacity to maintain a self-perception of a democratic state, while applying an undemocratic legal regime in the OPT. In the context of protest, since we witness a weakness of democracies to contain counter-hegemonic voices, the artificial line Israel draws to protect its democratic community from unwelcomed 'external' threats sheds light on artificial borders that other democratic communities draw internally to delegitimize certain voices.

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88 HRW, *supra* note 62, pp. 7-8.

89 See Today's Zaman, Indictment Against 15 Children Accepted in Kobanî Case, 8 January 2015, http://www.todayszaman.com/newsDetail.action;jsessionid=BMReTZH-cAQsTP5ebnQ4Ewv2?newsId=369235&columnistId=0.

90 Anayasa Mahkemesi, E.1976/27 – K. 1976/51, Rezmi Gazete 15939, 16 May 1977; and Anayasa Mahkemesi, E. 2004/90 – K. 2008/78, Rezmi Gazete 26927, 5 July 2008.

91 C. Belge, *supra* note 87, pp. 680 ff.

92 See B. Buzan / L. Hansen, The Evolution of International Security Studies, Cambridge 2009, pp. 213-214.

93 M. Verheyden-Hilliard / C. Messineo, Out from the Shadows. The Hidden Role of the Fusion Centers in the Nationwide Spying Operation against the Occupy Movement and Peaceful Protest in America – Report of the Partnership for Civil Justice Fund, http://www.bigbrotheramerica.org/report.

94 J. Waldron, Security and Liberty: The Image of Balance, in: Journal of Political Philosophy 11 (2003), pp. 191–210.

95 M. Neocleous, Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics, in: Contemporary Political Theory 6 (2007), pp. 131-149.

96 *Id*., p. 133.

The Israeli case shows two ways in which the right to protest is restricted: First, by applying two distinct legal regimes to control dissent and protest inside and outside the spatial and national borders of Israel. Inside Israel and for Israeli citizens in the OPT, human rights standards, incorporated in Israeli law and developed through case law, are applied. Whereas, in the OPT protest is governed by administrative military law and in contradiction to IHRL. Secondly, by applying two different legal paradigms to frame and suppress protest. Inside Israel and in respect to Israeli citizens in the OPT, protests are handled according to a 'law enforcement paradigm', by police officers. In the OPT, Palestinian protesters are as a de-facto default deemed illegal resisters and accordingly suppressed by means afforded by a 'conduct of hostilities' paradigm, by soldiers. In praxis, this distinction amounts to a difference in the proportionality of means used to control protests.

The depicted limits of protest of the Palestinian population demonstrate that the right is in fact non-existent. This is due partly to IHL's lack of response to occupied civilians needs under prolonged occupation, but primarily to a denial of its application by the governing power. Even though the occupier has a right to maintain public order, interpreted in light of the Geneva Conventions' purposes, public order should be kept primarily for the benefit of the occupied population and not used against it to undermine its ability to organize collectively in protest in defense of rights.

The manner and extent to which protest is restricted in Turkey displays the distance between state and society: instead of opening a channel of dialogue with the protesters, or at least enabling the existence of a legitimate sphere of protest, the state excludes protesters from within its 'imagined' borders by prosecuting them under anti-terror laws. The systematic application of such an extraordinary legal regime merges the protester and the terrorist, both allegedly posing an external threat to society. Every protest is in potential an act aiming to overthrow the social and political order. Although the proposed security amendments are harshly criticized by Human Rights groups, the government persists to justify them as being in conformity with IHRL and EU Law. Government officials even argued, and rightly so, that the increase of police powers is not uncommon, but in fact very similar to the legislation in effect in Germany for example.[97]

If the amendments are similar to those that are already in effect and applied as a matter of norm in other states, why, then, do critics argue that the proposed changes may create an exceptional state of affairs in Turkey? The answer to this question lays in the fact that in the Turkish case we can reconstruct a continuous pattern of excessive police violence toward protesters, state-centered prosecution of dissent, and strict interpretation of rigid laws by courts. Thus, we can expect that once harsher laws come into force, dissent will be policed and prosecuted with even more force. Future aggressive state action against protest will enjoy a facade of legal legitimacy even though not fully legitimate from a democratic and human rights point of view. For dissent and protest in Turkey this may have a chilling effect on potential protesters, for the law basically communicates: If you don't play, you can't lose.

Whereas, the act of externalization, or 'othering', of dissent by suspending its right to protest is usually framed as an exception,[98] in Turkey the proposed security amendments are rather in continuity with existing state praxis. This can only be fully understood by taking under account the specific historical tradition of Turkish governments' dealings with dissent. However, since the rhetoric of exceptionalism has become the norm for tough suppression of protest in many democratic states, the Turkey case invites a further critical analysis of the normalization of means previously perceived as extraordinary. ■

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97 Indeed, the police in Germany have the right to provisional arrest during protest according to § 127 of the Criminal Procedure Code, see Strafprozessordung, Bundesgesetzblatt (BGBl) I, Nr. 24, 7 April 1987. Moreover, Molotov cocktails are in Germany prohibited weapons according to the Law on Weapons, see Gesetz zur Neuregelung des Waffenrechts, Anlage 2, Abschnitt 1, Nr. 1.3.4, BGBl I., Nr. 49, 19 September 2003. Finally, Article 129 of the German Criminal Code regulates membership in terrorist organizations, see Strafgesetzbuch (StGB), BGBl I, Nr. 1, 7 January 1975. The German definition of membership in a terrorist organization has been criticized continuously, for it gives the authorities the power to investigate based on initial suspicion any crime associated with the support of a criminal association. See B. Kretschmer, Criminal Involvement in Terrorist Associations: Classification and Fundamental Principles of the German Criminal Code Section 129a StGB, in: German Law Journal 13 (2012), pp. 1016-1036.

98 K. L. Scheppele, Legal and Extralegal Emergencies, in: G. A. Caldeira / R. D. Kelemen / K. E. Whittington, The Oxford Handbook of Law and Politics, Oxford 2008.

Private Military and Security Companies and Counter-Piracy – A Comparison of (National) Legislation on the Use of Armed Guards on Board of Merchant Ships

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Obwohl die Piraterie in der Berichterstattung in den Hintergrund gerückt ist, besteht die Bedrohung des freien Seehandels durch die Piraterie unverändert fort. Zum Schutz von Handelsschiffen werden dabei vermehrt private Militär- und Sicherheitsunternehmen von den Reedereien angeheuert und auf Fahrten von Handelsschiffen durch Hoch-Risiko-Gewässer eingesetzt. Dieser Beitrag wird sich daher mit dem rechtlichen Rahmen für den Einsatz von privaten Militär- und Sicherheitsfirmen auseinandersetzen. Im ersten Teil wird der rechtliche Status von privaten Militär- und Sicherheitsfirmen in verschiedenen denkbaren Konstellationen, sei es im souveränen Hoheitsbereich oder in der sogenannten *terra nullius* oder sei es unter verschiedenen Rechtsregimen wie internationalem Menschenrechtsschutz oder humanitärem Völkerrecht erörtert. Hierzu werden das anwendbare Recht in Piraterie-Einsätzen analysiert und die Rechte und Pflichten von privaten Militär- und Sicherheitsfirmen herausgearbeitet. Entscheidend ist oftmals das Recht des Flaggenstaats des Handelsschiffs. Bei der Bekämpfung von Piraterie durch private Firmen stellen sich jedoch einige rechtliche Probleme, unter anderem da meist die relevanten internationalen Rechtsordnungen nicht anwendbar beziehungsweise die Richtlinien für Anti-Piraterie-Maßnahmen rechtlich unverbindlich sind. Den Kern des Beitrags bildet ein Vergleich der unterschiedlichen nationalen Regelungen und der unverbindlichen Richtlinien anhand der Kriterien Sicherheitsüberprüfung, Gewaltanwendung, Berichterstattung über Vorfälle und Waffenlizenzen. Hieraus lassen sich sinnvolle Rückschlüsse über die Interaktion und Kooperation mit privaten Militär- und Sicherheitsfirmen in der Praxis ziehen und wie Staaten die derzeitige Rechtslage verbessern könnten.

As the threat of piracy persists on the oceans, the deployment of private military and security companies in counter-piracy actions is a growing market. The private military and security companies are hired by the shipping company for accompanying merchant ships on board during the passage of high-risk waters. This essay will examine its legal background, focusing on the piracy hot spot at the Horn of Africa. The private military and security industry and its economic advantages form a basis for the evaluation of the legal status of these companies in general. Therefore, the applicable law in counter-piracy situations and the rights and duties of private military and security companies will be analyzed. Hereby an often decisive element is the law of the flag state of the vessel. Nevertheless, there are some legal problems concerning the use of private military and security companies in counter-piracy operations. The comparison of the different legal instruments and non-obligatory self-commitments forms the core of the essay. The thereby identified commonalities concentrate on the points: vetting, use of force, incident reporting and weapons licenses. Out of these useful suggestions on how to interact and cooperate with PMSCs in practice can be drawn and how states could improve the current legal circumstances.

1. Introduction

1.1. Piracy in the Gulf of Aden, the Horn of Africa and the (Western) Indian Ocean

Since about 5 to 8 years, piracy has been on the rise around the Horn of Africa. The threat posed by piracy is not only of concern to the international trade and shipping industry, and therefore national security interests, but also to the international community as of protecting development agencies. The hijacking of vessels is very lucrative due to million high ransom payments. Attacks happen typically by a swarm of small but fast boats, started from a dhow mother ship, whose troops try to embark the big trading ships (or even oil tankers) with automatic weapons and rocket launchers, to capture the crew and the ship and transfer the ship to safe havens close to the Somali Country.[1] By combined navy operations as the European Union (EU) Operation Atalanta and the North Atlantic Treaty Organization (NATO) Operation 'Allied Provider', 'Allied Protector' and 'Ocean Shield' and by single operations of several other navies, it has been achieved to reduce this threat significantly in the last two years. Also these efforts result partly of the application of armed guards on board of trading ships – most of them private military and security companies. Nevertheless, pirate attacks have not ceased to exist and new piracy threats are emerging in Western Africa. Piracy itself is a form of criminality that has transnational dimension and is of such interest, in contrast to regular crimes, which are settled in national law, that there are specific regulations in international law. In Article 101 of the United Nations Convention on the Law of the Seas (UNCLOS)[2] piracy is defined:

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

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1 T. Treves, Piracy, Law of the Sea and Use of Force: Developments off the Coast of Somalia, in: European Journal of International Law 20 (2009), pp. 399-401; A. Priddy / S. Casey-Maslen, Counterpiracy under International Law, Geneva 2012, pp. 7-8.

2 United Nations Convention on the Law of the Seas of 10 December 1982, 1833 UNTS 3.

(I) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (II) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft
(c) any act of inciting or of intentionally facilitating an act descripted in subparagraph (a) or (b).

A very similar definition can be found in Articles 14-22 of the High Seas Convention,[3] especially Article 15 High Seas Convention (Definition of Piracy). These definitions are applicable in the vast majority of cases, as nearly all states of the world are parties to one of these two treaties. Hence, as the Geneva Academy concludes, piracy contains these four elements: 1) the use of unlawful violence, detention or depredation; 2) committed for private ends; 3) committed on the high seas; 4) by the crew of a private vessel against another vessel, its crew, or cargo.[4] Air piracy, nevertheless included in the UNCLOS definition, will not be discussed here.

1.2. Private Military and Security Companies

Private – military and security – companies can be abbreviated as PMSCs. Sometimes PMSC is used for private maritime security companies, too. Also there are the abbreviations PMC – private military company and PSC for private security company, the latter for a more 'civilian-peaceful sound' to differ from the 'bad' military companies. The rise of the PMSCs began around the 1990s with the emergence of companies like Executive Outcomes and Sandline International. There were numerous reasons for this development: The end of the Cold War and the connected disarmament and the reduction of the number of troops, the end of the apartheid regime in Africa and the dismissal of big parts of the former South African Defense Forces (SADF).[5] Furthermore, there was a rise of non-international armed conflicts, the dissolution of Yugoslavia and linked civil wars in the Balkan region and finally the need for non-state troops. These do not add to the number of national casualties in conflicts (democracy problem) and are said to be cheaper and provide the opportunity of a lucrative, global market, which benefits from the growing globalization and privatization of nearly all industries.[6] Therefore, PMSCs are set out to complete the tasks the national armies cannot fulfill or do not want to fulfill due to political reservations (dangers) or to capacity reasons (of financial, functional and technical nature). This new form of PMSCs has to be differentiated from the former, historical meaning of a mercenary. A private military company is organized like a regular civilian company. It can even be structured like a stock company or a limited (company) with all rights and duties connected to the status of the company. The relations between the customer and the rights and duties of the PMSC are defined by a treaty, concluded with a national institution or a civilian client, even if this contractual relationship concerns the extraterritorial use of force in another nation's territory. The law enforcement for and against the PMSCs is regulated by this contract, mostly the national law of the contractors party, but can be excluded by the contract, too.[7] In general terms speaking, PMSCs can be divided by their operational fields in three different types: (1) military consulting, (2) military supply and (3) military provider companies.[8] It has to be added, however, that of course there are companies that perform not only one type of deployment but a mixture of the aforementioned types. Famous examples of PMSCs are: Executive Outcomes ('The' PMSC) in Angola and Sierra Leone,[9] Sandline International, which offered to do operational training and support nature against the unrecognized Bouganville Revolutionary Army (BRA),[10] Military Professional Resources Inc. (MPRI) in Croatia 1995/1996 for military training and strategic advice,[11] Blackwater and others in the Iraqi War 2003,[12] and finally PMSCs which perform armed and unarmed services, especially which organize and perform a big part of the ISAF-troop supplement in Afghanistan like Supreme Group.[13]

1.3. Deployment of PMSCs on Board of Trading Vessels and Merchant Ships

As the security needs in the Western Indian Ocean are massive, the deployment of PMSCs on board seems to be a logical step for the shipping industries. The military operations like the NATO Operation Ocean Shield and the EU Operation Atalanta last for more than five years now, as do the costs for or the expenses of the national navies persist and rise. Even if small, armed teams of the national armies for the so-called Vessel Protection Detachments (VDPs) are used, as preferred by the Netherlands for example, the cost and the logistical amount for these operations are quite high, ranging around 105.000 Euros for a 3-week deployment. In

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3 Geneva Convention on the High Seas of 29 April 1958, 13 UST 2312, 450 UNTS 11.

4 A. Priddy / S. Casey-Maslen, *supra* note 1, pp. 11-12.

5 P. W. Singer, Corporate Warriors, The Rise of the Privatized Military Industry, Ithaca 2004, p. 3; R. van Heerden / A. Hudson, Four Ball One Tracer – Commanding Executive Outcomes in Sierra Leone and Angola, Solihull / Pinetown 2012, pp. 24, 31.

6 P. W. Singer, *supra* note 5, pp. 3-6, 9-18.

7 *Id*., pp. 8-9, 19-29, 37-39, 44-48; compare Agreement for the Provision of Military Assistance Dated This 31 Day of January 1997 Between the Independent State of Papua New Guinea and Sandline International, http://psm.du.edu/media/documents/industry_initiatives/contracts/industry_contract_sandline-papua-new-guinea.pdf (all accessed on 4 May 2014); US Department of State, Worldwide Personal Protective Services, Blackwater Lodge & Training, SAQMPD04R1016, pp. 18, 22, 24-26.

8 P. W. Singer, *supra* note 5, pp. 88-99.

9 R. van Heerden / A. Hudson, *supra* note 5.

10 Compare Agreement for the Provision of Military Assistance, *supra* note 7.

11 P. W. Singer, *supra* note 5, pp. 4-6, 125-130.

12 Commission on Wartime Contracting in Iraq and Afghanistan, Transforming Wartime Contracting, Controlling Costs, Reducing Risks, Final Report to Congress, August 2011, pp. 1-3, 16-27; M. Schwartz, The Department of Defense's Use of Private Security Contractors in Afghanistan and Iraq: Background, Analysis, and Options for Congress, Report for Congress, R40835, 13 May 2011; compare US Department of State, *supra* note 7.

13 M. Schwartz, *supra* note 12, pp. 1-4, 7-11; Commission on Wartime Contracting in Iraq and Afghanistan, *supra* note 12, pp. 16-27.

contrast, the deployment of PMSCs on board of merchant ships lowers the insurance risk premium for shipping companies.[14] Furthermore, the area to monitor is too big to control effectively against spread piracy attacks or at least proves to be difficult.[15] The deployment of the navies is only a repressive, reactive solution against an ongoing and permanent problem, which is not solely situated in piracy but also in the circumstances of the failed state Somalia. Hence it is possible that the resistance in the states grows to continue these operations without prospects for a sustainable, effective improvement without a continuous deployment of state navies in a fiscal constraint environment.[16]

Private military companies in contrast have to be hired and paid by the shipping industry itself and therefore save these expenses. Also no ship that had PMSC personal on board has been hijacked in the past. Therefore, PMCs that are deployed on board of trading vessels can constitute a probable tool to reduce costs and secure the international trade without involving the international community and the nations' navies too much. Nevertheless, serious concerns persist because of possible excessive and arbitrary use of force by PMSCs against pirates or casual victims like fishermen which are suspected to be pirates, the legal uncertainties regarding the deployment of PMSCs in international law and missing law enforcement mechanisms against possible violations of law, especially human rights law. Generally, the deployment of PMSCs on board can escalate the violence as pirates have to step up against armed defense measures.[17] Also as PMSC personnel mostly will be armed, deployed for a limited time and obeying only to their leadership, the personnel cannot be qualified as belonging to the regular personal of the trading vessels. Beside the use of PMSCs on board, there are new developments: PMSCs using Patrol Boats[18] in the area or former pirates who now work as security guards on board of ships. The last issue resembles on a classical behavior of organized crime: If the protection money is paid, there will not be a pirate attack.

2. Legal Classification and Regulation of PMSCs in General

First of all, it has to be stated that there is no international treaty regulating the legal status and the rights and duties of PMSCs in general and vice versa in armed conflict. Hence, the legal classification of PMSCs in general depends on different factors, mainly the legislation and regulation of the contracting state. Also the legal status can be derived from the national sovereignty and jurisdiction in the area of operation of the PMSC, international law like the law of war or the law of the sea and the law not dependent on the area of operation like international human rights law.[19]

2.1. In the Territory of a State

The territory of a state is governed by the proprietor of sovereignty and therefore determined by the respective national legislation.[20] If the PMSC is employed in the territory of the contracting state, the legal status of the PMSC and its legal rights and duties is determined by the national law primarily and the legal provisions in the contract secondarily. Through regulations in the contract, national law can be derogated in the set borders of its national constitution. Also an international treaty governing the use of PMSCs would alter the legal status of the PMSC if the contractor state is party to that treaty. If there is an armed conflict in the territory of that state or a non-international armed conflict in the territory wherein the PMSC performs its duty, the status of the PMSCs has to be determined by the relevant law of armed conflict.[21] If there is no armed conflict and the PMSC is acting in the territory of another state, the legal status depends on the national legislation of this state. This could be different if there is a treaty with the contractor state concerning the legal status of the PMSCs.

2.2. In Other Areas not Belonging to the Territory or under the Jurisdiction of a State

In areas which do not belong to the territory of a state or are subject to the sovereignty or jurisdiction of a state, the legal status derives from the different legal regimes, which are established over all of these areas and which cannot and shall not be governed by sovereignty of a state as, for example, the high seas, the Arctic and the Antarctic. As already stated, no international treaty exists that determines the legal status of PMSCs. Therefore, general international law has to be considered. Most important for counter-piracy is certainly the UNCLOS and the High Seas Convention. According to Article 92 UNCLOS, on board of ships which are not considered as warships or as ships attributed to a government – merchant ships – the law of the flag state applies. Therefore, if PMSC personnel is employed on board of ships, the law of the flag state applies.[22] Finally, the comprehensive mandatory security regime for international shipping of 1 July 2004

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14 B. van Ginkel / F.-P. van der Putten / W. Molenaar, State or Private Protection against Maritime Piracy – A Dutch Perspective, Clingendael Report, The Hague 2013, p. 19; concerning East Africa, K. Ipsen, Völkerrecht, München 2014, §46, p. 920, para. 14.

15 N. Ronzitti, The Use of Private Contractors in the Fight against Piracy: Policy Options, in: F. Francioni / N. Ronzitti (eds.), War by Contract – Human Rights, Humanitarian Law and Private Contractors, Oxford 2011, p. 50; Bundespolizei See, Piraterieebericht der Bundespolizei See, 2013, p. 10; A. Priddy / S. Casey-Maslen, *supra* note 1, p. 15.

16 B. van Ginkel / F.-P. van der Putten / W. Molenaar, *supra* note 14, p. 12; A. Priddy / S. Casey-Maslen, *supra* note 1.

17 A. Priddy / S. Casey-Maslen, *supra* note 1, pp. 17-20.

18 J. Brown, Pirates and Privateers: Managing the Indian Ocean´s Private Security Boom, Sydney 2012, p. 3.

19 J. K. Elsea / M. Schwartz / K. H. Nakamura, Private Security Contractors in Iraq, Background, Legal Status and Other Issues, Report for Congress, RL32419, 25 August 2008, p. 14.

20 Permanent Court of Arbitration, Island of Palmas (or Miangas), United States v. The Netherlands, 2 RIAA 829, 4 April 1928, p. 838; Permanent Court of International Justice, S.S. "Lotus", France v. Turkey, PCIJ Series A No. 10, 7 September 1927, p. 19; B. Cheng, General Principles of Law as Applied by International Courts and Tribunals, Cambridge 1994, p. 51.

21 L. Doswald-Beck, Private Military Companies under International Humanitarian Law, in: S. Chesterman / C. Lehnhardt (eds.), From Mercenaries to Market: The Rise and Regulation of Private Military Companies, Cambridge 2007, p. 1.

22 N. Ronzitti, *supra* note 15, p. 43; Permanent Court of International Justice, *supra* note 20, p. 25.

has to be observed, including the Safety of Life at the Sea Convention (SOLAS)[23] and the International Ship and Port Facility Security Code (ISPS)[24].[25]

2.3. In Situations of Armed Conflict

In a situation that reaches the threshold of an international or a non-international armed conflict, humanitarian law or the law of armed conflict usually applies. The core part of the law of armed conflict is formed by the four Geneva Conventions (1949)[26] and the two Additional Protocols (AP) from 1977[27]. The Conventions are nearly universal ratified and considered as customary international law.[28] Due to missing ratifications of some influential nations, the application of the Additional Protocols as customary international law is highly controversial and has to be decided on a case-by-case basis.[29] In a case of a non-international armed conflict, Common Article 3 of the Geneva Conventions has to be considered by all parties for a minimum standard.[30] If there is an armed conflict and a private military company engages in it on the order of a party to the conflict, the legal status and especially the rights and duties of it are determined by the law of armed conflict, also called international humanitarian law. Dependent on the sort of armed conflict, international or non-international, the Geneva Conventions are applicable[31] and the acts of the PMSC have to comply with these provisions. However, there is a decisive problem:
How do PMSC fill in in the structure of the law of armed conflict, dividing legitimate targets from illegitimate targets and grant certain privileges to combatants which are denied to mercenaries or civilians participating in conflict? Are PMSCs qualified as combatants as they take part in hostilities on behalf of a party to the conflict, are bound to one party by contract and normally follow the orders of this party in general terms and therefore are kind of integrated in the armed forces? Or are they civilians as they are private contractors whose only binding factor is a civilian contract with a company, which has only another contract to a state?[32] On the first thought, one might think that this is an easy decision as there are provisions for mercenaries in Article 47 AP I of the Geneva Conventions (only in case of an international armed conflict) and two separate international conventions dealing with mercenaries, which apply also in non-international armed conflict.[33] The definition of a mercenary is quite similar in all three treaties and is viewed by the International Committee of the Red Cross (ICRC) as customary international law.[34] But on a close look these provisions have too high prerequisites as the six conditions are interpreted restrictively and have to be fulfilled cumulatively to qualify as a mercenary.[35] First of all, a big part of the personnel working for a PMSC is not recruited specially in order to fight in a certain armed conflict as in Article 47 paragraph 2 (a) AP I,[36] but they are working generally for the PMSC in multiple operations. Also sometimes the recruitment of a PMSC is happening while the threshold of an armed conflict is not reached. Furthermore, the term direct participation in hostilities, as of Article 47 paragraph 2 (b), is unclear, and there is an ongoing discussion about the independent criteria of the study of the ICRC.[37] Therefore, this provision could apply to PMSCs in some cases, depending on the view of the needed criteria. The motivation-criterion of Article 47 paragraph 2 (c) has to be considered critically because the term motivation is vague, and there might be different motivations to fight for a PMSC, as for example to protect its homeland from terrorists. Finally, the members of a PMSC are often nationals to one party of the conflicts as, for instance, many Blackwater members were United States nationals and therefore do not fulfill the criterion of Article 47 paragraph 2 (d). Last but not least, the provision of Article 47 AP I is only applicable in international armed conflicts; therefore, the validity and the scope in non-international armed conflicts are questionable. Hence, nearly no PMSC fulfills the legal prerequisites for mercenaries,[38] which is no secret to the PMSC industry and which tries to avoid any notion that they perform the 'dirty' mercenary business with the connected bad (medial) perceptions of all actors and states involved.
So the next thought might be that PMSCs could be considered as combatants.[39] If they were viewed as combatants, PMSCs would become legitimate targets for the opposite

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23 1980 UNTS 278.

24 International Maritime Organization (IMO), International Ship and Port Facility Security Code, SOLAS/CONF.5/34, 12 December 2002.

25 Compare IMO, Maritime Security and Piracy, http://www.imo.org/OurWork/Security/Pages/MaritimeSecurity.aspx.

26 Convention (I) for the Amelioration of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85; Convention (III) relative to the Treatment of Prisoners of War Field, 75 UNTS 135; Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287.

27 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, 8 June 1977.

28 UN Secretary General, Report S/25704, 3 May 1993, para. 35.

29 K. Ipsen, *supra* note 14, pp. 1179-1180; Food and Agriculture Organization of the United Nations, The Right to Adequate Food in Emergencies, International Humanitarian Law, Rome 2002, http://www.fao.org/docrep/005/y4430e/y4430e04.htm.

30 K. Ipsen, *supra* note 14, pp. 1192-1194.

31 International armed conflict: Four Geneva Conventions and AP I; Non-international armed conflict: Common Art. 3 of the Geneva Conventions and AP II.

32 L. Doswald-Beck, *supra* note 21, p. 4 (Combatants), p. 8 (Mercenaries), p. 9 (Non-combatants).

33 United Nations General Assembly (UNGA), International Convention against the Recruitment, Use, Financing and Training of Mercenaries, UNGA Res. A/RES/44/34, 4 December 1989, entered into force 20 October 2001; Organization of African Unity, Convention for the Elimination of Mercenarism in Africa, CM/817 (XXXIX), 3 July 1977, Annex II, Rev. 3, entered into force 22 April 1985.

34 J.-M. Henckaerts / L. Doswald-Beck, Customary International Humanitarian Law, Vol. I: Rules, Cambridge 2005, pp. 391-395.

35 L. Cameron, Private Military Companies, Their Status under International Humanitarian Law and Its Impact on Their Regulation, in: International Review of the Red Cross 88 (2006), p. 578.

36 *Id*., p. 581.

37 M. N. Schmitt (ed.), Tallinn Manual on the International Law Applicable to Cyberwarfare, Cambridge 2013, pp. 118-122.

38 J. K. Elsea / M. Schwartz / K. H. Nakamura, *supra* note 19, pp. 17-18; Compare: L. Cameron, *supra* note 35, pp. 577-582; L. Doswald-Beck, *supra* note 21, p. 8.

39 J. K. Elsea / M. Schwartz / K. H. Nakamura, *supra* note 19, pp. 16-17; L. Cameron, *supra* note 35, pp. 582-587.

party and they could participate lawfully in hostilities.[40] Nevertheless, most of the PMSCs do not fulfill the criteria established by Article 4 A (1) III. Geneva Convention and Article 43 I AP I – the integration of the individual PMSC-Members into the armed forces of a party – nor the criteria in Article 4 A (2) III. Geneva Convention – the qualification of the whole group as a militia.[41] As members of PMSCs are only considered to be mercenaries or combatants only in very rare cases, most of them have to be qualified as civilians. Generally, the civilian population has to be protected and has no right to participate directly in hostilities.[42] If PMSC members take directly part in hostilities, these persons lose their protection under the Geneva Conventions and Additional Protocols for such time as they participate in hostilities and can be punished by criminal prosecution.[43] In some (rare) cases PMSC-individuals can also be qualified as 'persons who accompany the armed forces' as proposed in Article 4 A (4) III. Geneva Convention and therefore can rely on prisoner of war (POW) status.[44]

To sum up: PMSCs in the most cases enjoy the same protection standard as civilians or organized armed groups directly participating in hostilities and have the same rights and duties as civilians in armed conflict. All members of a PMSC, except the nationals of a neutral or a co-belligerent state, fall under the IV. Geneva Convention as they are no members of the armed forces or otherwise prisoners of war, except for the 'persons who accompany the armed forces'. Some of the PMSC personnel might be excluded from the IV. Geneva Convention due to nationality. However, they can rely on customary rules like the prohibition of torture or inhumane treatment.[45] As in the vast majority of cases, PMSCs for counter-piracy actions are deployed on ships on the high seas or on the territory of states where there is no armed conflict prevailing; the problem of attribution arises only rarely, but it might be problematic as in the case of the Puntland Maritime Police Force.[46]

2.4. Human Rights and International Minimum Protection Standards

Concerning Human Rights, it has to be stated firstly that there are no treaties embedding PMSCs specially to comply with human rights law. The territorial extension of the codified Human Rights Law like the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) or the American Convention on Human Rights (ACHR) regularly depends on the exercise of a state function;[47] this can be delegated to PMSCs, compare Article 2 para 3 (a) ICCPR.[48] If a PMSC does not act on behalf of a state, the state under whose jurisdiction the company acts has the obligation to protect the human rights of others within its power or effective control.[49] Therefore, it can be deduced that PMSCs and their employees have to respect fundamental human rights as every other entity employing force and using weapons and as any other international corporation is bound by human rights law.[50] Especially the right to life,[51] prohibition of torture,[52] and the right not to be subject to cruel, inhumane or degrading treatment have to be observed.[53] But violations of human rights law have to be prosecuted by the national states;[54] this often can be difficult due to quick extraction (out of the country) of the misbehaving PMSC-members by the company itself or a contravening clause in the contract with the particular nation.[55] Needless to say, such clauses are unlawful from an international law perspective but continue to exist and be enforced in contractor – state relationship. In any case, individuals, whose acts reach the threshold of a war crime or a crime against humanity and happen in its personal and territorial scope of application, can be brought before the International Criminal Court (ICC) as the violation of human rights can entail international criminal responsibility.[56] Furthermore, the principle of universality of jurisdiction for certain crimes has to be considered in such cases as well.[57] Summarizing, the acts of PMSCs have to comply with universal human rights law and the minimum standards.[58] As there are no obligatory and binding international treaties, forcing PMSCs to implement and obey human rights law can be difficult and remains on duty of the national states. In a situation where both international humanitarian law and human rights law would apply, as these legal orders

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40 L. Cameron, *supra* note 35, p. 582.

41 L. Cameron, *supra* note 35, pp. 582-587; M. N. Schmitt, War, International Law, and Sovereignty: Re-evaluating the Rules of the Game in a New Century – Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees, in: Chicago Journal of International Law 5 (2005), pp. 527-531; L. Doswald-Beck, *supra* note 21, pp. 9-10.

42 L. Cameron, *supra* note 35, p. 587; M. N. Schmitt, Deconstructing Direct Participation in Hostilities: The Constitutive Elements, International Law and Politics 42 (2010), p. 698; L. Doswald-Beck, *supra* note 21, pp. 10-11.

43 L. Cameron, *supra* note 35, pp. 590-591.

44 G. Bartolini, Private Military and Security Contractors as "Persons who Accompany the Armed Forces", in: F. Francioni / N. Ronzitti (eds.), *supra* note 15, pp. 218-234.

45 L. Doswald-Beck, *supra* note 21, pp. 10-12.

46 M. Mazzetti / E. Schmitt, Private Army Formed to Fight Somali Pirates Leaves Troubled Legacy, The New York Times, 4 October 2012, http://www.nytimes.com/2012/10/05/world/africa/private-army-leaves-troubled-legacy-in-somalia.html?pagewanted=all.

47 F. Lenzerini / F. Francioni, The Role of Human Rights in the Regulation of Private Military and Security Companies, in: F. Francioni / N. Ronzitti (eds.), *supra* note 15, pp. 56-57.

48 International Covenant on Civil and Political Rights, 999 UNTS 171.

49 Human Rights Committee, General Comment no 31[80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev1/Add13, 26 May 2004, para. 8.

50 A. Clapham, Human Rights Obligations of Non-state Actors in Conflict Situations, in: International Review of the Red Cross 88 (2006), pp. 514-515; F. Lenzerini / F. Francioni, *supra* note 47, pp. 55-58, 60-61; compare: the US Alien Tort Statute, 28 U.S. Code § 1350; United States Court of Appeals, Second Circuit, Presbyterian Church of Sudan v. Talsiman Energy Inc., Docket No. 07-0016-cv, 2 October 2009.

51 F. Lenzerini / F. Francioni, *supra* note 47, p. 61.

52 A. Clapham, *supra* note 50, pp. 514-515; International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Kunarac, Kovac and Vukovic, Appeals Chamber Judgement, IT-96-23, IT-96-23/1-A, 12 June 2002, para. 148.

53 A. Clapham, *supra* note 50, p. 516; Human Rights Committee, supra note 49, para. 8.

54 L. Doswald-Beck, *supra* note 21, pp. 11-12; K. Ipsen, *supra* note 14, pp. 919-920; F. Lenzerini / F. Francioni, *supra* note 47, p. 57.

55 A. Clapham, *supra* note 50, p. 517.

56 F. Lenzerini / F. Francioni, *supra* note 47, p. 55; A. Clapham, *supra* note 50, pp. 516-517.

57 F. Lenzerini / F. Francioni, *supra* note 47, p. 55.

58 *Id*., p. 61.

are mutually complementary,[59] the humanitarian law is of priority.[60] Moreover, first steps to an international regulation of PMSCs were taken by the international community by introducing voluntary commitments for PMSCs. The basic idea of these commitments is that, for example, an institution controlled by the United Nations (UN) could screen and monitor the PMSCs in the future. If the PMSC acts in compliance with international human rights standards, this monitoring institution awards a certificate, which could be considered obligatory by potential customer states.[61]

2.5. Codes of Conduct, Guidelines and Voluntary Commitments

After the criticism on PMSCs rose enormously due to misbehavior and cruel methods in Iraq and Afghanistan,[62] the industry and the governments were forced to introduce a new system to restrict incidents like these. Nevertheless, the international community was not willing to conclude an international treaty ruling PMSCs with a lawful, obligatory character. Therefore, only recommendations and voluntary self-commitments exist, which had been formulated by the international community and international organizations like the IMO, singular states, the shipping industry and of course the PMSCs itself. These agreements are not legally enforceable like voluntary codes of conduct (CoCs). They mostly do not include provisions for standardized training or certification of the personnel, too.[63] The most important CoCs are the Sarajevo Code of Conduct for Private Security Companies,[64] the International Code of Conduct for Private Security Providers,[65] the Montreaux Document,[66] which does not regulate anti-piracy services as it only deals with armed conflict on land,[67] and specifically directed to PMSCs engaged in Counter-Piracy the IMO Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Security Personnel on Board Ships[68], the IMO Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships[69], the IMO Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships[70], the IMO Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships[71], the Industry Guidelines for the Use of Private Contractors, the Bimco Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel[72] and the Best Management Practices for Protection against Somalia Based Piracy (BMP4)[73].[74] Thus the legal obligations of the PMSCs depends on the single case of each PMSC and has to be decided on a case by case basis. Next to the non-obligatory character, the enforcement of these provisions poses problems, as it may be difficult to monitor and control the PMSCs in their engagement to get proper and objective evidence for their behavior or compliance.

3. Legal Framework for Counter-Piracy Outside a Territory or Outside the Jurisdiction of a State

As it is going to be shown, the actions of PMSCs in the uttermost cases do not fall under the provisions of counter piracy in its original sense. As furthermore the legal framework for counter-piracy is fairly clear, it will be presented only in a short overview.[75] The relevant applicable law if the act of piracy is not happening in the territory or under the extraterritorial jurisdiction is primarily the UNCLOS and the High Seas Convention. Thereby, the Articles 14 to 22 of the High Seas Convention are nearly identically reflected by the Articles of the UNCLOS.[76] The prerequisites and the definition for piracy are set in Article 101 UNCLOS.[77] It has to be pointed out that this paragraph applies only on the high seas as the national states have to fight piracy in their territorial waters themselves.[78] It is directed only to state authorities

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59 International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Kunarac, Kovac and Vukovic, Trial Judgment, IT-96-23-T, 22 February 2001, para. 467.

60 L. Doswald-Beck, *supra* note 21, p. 17; R. Frau, Unmanned Military Systems and Extraterritorial Application of Human Rights Law, in: Groningen Journal of International Law 1 (2013), pp. 3-6.

61 A. Clapham, *supra* note 50, pp. 516-517; P. W. Singer, *supra* note 5, p. 241.

62 For example Blackwater in Iraq and the scandal about the Abu Ghraib Prison: A. Clapham, *supra* note 50, p. 518.

63 Oceans Beyond Piracy, Introduction to Private Maritime Security Companies (PMSCs), p. 1, http://oceansbeyondpiracy.org/introduction-private-maritime-security-companies-pmscs.

64 South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons (SEESAC), Sarajevo Code of Conduct for Private Security Companies, 30 July 2006; A. Clapham, *supra* note 50, pp. 520-521.

65 International Code of Conduct for Private Security Service Providers, 9 November 2010, http://www.icoc-psp.org.

66 Montreux Document On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, August 2009.

67 N. Ronzitti, *supra* note 15, pp. 50-51.

68 IMO, Interim Guidance, Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Security Personnel on Board Ships in the High Risk Area, MSC.1/Circ.1405/Rev.2.

69 IMO, Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, MSC.1Circ./1406-Rev1.

70 IMO, Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, MSC.1/Circ.1408.

71 IMO, Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, MSC.1Circ./1443.

72 BIMCO, ICS, INTERCARGO, INTERTANKO, OCIMF, IG P&I Clubs, Industry Guidelines for the Use of Private Maritime Security Contractors (PMSC) as Additional Protection in Waters Affected by Somali Privacy, May 2011; BIMCO, Guidance on the Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV), https://www.bimco.org/Chartering/Clauses_and_Documents/Documents/Security/GUARDCON.aspx.

73 IMO, Revised Best Management Practices Guidance, Annex 2, Best Management Practices for Protection against Somalia Based Piracy, MSC. 1/Circ.1339.

74 K. Ipsen, *supra* note 14, p. 920, para. 14, fn. 299.

75 *Id*., pp. 919-922; for more details compare: N. Ronzitti, *supra* note 15, pp. 37-51; T. Treves, *supra* note 1, pp. 412-414.

76 T. Treves, *supra* note 1, p. 401.

77 K. Ipsen, *supra* note 14, pp. 919-920.

78 *Ibid*; an exception to the exclusive right and duty to fight piracy is set in the territorial waters of Somalia due to the failure and inability of the state organs, deduced from the Security Council (SC) Res. 1816, S/Res/1816 (2008), 2 June 2008; SC Res. 1838, S/Res/1838 (2008), 7 October 2008; SC Res. 1844 and SC. Res. 1846, S/Res/1846 (2008), 2 December 2008 and SC Res. 1851, S/Res/1851 (2008), 16 December 2008.

and is linked to warships or ships that perform governmental duties only; therefore, governmental authority must have been delegated. Generally, two forms of actions are allowed to be carried out in connection with piracy. The relevant rights are the seizure of a pirate ship or aircraft, Article 105 I UNCLOS,[79] and the right of visit (verification of suspicion by boarding), Article 110 UNCLOS[80].[81] The right to seizure is according to Article 107 UNCLOS only permitted to ships or aircrafts that a) belong to the armed forces of the state, b) bear the external marks distinguishing such ships of its nationality, c) are under the command of an officer duly commissioned by the government and d) be manned by a crew under regular armed forces discipline.[82] The right to visit is furthermore not only permitted to warships but also to military aircraft and any other duly authorized ships or aircraft clearly marked and identifiable as being on government service according to Article 110 IV and V UNCLOS.[83] Therefore, PMSCs cannot rely on the rights in connection with Article 101 UNCLOS when they perform only private obligations due to a contract with the shipping industry regularly.[84] Beside the counter piracy rights deriving from the UNCLOS, also UN Security Council Resolutions can permit certain rights in connection with counter piracy. For the relevant area of the horn of Africa and the coast of Somalia there are several UN Security Council Resolutions which grant special rights and duties to states whose navies are deployed in the area.[85] For example, these contain rights to protect maritime convoys of international organizations[86] or to permit fighting piracy also in the territorial waters of Somalia if the piracy incidents amount to a threat to international peace and security in the region.[87] Furthermore, NATO states performed several operations in and around Somalia to protect ships of the world food program and international trading routes in the Operation Allied Provider (October – December 2008),[88] Operation Allied Protector (March – August 2009)[89] and Ocean Shield (ongoing and extended until the end of 2014)[90]. The operations are conducted in full complementarity with the relevant UN Security Council Resolutions.[91] The EU-Operation Atalanta[92] is still continuing. As the UN Security Council Resolutions all address states to perform these rights and duties, a PMSC can only rely on those if it gets this state function awarded or governmental status granted. Summarizing, only if PMSCs have governmental status or governmental authority had been delegated and therefore their acts can be attributed to a government, PMSCs can rely on classic counter piracy rights. It has to be added that all of these rights get limited to some extend by the extraterritorial applicable human rights standards.[93]

4. Problems of Counter-Piracy in Connection with PMSCs

If a PMSC is embedded on board of a trading vessel, several legal problems can appear: for example, what happens if a ship with PMSCs employed gets attacked by pirates, defends successful and captures pirates? Do they treat them in accordance with international standards? What happens if they kill pirates? What if there are innocent casualties? What, if they cause damage to other trading vessels? This all depends on the legal framework applying to the PMSCs.

4.1. Non-International Armed Conflict

In the Gulf of Aden, the Bab al-Mandab, the Indian Ocean and in the surrounding countries (considering the territorial waters), no international armed conflict is prevailing. Considering Somalia and its territory, including the territorial waters, it can be argued that a non-international armed conflict exists between the different warlords, the Shabaab militia and the international substituted government.[94] As a non-international armed conflict could spillover geographically, the law of naval warfare is applicable between the parties of the conflict, but only partly modified due to the legal specialties of this type of conflict. If other states (directly) or their shipping are interfered by measures of war by the conflict parties beyond the territorial sea or the contiguous zone, another legal basis is needed.[95] Nevertheless, the PMSCs regularly are no party to this conflict and do not 'participate'

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79 K. Ipsen, *supra* note 14, T. Treves, *supra* note 1, pp. 401-402.

80 K. Ipsen, *supra* note 14, p. 921.

81 *Id*., pp. 919-922.

82 *Id*., pp. 919-920; N. Ronzitti, *supra* note 15, pp. 40-41.

83 K. Ipsen, *supra* note 14, p. 921.

84 Norwegian Maritime Directorate, Provisional Guidelines – Use of Armed Guards on Board Norwegian Ships, July 2012, p. 2; N. Ronzitti, *supra* note 15, pp. 40-42.

85 UN Security Council expressing concern about Somalian Piracy in: SC Res. 1676, S/RES/1676 (2006), 10 May 2006; SC Res. 1772, S/RES/1772 (2007), 20 August 2007; SC Res. 1801, S/RES/1801 (2008), 20 February 2008; protection of the world food maritime convoys for Somalia: SC Res. 1814, S/RES/1814 (2008), 15 May 2008; Counter Piracy Actions also in the territorial waters of Somalia: SC Res. 1816, S/Res/1816 (2008), 02. June 2008; SC Res. 1838, S/Res/1838 (2008), 7 October 2008; SC Res. 1844 and SC. Res. 1846, S/Res/1846 (2008), 2 December 2008 and SC Res. 1851, S/Res/1851 (2008), 16 December 2008; T. Treves, *supra* note 1, pp. 402-403.

86 SC Res. 1814, S/RES/1814 (2008), 15 May 2008, p. 5, Nr. 11.

87 SC Res. 1816, S/Res/1816 (2008), 2 June 2008, pp. 2-3, Nr. 7 (a),(b); T. Treves, *supra* note 1, pp. 402-404.

88 NATO, Protection of World Food Program Vessels, Patrols in the Waters Around Somalia, Counter-piracy Operations.

89 NATO, Defense against and Disruption of Pirate Activities, Location: Anywhere NATO Requires, Usually in the Eastern Atlantic, Mainly Deployment in South East Asia.

90 NATO, Counter-Piracy and against Armed Robbery, Somalia, Horn of Africa, Gulf of Aden and in the Indian Ocean.

91 NATO, Counter-piracy Operations, 29 January 2015, http://www.nato.int/cps/en/natolive/topics_48815.htm.

92 Operation against Somali-based piracy and armed robbery at the Sea off the Horn of Africa and in the Western Indian Ocean. The Operation is conducted within the framework of the Common Security and Defence Policy of the EU and in accordance with the relevant UNSC Resolutions. The Mandate covers the protection of World Food Program vessels, the protection of African Union Mission in Somalia, shipping, the deterrence, prevention and repression of acts of piracy and armed robbery at sea off the Somali coast, the protection of vulnerable shipping off the Somali coast on a case-by-case basis and in addition it contributes to the monitoring of fishing activities off the coast of Somalia. Operation Atalanta, EU Naval Forces, Mission, http://eunavfor.eu/mission.

93 K. Ipsen, *supra* note 14, pp. 919-920.

94 Classification as a non-international armed conflict: Rule of Law in Armed Conflict Project (RULAC), http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=204.

95 W. Heintschel von Heinegg, Methods and Means of Naval Warfare in Non-International Armed Conflicts, in: K. Watkin / A. J. Norris (eds.), Non-International Armed Conflict in the Twenty-first Century, International Law Studies, Vol. 88, Newport 2012, pp. 213-214, 231.

in the conflict itself if they are employed on board of trading vessels, Common Article 3 of the Geneva Conventions. Hence, the question if law of armed conflict applies, has to be decided on a case-by-case basis, considering the location and the conflict role of the respective PMSC.[96] If the trading vessels are on the high seas and no party to the conflict, no law of armed conflict applies.

4.2. No State Function or Attribution of PMSCs to a State

As a core characteristic of PMSCs, a state function is not attributed to them, and states take responsibility for actions of PMSCs in only rare cases. The law of the sea implies for ships fighting piracy to be clearly marked and identifiable as being in government service and authorized to that effect, Article 107 UNCLOS. If a PMSC was employed by a government, authorized to chase pirates and the government bears the responsibility, it would be lawful. However, until now no such state function is guaranteed internationally to any PMSC.[97] Hence, PMSCs cannot rely on all the aforementioned rights and duties deriving from the UNCLOS considering piracy. Even if offensive action of Article 105 UNCLOS would enable a more effective approach, the courses of actions of PMSCs against pirates have to be reduced to purely defense measures.

4.3. Non-Obligatory Character of the Voluntary Commitments and Codes of Conduct

The recommendations, guidelines and voluntary commitments have a non-obligatory character and do not represent regular legal regulations. Furthermore, the jurisdiction and the competence of states is often not clear. Therefore, most actors (states) do not feel responsible for the monitoring and screening of those groups and their actions. The rights and duties of PMSCs diverge from case to case. Finally, law enforcement for violations of these soft rules is hardly possible, probably even impossible in most of the cases. If PMSCs draft their own code of conduct without any additional international regulation, it will encourage the present state of anarchy.[98] However, all actions happening on board of trading ships are subject to national jurisdiction of the flag state.[99] Hence, the state has to enforce the law in case of rights violations.

4.4. Inconsistent Legal Positions in the Flag States of the Employing Merchant Ships

As there is no uniform legislation and regulation for PMSCs in the different nations, the legal position is very diverse. The law regulating the legal situation on board of a ship is always the law of the flag state.[100] As many different legal systems could apply to PMSCs, the legal assessment can vary broadly, and the classification of acts by PMSCs become very complicated and ambivalent. There might be cases wherein PMSCs are allowed to act on a ship flagged with a certain state but which constitute an unlawful act on another ship. Not only the PMSC personnel has to maintain an overview about their competences on board but also all other actors, for example the deployed navies in the area, have to consider the different legal situations. This could make it very difficult to maintain law and order in the area and pose a high challenge for the interaction with PMSCs.

4.5. Legal Loopholes and no Complementary Rules of Engagement (ROEs) by the Navies

Connected with the inconsistent legal positions, the national legislations differ considering PMSCs, and the self-commitment rules for PMSCs are not complementary for every situation; there is a risk of legal loopholes and grey zones. Same can be said about the rules of engagements of some navies. Especially missing rules for the use of force and accountability mechanisms can be critically. For example, the BMP4 guidelines do not contain rules about the use of force or information obligations of the ship owner who would have the contractual power to control the acts of the PMSC.[101] The BMP4 guidelines and the industry guidelines from 2011 also do not introduce an accountability mechanism. Furthermore, an only partial regulated area, wherein the use of force can be a main task but without uniform rules for accountability, can involve the risk of high criminal and civil liability charges, even for the employing companies.[102]

4.6. Violation of International Regulations Ruling the Transport of Arms

When PMSCs are employed on board as armed guards, they carry at least small weapons with them. As soon as the ship is entering sovereign (maritime) territory, this could become a problem. Moving, licensing and storage of weapons in many countries is restricted or forbidden and not included by the principle of innocent passage, or it might also be forbidden to call a port with weapons on board. Moreover, the PMSC on board of a ship is not allowed to exercise or practice with any weapon on board while traversing the sea of a state under the right of innocent passage, Article 19 (2) (a) UNCLOS.[103]

4.7. Patrol Boats of PMSCs

Furthermore, it might be the case that a PMSC is stationed on the territory of a country and is offering its services for passing ships by protecting them in the high seas with air

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96 *Id*., p. 231.

97 N. Ronzitti, *supra* note 15, pp. 41-42.

98 *Id*., p. 51.

99 *Id*., p. 43.

100 K. Ipsen, *supra* note 14, pp. 875-876, 885, 917.

101 Compare: UK Department for Transport, UK Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances, Version 1.2, May 2013, p. 17, 2.7, pp. 19-20, 3.4, 3.5.

102 Compare the process currently at the Indian Supreme Court against Italy concerning the shooting of an Indian fisher boat by Italian marines on board a tanker, as they mistook fishers for pirates: Kerala High Court Judgment, Massimilano Latorre v. Union of India, WP(C). No. 4542 of 2012, 252 KLR 794, 29 May 2012; J. Brown, *supra* note 18, p. 3.

103 P. Chalk, Private Maritime Security Companies (PMSCs) and Counter-Piracy, second United Arab Emirates Counter Piracy Conference, Dubai, June 2012, p. 4; N. Ronzitti, *supra* note 15, p. 48.

support or patrolling boats.[104] This could be a legal problem if the patrol boat performs naval rights and duties against pirates as regulated in the UNCLOS, for example hot pursuit or boarding and controlling foreign ships. The national state where the PMSC is based has the right to regulate this. Hence, there has to be an agreement or some sort of consent of this state with the PMSC about their rights and duties.[105]

5. Comparison of the Prevailing National Legislations

As the armed personnel of PMSCs is used on board of the merchant ships, primarily the right of the flag state employs.[106] If the ship is making a call at a port, the law of the port applies.[107] Also, the contract with the PMSC can play a role as aforementioned but in this case only regulates the ship owner-PMSC-relationship and therefore cannot derogate the law of the flag state as the shipping company has no legislative competence. Comparing the different legal situation between states, there are three types of legislation concerning PMSCs on board of ships. The first group of the considered states in this article – Denmark[108], Germany[109], Norway[110], India and United Kingdom (UK) – allows the use of armed guards on board of ships under certain conditions.[111] Thereby, India and the UK refer to existing national law like national firearms law[112] but do not establish special rules for the use of PMSCs; instead these states offer non-obligatory guidance for the shipping companies.[113] The second group does allow armed guards only in rare cases – Italy[114] – and the third group does not allow armed guards on board at all – Netherlands[115] and previously France[116]. The different national rules for PMSCs can be compared focusing on the points vetting, use of lethal force, incident reporting and weapons licenses. The Danish law provides in Section 7 (in the following Section) that the shipping company has to approve the suitability of the guards. Therefore, the shipping company needs according to Section 1 a granted application by the Minister of Justice, which has to include information about granted weapons licenses, Section 3. The permit pursuant to Section 1 is restricted to special types of weapons and ammunition in Section 4 and valid for one year, Section 9. The use of force in cases of piracy is restricted to self-defense, Sections 1 and 8, and has to be reported to the Ministry of Justice within 72 hours, Section 8. In Germany, a PMSC needs a certification of suitability by the German Ministry of Economic Affairs and the competent authority of the German Federal Police (GFP), § 1 Seeschiffbewachungsverordnung (SeebewachV), which is valid for two years, § 3 SeebewachV. The criteria for suitability of the personnel are laid down in §§ 7, 8, 9, 10 and for the management in § 11 SeebewachV. The use of force is only allowed in accordance with German national law with reference to the provisions for self-defense of the German criminal law (§§ 32-35 Strafgesetzbuch), § 12 IV Seeschiffbewachungsdurchführungsverordnung (SeebewachDV). Only the master of the ship has the power to order a use of force, § 12 III, IV SeebewachDV. In case of the use of a weapon by a PMSC member, there has to be an immediate report to the Ministry for Economic Affairs and the competent authority of the GFP, § 14 II SeebewachV. The armed guards need to have a weapon license pursuant to § 28a Waffengesetz, § 14 I Nr. 4 SeebewachV. In Norway, the suitability check is conducted pre-deployment in accordance with the IMO guidelines pursuant to Section 20 (3), and the accreditation is granted by the Norwegian Maritime Directorate (NMD) according to Section 20 (2), (4). The decision to employ force against piracy acts falls under the authority of the master, Section 17 (1), and is restricted to direct, immediate, significant and otherwise unavoidable threats, Section 17 (2). If the ship has a subject to attack and has employed force, a report has to be issued within 72 hours to the NMD, Section 18. Finally, an application for temporary firearms licenses is needed pursuant to Section 7, 8 of the Firearms Act and Section 23 of the Firearms Regulations. Italy, in contrast, does solely permit the use of PMSCs on board of ships if no vessel protection deployment (VDP) by Navy personnel or personnel from other armed forces under the control of the Italian Navy can be provided. These armed guards have to be authorized;[117] India provides some non-obligatory vetting-criteria in its Guidelines, 6.1 – 6.4. According to the guidelines in 6.7, the master should be in command and control at all

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104 J. Brown, *supra* note 18, p. 3.

105 N. Ronzitti, *supra* note 15, p. 47.

106 Permanent Court of International Justice, *supra* note 20, p. 25.

107 N. Ronzitti, *supra* note 15, p. 43.

108 Denmark: Ministry of Justice, Order on the Use of Civilian, Armed Guards on Danish Cargo Ships, Order No. 698, 27 June 2012.

109 Germany: Seeschiffbewachungsverordnung, BGBl. I p. 1562, 11 June 2013; Seeschiffbewachungsdurchführungsverordnung, BGBl. I p. 1623, 21 June 2013; § 31 Gewerbeordnung, Verordnungsermächtigung; § 28a Waffengesetz.

110 Norway: Norwegian Maritime Directorate, Regulations Concerning Amendments to the Regulation of 22 June 2004 No. 972 Concerning Protective Security Measures on Board Ships and Mobile Offshore Drilling Units, 1 July 2011; B. van Ginkel / F.-P. van der Putten / W. Molenaar, *supra* note 14, pp. 23-24.

111 See also the comparison of the UK, Norwegian and Danish Regulation System: B. van Ginkel / F.-P. van der Putten / W. Molenaar, *supra* note 14, pp. 30-33.

112 India: Sec. 77 Declaration by Owner of Baggage, Sec. 80 Temporary Detention of Baggage and Sec. 86 Transit and Transshipment of Stores of the Customs Act 1962; Sec. 45A Indian Arms Act 1959; UK: Firearms Act 1968; compare the foreword of Stephen Hammond, Minister for Shipping, see UK Department for Transport, *supra* note 102, pp. 6 f.

113 India: Ministry of Shipping, Guidelines on Deployment of Armed Security Guards on Merchant Ships, Issued vide F.No. SR-13020/6/2009-MG (pt.), 29 August 2011; UK: see UK Department for Transport, *supra* note 102.

114 Italy: Art. 5 Law No. 130, 2 August 2011; Memorandum of Understanding between the Ministry of Defence and the Italian Shipowners' Association for Boarding, 11 October 2011.

115 B. van Ginkel / F.-P. van der Putten / W. Molenaar, *supra* note 14, pp. 9, 23-24.

116 France: Act No. 83-629, 12 July 1983; Decree No. 95-589; France initially refused to allow private military companies on board of ships flying the French flag. However, due to the high demand of vessel protection by own armed forces, France finally initiated legislation allowing PMSCs on board: Geneva Centre for Democratic Control of Armed Forces, The ICoC and Regulation of Private Maritime Security Companies, Report on a Meeting Held in Geneva 04 July 2014, pp. 4 f., http://www.cnaps-securite.fr/wp-content/uploads/2014/07/Loi-n%C2%B0-2014-742-1-juillet-2014-APPN.pdf.

117 M. N. Schmitt, L. Arimatsu (eds.), Yearbook of International Humanitarian Law, Volume 14, The Hague 2011, p. 14, fn. 65; Article 133 Royal Decree No. 773 of 1931.

times. The rules for the use of force are set as agreed between the ship-owner, the PMSC and the master. The PMSCs should require that their members do not use force except in self-defense, Guidelines 6.9, and every case of weapons discharged should be reported, Guidelines 6.10. The UK allowed PMSCs on board of ships in 2011. As there is only guidance for the shipping companies by the UK government, there is no obligatory accreditation or vetting process for armed guards and only suggestions as the ISO PAS guidelines[118] according to Interim Guidance 3.1.[119] Nevertheless, a shipping company wanting to employ PMSCs on board of UK registered ships have to be authorized to possess a range of firearms, as do PMSCs need to apply to the Home Office for a section 5 authorization of the Firearms Act 1968.[120] In the defense against a pirate attack, the use of force in self-defense is allowed in accordance with the applicable UK Law(s) pursuant to Interim Guidance 8.3 ff., 8.7 ff. Finally, the order of the use of force is under the master´s authority, Interim Guidance 5.1, 5.4 ff.

In comparison, one can recognize that the national legislation has developed, and many states have rules for PMSC-deployment on board of ships. Furthermore, many nations consider the same legal issues. The vetting and the control of the suitability of the PMSC is considered obligatory by most of the states. In most cases, the master of the ship has and retains supreme command especially for the use of force. Moreover, nearly all legislation contains links to the BMP4 and the IMO Guidance, which are often non obligatory.[121] Nevertheless, some important states do not have obligatory rules for the use of armed guards. The legislations differ in the requirement of the certification of a PMSC generally and the specific requirements of the PMSC as well. Some nations postulate a certification by a state authority, others require a certification by an independent authority.[122] Moreover, different responsible authorities are provided for the certification as well as the contact point authority for the report of an attacked ship in case of the use of force. The reference on national weapons law, especially weapons licenses, differs. Finally, some nations do not have rules for accountability or regulate this topic only partly. The outcome of a comparison of the industries' self-commitments and the non-obligatory guidelines[123] are similar. However, these documents differ more fundamentally than the national legislations. Most documents contain not only voluntary provisions for the end-user but do not even have any provisions at all or partly for the vetting, use of force (BMP4), the incident report and accountability mechanisms, for example the BIMCO guidance[124] only contain rules for the use of force.

6. Common Aspects – Identifying Common Rights and Duties of PMSCs

Generally, a ship which is attacked by pirates always enjoys a right to self-defense. If the ship has armed guards on board, nothing different can apply, as it is a universal recognized right to defend yourself on an unlawful attack on high seas.[125] The right of collective self-defense, meaning the right to help another ship which is under attack, is granted to PMSCs due to Article 18 (2) UNCLOS during innocent passage in the territorial waters of another state. If the state requires consent for the passage of war ships, armed guards might be considered as warships.[126] The use of force of the PMSC-members justified by self-defense, however, must always be conducted in accordance with the principles of reasonableness, necessity and proportionality.[127] Nevertheless, the right to self-defense does not include a permission for PMSCs to seize a pirate ship, as this duty is only allowed to warships.[128] If there had been a case of the use of force, there has to be at least a report to the responsible authority of the flag state, if possible also to the Maritime Security Center at the Horn of Africa (MSCHOA).[129] Generally, the ship owner is held liable for all actions happening on board but is suggested to oblige the PMSCs for accountability of their own actions. Nearly all national legislation stipulates that the PMSC is directly obliged or has to self-commit itself to a guideline wherein the duty to comply with fundamental human rights law is provided. Most of the international guidelines address the compliance with human rights law, too.[130] Therefore, it can be deduced that the state practice is developing, PMSCs as armed guards on board of ships have to act in accordance or are bound by human rights law. Furthermore, the need for a weapon license process is underlined by most of the states as is the obligation to comply with

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118 ISO PAS 28007:2012, Guidelines for Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships; UK Department for Transport, *supra* note 102, pp. 18-21, 3.5, 3.6, 3.9-3.11.

119 B. van Ginkel / F.-P. van der Putten / W. Molenaar, *supra* note 14, p. 23; UK Department for Transport, *supra* note 102, p. 18, 3., 3.1.

120 UK Department for Transport, *supra* note 102, p. 45, Annex 2: Overview of Home Office Process.

121 Compare: Germany, see § 10 I Nr. 11 SeebewachV, § 12 (2) SeebewachDV; Norwegian Maritime Directorate, *supra* note 111, Section 20 (3); UK Department for Transport, *supra* note 102, pp. 14-15, 1.10.

122 Compare the Rules in Germany, § 1 SeeBewachV, in Denmark, see Ministry of Justice, *supra* note 109, Section 1, 3, and Norway, see Norwegian Maritime Directorate, *supra* note 111, Section 20 (2); UK Department for Transport, *supra* note 102, p. 18, 3.1, 3.2.

123 Compare chapter 2.5 Codes of Conduct, Guidelines and Voluntary Commitments.

124 BIMCO, *supra* note 72.

125 T. Treves, *supra* note 1, pp. 412-414; A. Priddy / S. Casey-Maslen, *supra* note 1, p. 28.

126 N. Ronzitti, *supra* note 15, p. 48.

127 Compare: Norwegian Maritime Directorate, *supra* note 111, p. 105, Section 17 (2); UK Department for Transport, *supra* note 102, p. 29, 5.4; India, see Ministry of Shipping, *supra* note 114, p. 6, 6.9; Germany, see § 12 (4) S.2 SeebewachDV; Denmark, see Ministry of Justice, *supra* note 109, Section 7 (5); International Tribunal for the Law of the Sea, Saint Vincent and the Grenadines v. Guinea, 4 December 1997, para. 155; T. Treves, *supra* note 1, pp. 413 f.

128 Legal framework for counter-piracy outside a territory or outside the jurisdiction of a state; compare: draft Art. 45 on piracy: "does not apply in the case of a merchant ship which has repulsed an attack by a pirate ship and, in exercising its right of self-defense, overpowers the pirate ship and subsequently hands it over to a warship or to the authority of a coastal state", United Nations, Yearbook of the International Law Commission 1965, Vol. II, New York 1957, Commentary to Art. 45; N. Ronzitti, *supra* note 15, pp. 42-43.

129 UK Department for Transport, *supra* note 102, p. 13, 1.2, p. 34, 7.3, 7.4.

130 BIMCO, *supra* note 72, pp. 3, 7 (a) (ii); BIMCO, ICS, INTERCARGO, INTERTANKO, OCIMF, IG P&I Clubs, *supra* note 72, pp. 9-10; International Code of Conduct, *supra* note 65, Preamble, pp. 3, 6 c); IMO, *supra* note 71, Annex, pp. 9-10, 5.13-5.17.

international and national weapons moving, trading and importing / exporting-law. Considering the use of force, a PMSC-group and its leader on board have to observe the orders of the ship´s master. It has to be added and underlined that there is no right to hot pursuit and no right to hunt for pirates.[131]

7. Recommendations

For a successful and effective interaction with PMSCs on board of merchant ships, a few measures have to be taken by the states and their navies. First of all, there should be a comprehensive summary of the different national legislations on PMSCs used as armed guards on board of merchant ships and a summary of the most important guidelines. To assess the risk of an interaction with unsafe or unreliable PMSCs on board of ships, lists of states which do not have a national legislation or which do not have a sufficient regulation of PMSCs should be included. This summary should be combined with tables concluding the content to enable a quick use in naval operations. Also ROEs for the navies should be developed on the basis of these conclusions and regularly updated due to law changes. These ROEs should include the identified rights and duties of the navy in relation to PMSCs. Moreover, the standardization of different ROEs between allied navies or in international organizations coordinating naval counter-piracy operations as the EU or NATO should be put forward; same applies to the national legislations. It is suggested that especially the EU tries to find a unified approach to regulate PMSCs on board of ships or that at least the supporting states standardize their legislation to improve the practice for the navies and, thereby, defining international standards for the deployment and interaction of PMSCs. In more detail, there should be an obligatory suitability-check and a certification mechanism for PMSCs implemented in each legislation of the supporting nations, which is controlled by state authorities and includes provisions for weapons licenses. Furthermore, there have to be strict liability and accountability rules for the PMSCs to avoid legal loop holes and missing responsibility for unlawful acts.

8. Conclusion

The persistent threat of piracy necessitates the protection of the international trade by sea. Every nation has to consider its own way to react to that threat, possibly through their navies or their legislation to allow private armed guards on board of merchant ships. Either way has its advantages and disadvantages as mentioned in the foregoing. Especially the expense factor might be a crucial reason for the use of armed guards by the shipping companies. If the field of PMSCs persists to be regulated inconsistently, painful disadvantages and risks are threatening the shipping companies – potentially by cases of excessive use of force by deployed PMSCs, which could lead to high claims for damages. Therefore, standardization and harmonization of law are necessary. These must include provided control mechanisms to ensure the quality of the PMSCs and to guarantee their obligation to statute and law, especially to human rights law.[132] If such mechanisms are implemented in the legislation effectively and form a comprehensive international legal body, the protection of ships by armed guards belonging to PMSCs can be permitted without bigger concerns. In the long term, however, preventive solutions have to be developed to fight the reasons of piracy and not to react only in a repressive way to the problem of piracy as it is done at the moment. ■

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[131] N. Ronzitti, *supra* note 15, p. 46.

[132] *Id*., pp. 50-51.

On the Lawfulness of the Use of Ukrainian Military in the Initial Phase of the Anti-Terrorist Operation in the East

Stan Starygin*

Der Einsatz der Armee durch die ukrainische Regierung im Rahmen von Anti-Terror-Operationen im Osten des Landes sorgte sowohl für heftige Gegenreaktionen und Missgunst in der Bevölkerung des Ostens als auch für scharfe Kritik aus Russland. Dieser Beitrag soll, beschränkt auf die Anfangsphase der Anti-Terror-Operationen, die Rechtmäßigkeit dieses Militäreinsatzes untersuchen. Dabei soll allerdings keine Bewertung der politischen Entscheidung vorgenommen werden.

The use of the military by the Ukrainian government in anti-terrorist operations in the east of the country has caused much backlash and resentment amongst the populace of the East as well as harsh criticism from Russia. Limiting itself to the initial stages of the anti-terrorist operations, this note seeks to determine whether the Ukrainian government acted lawfully when it ordered the military into action, without making any determination on the soundness or any other aspect of the policy decision to involve the military.

1. Introduction

Peaceful protests initiated by pro-European Union (EU)-leaning Ukrainian-speaking residents of Ukraine's Western and Central Regions against the ethnic Russian President Victor Yanukovych's decision to scrap the draft Association Agreement with the European Union in favor of closer ties with Russia eventually escalated to engulf sizable swathes of the country in civil strife. The successful protesters in Kiev toppled Yanukovych in a bout of militancy and ushered in a new unelected pro-EU government. Opposition to that government formed in the anti-EU predominantly Russian-speaking Southeast with strong ties to Russia. In some provinces of the Southeast, this opposition took the shape of armed militancy.

On April 8 2014, the Ukrainian government launched an offensive, dubbed the Anti-Terrorist Operation (ATO), to quell militant protests in three eastern provincial capitals: cities of Donetsk, Lugansk and Kharkov. I will refer to this phase of the offensive as 'Initial ATO.' Following the quelling of protests in Kharkov and the escalation of the situation in Donetsk Province to the level of armed insurgency, on 13 April 2014, the Ukrainian government modified and expanded the scope of the Initial ATO to exclude Kharkov and to include more locales in Donetsk Province and to recalibrate the commitment of force to the ATO in that province, with a view to its rapid escalation. I will refer to this phase of the offensive as 'Modified and Expanded ATO.'

The Armed Forces of Ukraine (hereinafter the military),[1] both personnel and equipment have been deployed from the onset of Initial ATO, experiencing a steep ramp-up in the Modified and Expanded ATO. This note seeks to determine whether said deployment of the military was lawful under applicable Ukrainian law.

2. Law

The fact that the Ukrainian government billed the enforcement actions from 8-16 April 2014 as ATOs necessarily means that those enforcement actions were governed by a 2003 statute titled 'On Combating of Terrorism' (Counter-terrorism statute).[2] Unlike the US *Posse Comitatus* Act, the Counter-terrorism statute does not contain a sweeping prohibition on the use of the military against citizenry as "it shall not be lawful to employ any part of the Army of the United States, as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress" of the original *Posse Comitatus* Act.[3] However, the Counter-terrorism statute delineates the contours of the use of the military in ATOs.

To this effect, the Counter-terrorism statute expressly states that "lawfulness" is one of the "fundamental principles of the combating of terrorism."[4] It is the responsibility of the Ukrainian parliament (Supreme Council or Verkhovna Rada) to ensure "[o]versight of compliance with the law at the time combating of terrorism is conducted."[5] The statute defines terrorism as "a societally harmful activity that consists in the willful and wanton use of violence by means of hostage taking, arson, murder, torture, intimidation of the populace and public authorities, or by causing other harm to the life or wellbeing of innocent people, or by threats of committing criminal acts with the purpose of attaining criminal ends."[6] The statute defines terrorist activity as a term distinct from terrorism and as "activity that comprises: planning, organization, and implementation of terrorist attacks; incitement to commit terrorist attacks, violence against individuals or organizations, destruction of facilities to attain terrorist ends;

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1 The term is used to the exclusion of the Ministry of Interior troops and any other armed government formations that are not placed in a reporting relationship with the Minister of Defense.

2 Author's translation of the title of the statute.

3 45th Sess., Ch. 263, 264, 1878.

4 Zakon Ukrainy Pro borbu z terrorizmom (PBT Ukr.), Law on Combating of Terrorism, Art. 3.

5 *Id*., Art. 30.

6 *Id*., Art. 1.

constitution of illegal armed formations, criminal groups (criminal organizations), constitution of groups with the purpose of committing terrorist attacks, as well as participation in such attacks; recruitment, arming, training and use of terrorists; propaganda and dissemination of the ideology of terrorism; financing and other assistance to terrorism."[7] In addition to a definition of terrorist activity, the statute contains a definition of terrorist attack which it defines as a criminal act of use of weapons, detonation of explosives, arson and other acts liability for which is prescribed by Article 258 of the Criminal Code of Ukraine. ATO is defined as "a set of coordinated special measures aimed at warning, prevention and cessation of criminal acts carried out to attain a terrorist end, hostage rescue, incapacitation of the terrorists, [and] amelioration of the effects of the terrorist attack or other criminal act that was carried out to attain a terrorist end."[8] The statute approaches the issue of entities that can participate in an ATO by stating that "[c]entral agencies of the executive branch participate in the combating of terrorism within the scope of their authority as defined by statutes and other laws pursuant to them."[9] The statute further states that the Security Service of Ukraine (SBU)[10] is the lead agency on combating of terrorism with the Ministry of Defense being one of the expressly-identified core[11] supporting agencies.[12] The statute delineates the scope of authority[13] of the Ministry of Defense vis-à-vis ATOs in the following manner: "provide[s] protection from terrorist attacks on the facilities of the Armed Forces of Ukraine, weapons of mass destruction, missiles and small arms, ammunition, explosives and poisonous substances that are stored in military installations or are secured in designated locations; provides training to and utilization of the Infantry, the Air Force, the Navy in the event of a terrorist attack in the airspace, the territorial waters; take[s] part in the conducting of anti-terrorist operations at military installations and in the event of a terrorist threat to the national security from without Ukraine."[14] The statute does not provide for any other modality of involvement of the Ukrainian military in ATOs. The oversight of the Ministry of Defense when and to the extent to which it is involved in an ATO lies within the purview of the President of Ukraine and the Cabinet of Ministers.[15]

In light of the above, the lawfulness of the use of the military will turn on whether prior to the commencement of each of the Initial ATOs taken separately or each of the Modified and Expanded ATOs taken separately; there had been an attack that can be categorized as "terrorist" within the meaning of the statute, and that was perpetrated by persons involved in an activity that can be categorized as "terrorist" within the meaning of the statute, and whether such attack, if any, was perpetrated on "the facilities of the Armed Forces of Ukraine, weapons of mass destruction, missiles and small arms, ammunition, explosives and poisonous substances that are stored in military installations or are secured in designated locations" or was perpetrated "in the airspace, the territorial waters" or on "military installations" or there was "a terrorist threat to the national security from without Ukraine." I will cumulatively refer to these determinative criteria as prongs of the test of 'the lawful scope of permissible use of military in ATOs' (ATO test) for which the following shorthand will be used: Prong 1: terrorist activity; Prong 2: terrorist attack; Prong 3: military installations, weapons, explosives, airspace and territorial waters and external. The ATO test is a conjunctive-disjunctive hybrid that follows the following formula: Prong 1 or Prong 2 + Prong 3 (anyone of the sub-prongs satisfies).

3. Initial ATO

The protests against the unelected pro-EU government graduated to armed militancy on 5 April 2014 when the SBU seized 300 assault rifles, an antitank grenade launcher, firebombs and ammunition in the town of Stakhanov, Lugansk Province from a militant group soon to become known as 'Army of the Southeast.'[16] When a mob freed the arrested members of the Army of the Southeast and seized the building of the SBU Lugansk headquarters, in which the captured weapons were held, a controversy as to whether the Army of the Southeast was also in possession of explosives and whether it mined the SBU building with them as an anti-breach measure arose.[17] While admitting to having a cache of

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7 *Ibid*.

8 *Ibid*.

9 *Id*., Art. 4.

10 'SBU' is a Ukrainian acronym meaning 'Sluzhba Bezpeki Ukrainy' or 'Security Service of Ukraine.' I will not seek to Anglicize 'SBU' beyond the direct phonetic transliteration.

11 As opposed to supplementary agencies identified further in the article.

12 PBT Ukr., Art. 4.

13 I translated 'povnovazhennya' to 'scope of authority'. It can also be translated as 'powers'. This is an important distinction as it is the powers that the statute seeks to delimit and apportion; not to identify the skills, abilities and proficiencies it expects or believes the designated agencies likely to possess.

14 PBT Ukr., Art. 5.

15 PBT Ukr., Art. 30; this statutory designation of President is hardly of significance as he or she has the superior constitutional designation of "Commander-in-Chief of the Armed Forces of Ukraine", Constitution of Ukraine, Art. 106, § 14.

16 Pro-Russian Protests in Eastern Ukraine, Deutsche Welle, http://www.dw.de/pro-russia-protests-in-eastern-ukraine/a-17547540 (30 June 2014; Troubling Events in Eastern Ukraine, Euromaidan Press, http://euromaidanpress.com/2014/04/06/troubling-events-in-eastern-ukraine-sunday-april-6-2014/ (30 June 2014); Pro-Russians Storm Ukraine Government Buildings, Associated Press, http://www.dailymail.co.uk/wires/ap/article-2598051/Pro-Russians-storm-Ukraine-government-buildings.html (30 June 2014); Pro-Russian Protesters Storm Government Building in the East, Reuters, http://www.nbcnews.com/#/storyline/ukraine-crisis/pro-russia-protesters-storm-government-building-east-ukraine-n73151 (30 June 2014); Interview, *supra* note 16.

17 SBU, SBU Demands Release of Hostages, http://www.sbu.gov.ua/sbu/control/en/publish/article;jsessionid=85215827CAA641157D018AEFF893235C.app2?art_id=123855&cat_id=35317 (3 July 2014); M. Chastain, Ukraine's Security Services Claims Pro-Russians Have 60 Hostages in Luhansk, Breitbart, http://www.breitbart.com/Big-Peace/2014/04/08/Ukraine-s-Security-Service-Claims-Pro-Russians-Have-60-Hostages-in-Luhansk (3 July 2014); Lugansk Separatists Mined the Building of SBU and Hold in Hostages of 60 People, Prestupnosti.NET, https://news.pn/en/criminal/101229 (3 July 2014); People Inside Building of Lugansk Dept. of SBU Say there Are No Hostages Inside, ITAR-TASS, http://en.itar-tass.com/world/727040 (3 July 2014); T. Grove, Ukraine Says Separatists Hold Hostages; Activists Deny Charge, Reuters, http://uk.reuters.com/article/2014/04/08/uk-ukraine-crisis-luhansk-idUKBREA371E820140408 (3 July 2014).

weapons prior to 5 April 2014,[18] the group denied that said cache was ever seized by SBU.[19] Nothing is known of the provenance of this weaponry. No attack was staged on the military installations or any other locations designated for storage of weapons in Lugansk Province or anywhere in the East prior to 5 April 2014 and in the period during which these weapons were procured. The Ukrainian government was in full control of all of its military installations and other locations designated for storage of weapons in Lugansk Province and in the East at large prior to April 5, 2014. In the event, these weapons were obtained by the Army of the Southeast from a military installation or any other location designated for storage of weapons in Lugansk Province or elsewhere in the East by nonviolent and yet illegal methods, the Ukrainian government had both the opportunity to detect (particularly an amount as conspicuous as 300 units and enough explosives to mine a 5-storey building)[20] the disappearance of the weapons and explosives and the responsibility to inform the public of such. Neither took place.

For this acquisition of weapons and explosives, if any, to give rise to an ATO with the involvement of military, it must satisfy the ATO test. First, the sub-prongs of 'planning and organization of terrorist attacks,' 'constitution of illegal armed formations,' 'propaganda and dissemination of ideology of terrorism', and 'constitution of groups with the purpose of committing terrorist attacks' sub-prongs of the 'terrorist activity' prong of the test lend them to easy proof by the statements made by members of the Army of the Southeast.[21] However, none of the sub-prongs of the 'military installations, weapons, explosives, airspace and territorial waters, and external' prong of the test can be satisfied by the circumstances of the Army of the Southeast circa 5 April 2014 – no attacks were staged on military installations; no weapons were seized from military installations or any other locations designated for storage of weapons; no explosives were seized; the Ukrainian airspace and territorial waters were not breached in the area of operation of the group; and there was no credible evidence of a terrorist threat to Ukraine's national security from without Ukraine.[22] This means that the circumstances of the Army of the Southeast, which was the core or the extent of militancy in Lugansk Province, failed the ATO test. This, in turn, necessarily means that no ATO with the involvement of military could have been lawfully ordered by the Ukrainian government in response to the Army of the Southeast's actions prior to 5 April 2014.[23]

While an ATO, whether billed as such or not, was conducted against the Army of the Southeast on 5 April 2014, no evidence exists to indicate the involvement of the military in it which, in turn, means that no issue of lawfulness of the use of military in said ATO arises.

On 6 April 2014, however, the activities of the Army of the Southeast graduated from acquisition and storing of weapons to a threat of their use. A clamoring mob outside the SBU Lugansk building released the recently detained members of the Army of the Southeast who joined the mob to seize the SBU Lugansk building[24] and the armory contained in it. The reporting of the amount of weapons seized ranges from "200-300 Kalashnikov rifles"[25] to "close to a thousand Kalashnikov rifles, two machine guns, grenades and Makarov handguns" plus the 300 rifles earlier seized from the Army of the Southeast.[26] The Army of the Southeast admitted to being in possession of these weapons[27] and threatened their use in the event the Ukrainian government

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18 United Militias of the Southeast of Ukraine Address the Bandera Junta in an Interview with Komsomolskaya Pravda, https://www.youtube.com/watch?v=ntndps34WhU (19 July 2014), a masked representative of the Army of the Southeast claims that the group is in possession of approximately 5,000 units of small arms and enough ammunition for nonstop 48-hour combat.

19 Interview, *supra* note 16, a commander states: "But they [SBU] turned out to be a bit unprofessional. […] We kind of overestimated them. […] They failed to locate our cache of weapons"; Ex-SBU Lugansk Director Petrulevich: Terror Groups of GRU Russia Are Already in Kiev Waiting for Go-Ahead, Gordon, http://gordonua.com/publications/Petrulevich-Terroristicheskie-gruppy-GRU-Rossii-uzhe-v-Kieve-i-zhdut-signala-29825.html (4 July 2014).

20 Provided there were any explosives, which appear to be a part of the SBU-created canard of 'hostages in a mined building.'

21 Interview, *supra* note 16; Press Conference of the Army of the Southeast, Midgard-Info, https://www.youtube.com/watch?v=LkE_XiV4ABg (19 July 2014), Army of the Southeast: "We had our release [by the mob from SBU custody] planned for 6 [April]" and "once released on 6 [April], we would walk in here [the SBU building] and have our weapons"; Self-defense of Donbas, Kharkov, Odessa, Russia24, https://www.youtube.com/watch?v=f-JhLvkF0eo (19 July 2014), Army of the Southeast: "We will break up into groups of 5-6 and burn down military vehicles"; Attention! Draft in Southeast of Ukraine! USW SWD https://www.youtube.com/watch?v=M8s1IetITWs (19 July 2014), the 'constitution of illegal armed formations' and 'constitution of groups with the purpose of committing terrorist attacks' sub-prongs may be satisfied by the threat to "raise an army of the southeast on 6 April" and a call to assemble "in squares of your towns on 6 April […] carrying […] weapons"; United Militias of the Southeast of Ukraine, *supra* note 18.

22 The contemporaneous leaders of the Army of the Southeast, Alexey Rilke and Valery Bolotov, were Lugansk- and Lugansk Province-based Ukrainian citizens; United Militias of the Southeast of Ukraine, *supra* note 18, representative of the Army of the Southeast on the subject of assistance to his group from outside of Ukraine: "We reached out to Crimea and Russia. When Crimea needed help we gave it by being a buffer zone. But for some reason now no one is returning our calls either from the Crimea or from Russia".

23 Attention! Draft in Southeast of Ukraine!, *supra* note 21, the threat to "raise a popular army of the southeast on 6 April" and a call to assemble "in squares of your towns on 6 April […] carrying […] weapons," and suggesting a possibility of "a bloodshed" were sufficient to order an ATO, but not an ATO with the involvement of military.

24 There are highly conflicting reports on how it happened, with some of them suggesting collusion between the SBU Lugansk management and the Army of the Southeast.

25 M. Chastain, Luhansk Committee of Voters Claim Hostage Situation was Hoax, Breitbart, http://www.breitbart.com/Big-Peace/2014/04/09/Luhansk-Committee-of-Voters-Claim-Hostage-Situation-was-a-Hoax (1 July 2014); T. Grove, Separatists in East Ukraine Call on Putin for Help; Kiev Warns of Force, Reuters, http://www.reuters.com/article/2014/04/09/us-ukraine-crisis-luhansk-idUSBREA380C620140409 (1 July 2014); Power Has to Hear Inhabitants of the East, Prestupnosti, https://news.pn/en/criminal/101275 (1 July 2014).

26 Ex-SBU Lugansk Director Petrulevich, *supra* note 19; A. Luhn, Pro-Russian Occupiers of Ukrainian Security Service Building Voice Defiance, Guardian, http://www.theguardian.com/world/2014/apr/10/luhansk-protesters-occupy-security-headquarters (1 July 2014).

27 Interview, *supra* note 16, commander of the Army of the Southeast Alexey Rilke: They "are now using [SBU's] weapons"; T. Grove, Ukraine Says Separatists Hold Hostages; Activists Deny Charge, Reuters, http://uk.reuters.com/article/2014/04/08/uk-ukraine-crisis-luhansk-idUKBREA371E820140408 (1 July 2014).

attempted to force them out of the SBU building.[28] However, the group insisted that they had SBU Lugansk Director Alexander Petrulevich's permission to take the weapons,[29] which the latter strenuously denies.[30] On 10 April 2014 Minister of Interior Arsen Avakov threatened an ATO against the occupiers of the SBU Lugansk building.[31]

Whether Minister Avakov's threat of an ATO could lawfully come on the armor of the military is determined by applying the ATO test. First, as established above, the Army of the Southeast had been involved in terrorist activity over a period of time leading up to 6 April 2014 which satisfies the 'terrorist activity' prong of the test. However, while weapons were verifiably taken from the SBU Lugansk building's armory, there is controversy as to the circumstances under which they were taken. This controversy prevents the satisfaction of the 'small arms [and] ammunition […] secured in designated locations' sub-prong of the 'military installations, weapons, explosives, airspace and territorial waters, and external' prong of the test. The entire 'military installations, weapons, explosives, airspace and territorial waters, and external' prong is finally failed by the absence of circumstances to satisfy any of its other sub-prongs. The 'terrorist attack' prong of the test might be equally out of reach for the circumstances at hand.[32] Thus, the circumstances in Lugansk as of 6 April 2014 failed the ATO test and made the use of military in an ATO mounted in response to said circumstances unlawful. The Ukrainian government could have cured this failure by resolving the controversy over the manner in which the weapons were taken from the SBU armory.

However, the government sought to involve the military in the discussion of the events, inter alia, in Lugansk as early as 6 April 2014.[33] While it is not clear whether the military's involvement was sought in an offensive or a purely defensive capacity,[34] it is apparent that the involvement of the military in the discussion was due to the escalation of the protests on 6 April 2014 and not due to the formation of an external threat. This discussion appears to have resulted in "armored troop carriers [seen as] driving in the direction of Luhansk"[35] between 8 and 10 April 2014. However, Chief of the ATO in Lugansk denies that the ATO in Lugansk received armored vehicles on 8-10 April 2014[36] and does not disclose any involvement of the military during that period.[37]

This controversy makes it inconclusive whether the Ukrainian government sought to involve or involved the military in the ATO in Lugansk on 6-10 April 2014. This inconclusiveness, in turn, makes it impossible to credibly determine whether the Ukrainian government acted lawfully vis-à-vis the use of military during that period.

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28 Interview, *supra* note 16, commander of the Army of the Southeast Alexey Rilke: "if they [the Ukrainian government] start firing, we will return fire"; T. Grove, *supra* note 25; A. Luhn, *supra* note 26; Attention! Draft in Southeast of Ukraine!, *supra* note 21, video calls for an assembly with weapons and predicts a possibility of their use when the spokesman for the militants encourages mothers to take their sons out of the military units in which their serving for "the period of confrontation to avoid unnecessary bloodshed".

29 Interview, *supra* note 16, commander of the Army of the Southeast Alexey Rilke: "the general himself […] SBU [Lugansk] Director permitted us to take these weapons [the weapons that were in the SBU armory] and issued us bullet proof vests […]he turned out to be a very good man. […] He [Petrulevich] was holding up well. […] We let him go home in the evening. […] He was last to leave as veritable captain of a ship. […] He got rattled up a lot and the latest we have on him is that he is in a hospital. […] We do not know what for but it is likely that it might be for the heart. […] Might be heart failure or a heart attack […] We don't know exactly but he did get rattled up a lot."; H. Coynash, Was Luhansk's SBU's Hostage Story a Hoax? Kyiv Post, http://www.kyivpost.com/opinion/op-ed/halya-coynash-was-luhansk-sbus-hostage-story-a-hoax-342724.html (4 July 2014); Donetsk Activists Proclaim Independent Ukraine, RT, http://rt.com/news/donetsk-republic-protestukraine-841/ (3 July 2014).

30 Ex-SBU Lugansk Director Petrulevich, *supra* note 19, Petrulevich denies that he cooperated with the Army of the Southeast arguing that "Rilke, Bolotov and their handlers had to defame [him] as they knew that [he] headed the ATO in Lugansk Province and was making preparations to clear the SBU [building] of militants". He argued that he was detained by the Army of the Southeast in the SBU Lugansk building and that the militants broke into the armory but cutting through the lock).

31 A. Luhn, *supra* note 26, Avakov: an ATO "in all three" [provinces, including Lugansk] could spring into action "at any moment".

32 There is no evidence of weapons having been used to seize the SBU Lugansk building beyond eggs, rocks, a smoke grenade and a firebomb, Pro-Russians Storm Government Buildings in Ukraine, Associated Press, http://www.dailymail.co.uk/wires/ap/article-2598051/Pro-Russians-storm-Ukraine-government-buildings.html (20 July 2014); Seizure of SBU Building in Lugansk, Accidents News, https://www.youtube.com/watch?v=a1bTEa4SSbY (25 July 2014).

33 Troubling Events in Eastern Ukraine, Euromaidan Press, http://euromaidanpress.com/2014/04/06/troubling-events-in-eastern-ukraine-sunday-april-6-2014/ (1 July 2014); Pro-Russia Protests in Eastern Ukraine, Deutsche Welle, http://www.dw.de/pro-russia-protests-in-eastern-ukraine/a-17547540 (1 July 2014); Ukraine: President Calls Emergency Meeting Over Protests, BBC News Europe, http://www.bbc.com/news/world-europe-26917428#: (3 July 2014).

34 There is a critical difference between putting the military on heightened alert to tighten security at military installations and involving the military in a law enforcement or otherwise coercive or combat role.

35 A. Luhn, *supra* note 26; Convoys of Armored Vehicles are on the Way to Lugansk and Donetsk, Nasha Planeta, http://planeta.moy.su/news/na_doneck_i_lugansk_dvizhutsja_kolonny_tjazheloj_tekhniki/2014-04-10-1042 (4 July 2014), local residents of the village of Dobropoliye, Donetsk Province: Armored vehicles arrived by railroad and are now headed to Donetsk City and Lugansk Province with men in military uniforms aboard. These men were from a unit in Dnepropetrovsk, which at the time was the base of the 25th Separate Airborne Brigade, but also could have been from one of the units of Ministry of Interior Troops stationed in Dnepropetrovsk (Unit 3036, Unit 3023). The Ministry of Defense is reported to have confirmed this troop movement but ascribed it to the ongoing nationwide war games, not ATOs in Lugansk or Donetsk; Military Armored Vehicles Enter Restive Lugansk, Nashi Dni, http://nashidni.org/populars/1144-sobytiya-na-ukraine-10-aprelya-2014-rochno.html (4 July 2014), Ukrainian channel 1 + 1 reports that APCs entered Lugansk arriving from a base in Dnepropetrovsk, with the source of information being the Ministry of Interior; APCs Going to Lugansk, https://www.youtube.com/watch?v=PUUIx8KDVa4 (8 April 2014), a convoy of APCs presumably headed to Lugansk.

36 Ex-SBU Lugansk Director Petrulevich, *supra* note 19, Petrulevich states he was Chief of the ATO in Lugansk from 7-14 April 2014 during which not a single armored vehicle was assigned to the ATO in Lugansk, even though he specifically requested them.

37 *Ibid*, Petrulevich discloses the staffing of the ATO in Lugansk with 120 members of the special forces unit Alpha and three regiments of Ministry of Interior troops and laments their arriving improperly equipped but says nothing about the military.

Concurrently on 6 April 2014, the Provincial Administration buildings were occupied in the provincial capitals of Donetsk and Kharkov.[38] No weapons or explosives were reported as taken but a military installation was reported as having come under the threat of impending attack in Donetsk Province.[39] On 7 April 2014, the SBU Donetsk building was seized by a mob[40] and the SBU Kharkov building was encircled by protesters.[41] Weapons are reported to have been taken from the SBU Donetsk building.[42] The government regained control of the SBU Donetsk building on the same day,[43] and the crowd encircling the SBU Kharkov building dispersed. An ATO was announced in both Donetsk[44] and Kharkov.[45] On 10 April 2014, a mob blocked the exit and attempted to storm the entrance of a conscription center in Donetsk but dispersed following negotiations that resulted in the recently deployed unit of airborne returning to base in Kirovograd.[46]

The circumstances of civil strife in Kharkov on 6-8 April 2014 are unlikely to pass the ATO test. First, while a certain measure of planning and organization went into the protests in Kharkov, there is no evidence that their amount and nature meet the threshold of the 'terrorist activity' prong. Second, the circumstances of Kharkov events do not bear out any of the sub-prongs of the 'terrorist attack' prong.[47] Third, the circumstances of the Kharkov events do not bear out any of the sub-prongs of the 'military installations, weapons, explosives, airspace and territorial waters, and external' prong. This failure of the ATO test necessarily means that the Ukrainian government had no lawful imprimatur to deploy the military in response to the circumstances in Kharkov on 6-8 April 2014.

With the exception of jet fighters that grazed downtown Kharkov,[48] there is no reason to believe that the Ukrainian government deployed the military as part of the ATO in

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38 Ukraine: Pro-Russians Storm Offices in Donetsk, Luhansk, Kharkiv, BBC News Europe, http://www.bbc.com/news/world-europe-26910210 (3 July 2014); Pro-Russians Storm Government Buildings in Ukraine, *supra* note 32; Ukraine Crisis: Storyline, NBCNews, http://www.nbcnews.com/storyline/ukraine-crisis/pro-russia-protesters-storm-government-building-east-ukraine-n73151 (3 July 2014).

39 Activists Seized Provincial Administration Buildings in Kharkov and Donetsk and of SBU in Lugansk (Chronology of Events), Novaya Gazeta, http://www.novayagazeta.ru/news/1680441.html (4 July 2014), MP Alexander Briginets: "An attack on a military installation at the Volodarsky salt mine [in Donetsk Province] is in the works".

40 Prosecutors Start Investigation into Seizure of SBU [building] in Donetsk, Ukr Inform, http://www.ukrinform.ua/eng/news/prosecutors_start_investigation_into_seizure_of_sbu_in_donetsk_319757 (3 July 2014); Pro-Russian Protesters Seize Govt Buildings in Ukraine's Donetsk, Lugansk and Kharkov, RT, http://rt.com/news/ukraine-donetsk-protest-russia-733/ (3 July 2014), ITAR-TASS references the local media that protesters in Donetsk seized the SBU building.

41 Donetsk Activists Proclaim Independent Ukraine, *supra* note 29.

42 A. Higgins / D. M. Herszenhorn, US and NATO Warn Russia Against Further Intervention in Ukraine, NY Times, http://www.nytimes.com/2014/04/09/world/europe/russia-ukraine-unrest.html?_r=0 (3 July 2014); SBU Building in Donetsk Retaken; Provincial Administration Remains Occupied by Separatists, Narodna Rada Novosti, http://narodnarada.info/news/zdanie-sbu-donecke-osvobojdeno-doneckaya-oga-news-1259.html (3 July 2014), as a result of negotiations, the occupiers of the SBU building agreed to vacate it and to return some of the seized weapons while keeping the handguns and the assault rifles for themselves; Protests in the East of Ukraine: Lugansk is Ready for an Attack on the SBU [building]; Donetsk: Towards a Consensus, Postimees, http://rus.postimees.ee/2757208/protesty-na-vostoke-ukrainy-lugansk-gotov-k-shturmu-sbu-doneck-k-konsensusu (3 July 2014), Vice Prime Minister Yarema: authorities continued to demand that the protesters return the 93 handguns and 5 Kalashnikov assault rifles seized from the SBU Donetsk building; *S*eparatists Left SBU Building in Donetsk; Weapons Missing, Ukrainskaya Pravda, http://www.pravda.com.ua/rus/news/2014/04/8/7021743/view_print/ (3 June 2014), SBU Donetsk officer: SBU building armory had been broken into.

43 R. Olearchyk, Armed Pro-Russia Separatists Storm Buildings in Eastern Ukraine, Financial Times, http://www.iri.org/news-events-press-center/news/financial-times-cites-iri-ukraine-poll (3 July 2014); A. Higgins / D. M. Herszenhorn, *supra* note 42; D. M. Herszenhorn and A. Rothapril, In East Ukraine, Protesters Seek Russian Troops, NY-Times (4 July 2014); SBU Building in Donetsk Retaken, *supra* note 42, while not disagreeing with the SBU building having been retaken, this account does not attribute it to a law enforcement operation but to a negotiation conducted with the occupiers by Levchenko and a local industrialist Akhmetov; Special Forces Cleared SBU Donetsk from Separatists, ZN, UA, http://zn.ua/UKRAINE/specnaz-osvobodil-zdanie-doneckoy-sbu-ot-separatistov-142786_.html (3 July 2014), interim President's chief of staff Sergey Pashinsky: "the SBU Donetsk building earlier captured by the separatists had been retaken by the special forces in the evening of 7 April". It further quotes Inter-Fax Ukraine as stating that this information had been corroborated by Deputy Secretary of the National Security Council of Ukraine Victoria Siumar. The picture embedded in the article shows special forces wearing armbands with the acronym 'SBU' written on them in Cyrillic lettering scaling the staircase of what is, presumably, the SBU Donetsk building.

44 Turchinov Announced the Commencement of Anti-Terrorist Operation in the Southeast of Ukraine, Vesti, http://vesti.ua/strana/46250-turchinov-objavil-o-nachale-antiterroristicheskoj-operacii-na-jugo-vostoke-ukrainy (4 July 2014), Turchinov: "Anti-terrorist action will be taken […] against those who took up arms"; Donetsk Conscription Center: A Bus with Mercenaries on Board, Alexander Hertz, https://www.youtube.com/watch?v=O94JgbDiVO8 (20 July 2014), existence of an ATO in Donetsk was common knowledge among the denizens of Donetsk.

45 Turchinov Announced the Commencement, *supra* note 44; K. Choursina *et al*., Ukraine Mounts Security Push as Russia Warns on Civil War, Bloomberg, http://www.bloomberg.com/news/2014-04-07/u-s-ukraine-accuse-russia-as-protesters-seize-offices.html (4 July 2014).

46 Donetsk. Unrest Night of 9 April and Morning of 10 April, http://www.youtube.com/watch?v=5hLqemJyy8s (6 July 2014), military unit shown in this video is the Kirovograd-based 3rd Separate Regiment of Special Forces of the Ministry of Defense of Ukraine that was deployed to Donetsk on 8 April 2014; Donetsk Conscription Center, *supra* note 44; Separatists Turn Around a Military Convoy Near Donetsk, Nashi Dni, 11 April 2014, http://nashidni.org/populars/1162-situaciya-v-donecke-seychas-11-aprelya-2014.html (5 July 2014), "military personnel [that were temporarily quartered at the provincial conscription center] were allowed to depart to their home in Kirovograd".

47 Unless an argument can be advanced that any spontaneous protests with a violent streak necessarily by their nature satisfy the 'endanger public life and health' sub-prong of the 'terrorist attack' prong. Or if an argument can be advanced that clubs fall within the meaning of "weapons" of Article 1 of the Counter-terrorism statute which will be difficult to sustain in light of the ample precedent established by the Ukrainian government that elected not to prosecute a single person who used clubs against government personnel and property during the riots in Kiev.

48 Jet Fighters Fly Over Freedom Square in Kharkov, UAINFO, http://uainfo.org/yandex/304806-nad-ploschadyu-svobody-v-harkove-letayut-istrebiteli-foto.html (4 July 2014); Jet Fighters Scrambled into Kharkov Sky, DNI.RU, http://www.dni.ru/polit/2014/4/7/268547.html, jets fly over downtown Kharkov, the part of the city where the protests were being held. The Ministry of Defense confirmed that the aircraft belonged to the Ukrainian Air Force. The Ministry of Interior confirmed that the aircraft belong to "the Air Force," adding that "they were practicing flying missions over the city" as part of the war games that commenced on 1 March 2014; Jet Fighters Over Kharkov, Kharkovskiye Vesti, http://vesti.portal.kharkov.ua/2014-04-07/7926#.U7YvpWD-LEV (4 July 2014).

Kharkov on 6-8 April 2014, assertions to the contrary notwithstanding.[49] While at first blush, the use of jet fighters might seem unlawful, this concern is allayed by the fact that said fighters covered a large swath of land on that mission that was, by no means, limited to the city of Kharkov.[50] This makes their relation to the ATO in Kharkov not immediately apparent. This, in turn, makes for a likely conclusion that the Ukrainian government did not engage in the unlawful use of the military during the ATO in Kharkov from 6-8 April 2014.

The circumstances in Donetsk and Donetsk Province were, however, different with the key differences being that weapons were seized from the SBU Donetsk building, that an attack was staged on a conscription center and that a military base came under the threat of impending attack. These circumstances satisfy the 'attack on […] small arms [and] ammunition […] that are […] secured in designated locations' and the 'attack on the facilities of the Armed Forces of Ukraine' sub-prongs of the 'military installations, weapons, explosives, airspace and territorial waters, and external' prong of the ATO test. However, none of the sub-prongs of the 'terrorist attack' prong are borne out by the circumstances of Donetsk and Donetsk Province on 6-9 April 2014.[51] There is little to no evidence that may bear out any of the sub-prongs of the 'terrorist activity' prong.[52] This creates a 1-2 result that fails the ATO test. The failure of the ATO test by the circumstances of Donetsk and Donetsk Province on 6-9 April 2014 means that the Ukrainian government had no lawful right to deploy the military in response to the events during that period.

While not being permitted to do so by law, the Ukrainian government might appear to have engaged in the use of military in the ATO in Donetsk and Donetsk Province from 6 April to 9 April 2014 by deploying a Kirovograd-based military unit A-0680 of 3rd Separate Regiment of Special Forces of the Ministry of Defense,[53] a unit of the Dnepropetrovsk-based 25th Separate Airborne Brigade,[54] jet fighters,[55] and heavy artillery pieces.[56] On a closer look, however, the jet fighters' relation to the ATO in Donetsk is not immediately apparent as their mission covered a large swath of land and was not limited to the city of Donetsk.[57] The relation of the artillery pieces to the ATO is equally not immediately apparent as at that stage most protesters were still armed with clubs, and even small arms were just making their first appearance thus making the deployment of heavy artillery highly excessive. While the purpose of presence of the airborne is more obvious, it cannot be ascertained without further disclosures and for the reason that they did not have the opportunity to complete their missions. Thus, what at first blush might appear as the Ukrainian government's use of military in the ATO in Donetsk on 6-9 April 2014, cannot be readily ascertained on the basis of the presently available evidence. This, in turn, makes it impossible to credibly determine whether the Ukrainian government breached the law in its conducting of the ATO in Donetsk during said period and insofar as the use of the military is concerned. What is, however, possible to determine is that if the Ukrainian government deployed any of the above military units in aid of the ATO in Donetsk, it necessarily broke the law. If further evidence suggests that this was the case, it is apparent that recourse to the measure-of-last-resort argument will not be available to the Ukrainian government as numerous law enforcement options were available to it that did not include the military.[58]

This concludes the Initial ATO, which was followed by the escalation of the force and expansion of the geographic area.

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[49] A. Higgins / D. M. Herszenhorn, *supra* note 42; http://www.tridentmilitary.com/Ukrainianmilitaria/Ukrainianpatches.html (4 July 2014); http://www.tridentmilitary.com/New-Photos7/upo377.jpg (3 July 2014); Updates from Eastern Ukraine, Euromaidan Press, http://euromaidanpress.com/2014/04/08/updates-from-eastern-ukraine-april-8-2014/ (3 July 2014); "Yaguar" Release Kharkiv OSA (Provincial Administration building) Without Shots or Victims – Lawmaker, UNIAN, http://www.unian.info/politics/905270-yaguar-release-kharkiv-osa-without-shots-and-victims-lawmaker.html (3 July 2014).

[50] Jet Fighters that Will be Guarding the Border of Ukraine Flew Over Kharkov, News UA, http://nua.in.ua/novosti/ukraina/nad-xarkovom-proleteli-boevye-istrebiteli-kotorye-budut-oxranyat-granicy-ukrainy/ (20 July 2014), presumably the same planes were seen as flying over Donetsk on the same day; Ukrainian Jet Fighters Fly Over "Restive" Parts of the Country, Daily.net, http://24daily.net/?p=29065 (23 July 2014), "[r]esidents of Kharkov, Donetsk, Dnepropetrovsk and Lugansk spotted jet fighters in the sky over their cities".

[51] There is no evidence that weapons were used to stage any of the attacks, unless the term "weapons" contained in Article 1 of the Counter-terrorism statute is to be interpreted to include clubs, an interpretation that will be difficult to sustain in light of the ample precedent established by the Ukrainian government that elected not to prosecute a single person who used clubs against government personnel and property during the riots in Kiev.

[52] While a certain measure of planning and organization is evident in the Donetsk protests, there is no evidence that their amount and nature meet the threshold of the 'terrorist activity' prong. The attack on the conscription center and the threat of impending attack on the military base appear to be entirely spontaneous.

[53] Donetsk, *supra* note 46; Donetsk Conscription Center, *supra* note 44.

[54] Convoys of Armored Vehicles are on the Way, *supra* note 35.

[55] Airspace of Donetsk is Patrolled by Military Jet Fighters, girnik.dn.ua, http://girnyk.dn.ua/news/vozdushnoe_prostranstvo_nad_doneckom_patrulirujut_voennye_istrebiteli_foto_video/2014-04-07-4170 (4 July 2014), Press Secretary of the Ministry of Defense Bogdan Senik: The jets belonged to the Ukrainian Air Force and they "were conducting a flight that combined surveillance of the area and defense of the airspace in the event of emergency"; Jet Fighters Over Donetsk, https://www.youtube.com/watch?v=jgwcRQtuxMk (4 July 2014), video was shot from a Donetsk street. The crowd can be heard cheering because they mistakenly thought they were Russian jets.

[56] Convoys of Armored Vehicles are on the Way, *supra* note 35; Ukraine: Liveblog: Day 51, The Interpreter, http://www.interpretermag.com/ukraine-liveblog-day-51-separatists-given-48-hour-deadline/ (5 July 2014); Separatists Turn Around a Military Convoy, *supra* note 46, local residents blocked a military convoy outside Donetsk originating from a base in Zaporozhye upon belief that it was on its way to crush the rebellion in Donetsk. The commanding officer of the convoy stated that the movement was authorized by his superiors as part of war games; A. Luhn, Military Assaults against Pro-Russian Occupiers are Rumored in Eastern Ukraine, Guardian, http://www.theguardian.com/world/2014/apr/10/military-assaults-rumoured-eastern-ukraine-russian (5 July 2014); Situation in Donetsk Now, Kievskiye Vedomosti, http://kvedomosti.com/6001-situaciya-v-donecke-seychas-11-aprelya-2014.html (6 July 2014), this reports of "people wearing St. George ribbons, hamper[ing] the movement of gunners from Zaporozhye".

[57] Jet Fighters that Will be Guarding the Border, *supra* note 50; Ukrainian Jet Fighters Fly Over "Restive" Parts, *supra* note 50.

[58] The following units of Ministry of Interior Troops were available to the Ukrainian government in Donetsk City: 2249, 3004, 3023, 3037. If there was any loyalty concern regarding any or all of these units for being, in part, made up of natives of Donetsk, the Ukrainian government had the following units of the Ministry of Interior Troops available to it in the vicinity: 3036, 3023. In addition, the provincial capitals of every district town in Kharkov and Dnepropetrovsk Provinces had an SBU unit that was available to the Ukrainian government at the time.

4. Modified and Expanded ATO

On 12 April 2014, armed militants seized the building of the district headquarters of the Ministry of Interior and the building of the district SBU office in the town of Slavyansk, Donetsk Province.[59] The buildings' armories were broken into and weapons were seized.[60] However, no military installations were attacked. On the same day, attempts were made to seize a police building and the town hall in the town of Krasny Liman, Donetsk Province.[61] No weapons were seized on this occasion and no military installations were attacked.[62] On the same day, government buildings were seized in the town of Druzhkovka, Donetsk Province.[63] No weapons were taken and no military installations were attacked. On the same day, there was an attempt to seize the building of district headquarters of the Ministry of Interior in the town of Krasnoarmeisk, Donetsk Province.[64] No military installations were attacked and no weapons were seized. On the same day, the District Administration building was seized in the town of Kramatorsk.[65] Access to the police armory was gained at gunpoint and weapons were taken.[66] On the same day, an unarmed mob attacked and disarmed a military convoy in the town of Artyomovsk.[67] Initial reports of seizures of government buildings in other towns of Donetsk Province were either not confirmed or expressly denied by later reports.

All of the above attacks, save for the one on a military convoy in Artyomovsk, were staged by paramilitary groups of mixed local[68]

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59 T. Lister *et al*., Ukraine Crisis: Gunmen Seize Buildings in Eastern Towns, Kerry Talks with Lavrov, CNN, http://edition.cnn.com/2014/04/12/world/europe/ukraine-crisis/ (8 July 2014); Ukraine Gunmen Seize Building in Sloviansk, BBC News Europe, http://www.bbc.com/news/world-europe-27000700 (8 July 2014); Militants Captured Slavyansk, Kramatorsk and Krasny Liman, Ukrainskiye Vedomosti, the militants seized five buildings in Slavyansk. They are three district police departments, the Slavyansk SBU and the town council.

60 Ukraine Gunmen Seize Building in Sloviansk, *supra* note 59; T. Lister *et al*., *supra* note 59; Militants Captured Slavyansk, *supra* note 59, purpose of the attack was to seize over 20 assault rifles and over 400 handguns and ammunition; Police Station in Kramatorsk, Ukraine Captured by Pro-Russian Forces, Breitbart, http://www.breitbart.com/Big-Peace/2014/04/12/Police-Station-in-Kramatorsk-Ukraine-Captured-by-Pro-Russian-Forces (9 July 2014); Ukraine: Pro-Russian Militants Seize Second Building in Slavyansk, Euronews, https://www.youtube.com/watch?v=2QlzlxqVQKk (10 July 2014), "militants in Slavyansk seized hundreds of police handguns and gave them out the pro-Russian protesters".

61 T. Lister *et al*., *supra* note 59; V. Ovcharenko, Krasny Lyman – Ukrainian North of Donbas, Maidan, http://world.maidanua.org/2014/krasny-lyman-ukrainian-north-of-donbas (9 July 2014); Seizure of Police Building in Krasnyi Liman, Ukraine, https://www.youtube.com/watch?v=Mc7wzgujphw (8 April 2014), unarmed but hostile locals confronting armed and masked militants shouting at them; Ukraine: Activists Deny Seizure of Police Station in Krasny Liman, https://www.youtube.com/watch?v=MG_77VXVeCc (9 July 2014), unarmed mob standing and milling outside the municipal police station. Pro-Russian activist says that the building has not been seized. The video later shows a peaceful meeting of the locals outside the police station to discuss the current political situation; Police HQ in Donetsk Region City Under Gun Attack – Ukraine Minister, Russia Beyond the Headlines, http://rbth.com/news/2014/04/12/police_hq_in_donetsk_region_city_under_gun_attack_-_ukraine_minister_35868.html (9 July 2014); Armed Men Occupied Police Building in Yet Another Town in Donetsk Province, Navigator, http://www.politnavigator.net/v-eshhe-odnom-gorode-doneckojj-oblasti-vooruzhennye-lyudi-zanyali-miliciyu.html (8 July 2014), police station was seized.

62 Seizure of Police Building in Krasnyi Liman, *supra* note 61, this clearly indicates that the militants intended to seize weapons.

63 Ukraine Gunmen Seize Building in Sloviansk, *supra* note 59.

64 Ministry of Interior: Seizure of District Quarters of the Ministry of Interior was Rebuffed in Krasny Liman, Krasnoarmeisk and Kramatorsk, 24 TV News Channel, http://24tv.ua/home/showSingleNews.do?v_krasnom_limane_krasnoarmeyske_kramatorske_ne_dopustili_zahvat__rayotdelov__mvd&objectId=432125&lang=ru (10 July 2014), Ministry of Interior Press Service: Information of seize of the district headquarters of the Ministry of Interior in "Krasny Liman, Krasnoarmeisk and Kramatorsk is not borne out by reality." The Ministry's building protection plan titled 'Fortress' was activated in the morning of 12 April 2014.

65 Ukraine Gunmen Seize Building in Sloviansk, *supra* note 59; Take Over of Police HQ in Kramatorsk Ukraine, https://www.youtube.com/watch?v=ivO9nSRrfuY (8 July 2014); Full Scale Operation Against Armed Rebels In Ukraine, Magnificent News Network, https://www.youtube.com/watch?v=ngLWLtxKHJU (9 July 2014), "armed men took over police stations and official buildings in […] Druzhkivka".

66 Assault on Police Department of Kramatorsk, https://www.youtube.com/watch?v=YfLH_NZox9k (9 July 2014), a town hall employee: The assailants demanded access to the armory and surrender of all weapons held by town authorities; Kramatorsk: Assault of the Municipal Police Department, http://lavrenkin.livejournal.com/141926.html (9 July 2014), assailant: After a brief firefight the police left the building unarmed. This means that the weapons were left in the building and seized by the assailants.

67 Pro-Russian Separatists Disarmed Ukrainian National Guard Soldiers in Artemovsk, EuroMaidan PR, https://www.youtube.com/watch?v=LYvfON_ZGds (11 April 2014); Seizure of Weapons from National Guard of Ukraine, QMurom, https://www.youtube.com/watch?v=X9zWSGmeqdk (11 April 2014); The Mob Disarms the National Guard Moving under the Flag of the Airborne, Novostnoy Donbas, https://www.youtube.com/watch?v=LkxI54yfmww (11 April 2014), commanding officer identifies his military unit as "military unit 1126 […] Dniepropetrovsk Province". One of the protesters can be heard saying that the convoy was moving under the airborne flag and the commanding officer agreeing with that saying "we took that flag down".

68 Russian Subversion Group Communication Intercept Leak from Sloviansk Ukraine, EuroMaidan PR, https://www.youtube.com/watch?v=w2nGLiBzWZc (23 July 2014), a Russian militant makes it apparent that there are "his troops", i.e. the foreign militants and "the militia", i.e. the local militants; Russian Roulette in Ukraine (Dispatch 25), Vice News, https://www.youtube.com/watch?v=5wxEIWu9c94 (23 July 2014), a group of militants asserts that all the Slavyansk assailants were locals and that Russia had nothing to do with the seizures of the buildings in Slavyansk; Seizure of Police Building in Krasnyi Liman, *supra* note 61, a militant is saying that he is from the neighboring Dnepropetrovsk Province; Russian Roulette in Ukraine (Dispatch 28), Vice News, https://www.youtube.com/watch?v=VNig07RtWxA (23 July 2014), a militant is saying that he is from Crimea and that his troops are from Dnepropetrovsk, Kharkov and other parts of Ukraine; Ukraine 26 April 2014 – Interview of Self-Defense Troops Colonel Igor Strelkov Revealing Truth, Komsomolskaya Pravda, https://www.youtube.com/watch?v=gY39aZTHlbw (24 July 2014), the Shooter reveals that his troop is "a militia heavily diluted with people from other parts of Ukraine," quantifying that with "more than a half, I would even say 2/3 are citizens of Ukraine"; New Interview with Commander of the Militia of Donbas Igor Strelkov, Rossiya24, https://www.youtube.com/watch?v=m_jhk7S90J4 (25 July 2014), the Shooter states that he was asked to come to Donbas by Donbas locals whom he met volunteering in Crimea.

and foreign origin,[69] operating in a coordinated manner and under highly sophisticated central command.[70] Consequently, these incidents lend themselves to analysis of the ATO test as two discrete groups.

As such, the circumstances of the Artyomovsk incident do not satisfy any of the sub-prongs of the 'terrorist activity' prong of the ATO test as the spontaneous nature of the attack shows no pre-planning or organization of any level of sophistication or at all. The Artyomovsk attack equally fails the 'the terrorist attack' prong of the test as no weapons or explosives were used and no fires were set.[71] However, there is no doubt that the troop attacked was a military unit, which qualifies it for the 'terrorist attack on the facilities of the Armed Forces of Ukraine' sub-prong of the 'military installations, weapons, explosives, airspace and territorial waters, and external' prong of the ATO test. The fact that weapons were seized in the course of this attack qualifies it for the 'attack on small arms [and] ammunition' sub-prong of the 'military installations, weapons, explosives, airspace and territorial waters, and external' prong of the test. While there is strong support for the 'military installations, weapons, explosives, airspace and territorial waters, and external' prong of the test in the circumstances of the Artyomovsk attack, it has no effect of survival on the test due to the failure of the two other prongs. This necessarily means that the Ukrainian government had no lawful right to initiate an ATO in Artyomovsk with involvement of the military in response to this incident.[72]

There is no reason to believe that the Ukrainian government ordered an ATO, whether with the involvement of the military or not, in response to the above attack thus acting lawfully, whether by intent or omission.

The remainder of the attacks can be placed in one category for the purpose of 'terrorist activity' prong analysis as all of them originated from a single source. First, the 'planning, organization, and implementation of terrorist attacks,' 'constitution of illegal armed formations,' 'constitution of groups with the purpose of committing terrorist attacks, as well as participation in such attacks,' 'recruitment, arming, training and use of terrorists,' and 'financing and other assistance to terrorism' sub-prongs of the 'terrorist activity' prong of the ATO test are borne out by the circumstances of these attacks with flying colors.[73] Second, all attacks were perpetrated by armed men, albeit shots were fired only in Slavyansk, Kramatorsk, and Krasny Liman. The firing of weapons, however, does not appear to be necessary to satisfy the 'use of weapons' sub-prong of the 'terrorist attack' prong. Third, the 'small arms [and] ammunition […] secured in designated locations' sub-prong of the 'military installations, weapons, explosives, airspace and territorial waters, and external' prong of the test is satisfied by the seizure of weapons in the circumstances of Slavyansk and Kramatorsk while it is not satisfied by the circumstances of Krasny Liman, Krasnoarmeysk or Druzhkovka. With no other circumstances in Krasny Liman, Krasnoarmeysk or Druzhkovka to satisfy any of the other sub-prongs of the 'military installations, weapons, explosives, airspace and territorial waters, and external' prong, the circumstances in these towns as of 12 April 2014 fail the 'military installations, weapons, explosives, airspace and territorial waters, and external' prong and therefore the ATO test. However, the ATO test succeeds in the circumstances of Slavyansk and Kramatorsk. This compels the result that the Ukrainian government was permitted by law to use the military in ATOs in Slavyansk and Kramatorsk in response to the events of 12 April 2014 but was prohibited from doing so in Krasny Liman, Krasnoarmeisk and Druzhkovka.

While conflicting reports were still gushing out of the half a dozen towns in northern and central Donetsk Province and before the attack in Kramatorsk, Minister of Interior Avakov was already involving the military in "implementing" an "operational response plan."[74] At that stage, the Ukrainian government had no lawful right to involve the military in ATO planning in any of the 5 towns, except for Slavyansk. However, it appears that the Ukrainian government began an ATO with involvement of the military in an area far larger than the one mandated by law. By doing so, the Ukrainian government acted unlawfully. No tenable argument can be mounted that the use of military was a measure of last resort as an overwhelming law enforcement force was available[75] to the Ukrainian government to counter three dozen insurgents. Minister Avakov announced "operational response plan," however, began manifesting itself before the very fact of its creation was announced and before the situation could be assessed as to the lawfulness of deployment of the military. This is evident from the movement of the personnel of military unit 1126 from its base in the city of Dnepropetro-

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69 Russian Roulette in Ukraine (Dispatch 30), Vice News, https://www.youtube.com/watch?v=-QP6sM5VnUQ (23 July 2014), a militant shows his Russian passport issued to Alexander Mozhaev; Take Over of Police HQ in Kramatorsk Ukraine, *supra* note 65, Alexander Mozhaev can be seen taking part in the assault on the Kramatorsk police headquarters; Heroes: Call-name 'Esaul'*;* For the Faith and the Truth, Heroes of Today, https://www.youtube.com/watch?v=4e3p48pvLU0 (23 July 2014), the same militant can be seen as guarding the police headquarters building in Kramatorsk; Russian Subversion Group, *supra* note 68, these intercepts identified a militant code-named 'Strelok' (The Shooter) who is the Russian citizen Igor Strelkov / Girkin.

70 Russian Subversion Group, *supra* note 68, these intercepts disclose a highly sophisticated multi-tier command structure that links the militants in Lugansk Province with those in Donetsk Province; Russian Insurgents Igor Girkin and Vladimir Lukin, Intercept, https://www.youtube.com/watch?v=TkQW-25O2P4 (24 July 2014), Girkin constantly references orders he had been given.

71 Unless an argument can be advanced that any spontaneous protests with a violent streak necessarily by their nature satisfy the 'endanger public life and health' sub-prong of the 'terrorist attack' prong.

72 This is said without prejudice to military Unit 1126's right to defend itself or the Armed Forces of Ukraine's right to defend military Unit 1126, but the law does not permit for such defense to be conducted through the means of an ATO.

73 Ukraine 26 April 2014, *supra* note 68, Strelkov and Boroday Press Conference in Donetsk; Russian Subversion Group, *supra* note 68, this reinforces the evidence available to satisfy the 'planning and organization' sub-prong of the test as it makes it apparent that the attacks of 12 April 2014 were staged according to plan.

74 Separatist Uprising Spreads in Eastern Ukraine, Radio Free Europe / Radio Liberty, http://www.ecoi.net/local_link/273808/389580_en.html (10 July 2014).

75 The following units of Ministry of Interior Troops were in the vicinity: 2249 (Donetsk), 3004 (Donetsk), 3023 (Donetsk), 3037 (Donetsk), 3005 (Kharkov), 3036 (Dnepropetrovsk), 3023 (Dnepropetrovsk). In addition, the provincial capitals of every district town in Kharkov and Dnepropetrovsk Provinces had a functioning SBU unit.

vsk to the northwest of Donetsk Province.[76] It was widely believed by the local populace that military unit 1126 was deployed in response to the protests.[77] The only way the deployment of military unit 1126 was lawful is, if when stopped by the mob in Artyomovsk, it was on its way to Slavyansk. As this is impossible to determine on the presently available evidence, it is equally impossible to determine whether the Ukrainian government acted lawfully by deploying unit 1126 to Donetsk Province. It is, however, possible to conclude that the Ukrainian government acted lawfully when it announced that "units from all enforcement agencies of the country would be engaged"[78] in the ATO in Slavyansk and backed that with action by deploying the military to Slavyansk on 13 April 2014.[79]

On 14 April 2014, the militants in Slavyansk seized the Slavyansk airfield.[80] The airfield in question is code numbered 'ZC1Y' and is listed as inactive and belonging to a civil aviation academy.[81] Other reports classify it as a farm support airfield[82] with the Ukrainian government being the only source claiming this to be a military airfield.[83] These two classifications are, however, not dissonant; in fact, they are perfectly consonant with each other – the airfield in question is not military but belongs to the local civil aviation academy, which, in part, trains cadets in delivering air support to farms. There is nothing that supports the Ukrainian government's narrative that the Slavyansk airfield was a military installation prior to 15 April 2014. On 15 April 2014, jet fighters and helicopters were deployed to the Slavyansk airfield[84] as part of the ATO in that locale.[85] Ground troops that included the military were deployed on the same day.[86]

The seizure of the Slavyansk airfield was a corollary of the seizure of the town of Slavyansk by armed insurgents and an unarmed local militia. This easily satisfies the 'terrorist activity' prong of the ATO test. The 'terrorist attack' prong of the test is satisfied by its 'use of weapons' sub-prong that is borne out by the evidence of the use of small arms in the seizure of the Slavyansk airfield. The 'military installations, weapons, explosives, airspace and territorial waters, and external' prong is satisfied by its 'in the event of a terrorist threat to the national security from without Ukraine' subprong that is borne out by the Ukrainian government's knowledge that the seizure of Slavyansk was at least in part of foreign nature prior to 15 April 2014.[87] The satisfaction of the ATO test by the circumstances of the seizure of the Slavyansk airfield necessarily compels the result that on 15 April 2014, the Ukrainian government acted lawfully when it deployed the military to the Slavyansk airfield as part of the ATO in that locale.

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76 Pro-Russian Separatists Disarmed Ukrainian National Guard Soldiers in Artemovsk, *supra* note 67; Seizure of Weapons from National Guard of Ukraine, *supra* note 67.

77 The Mob Disarms the National Guard Moving under the Flag of the Airborne, *supra* note 67.

78 Avakov: Anti-Terrorist Operation Has Begun in Slavyansk, Gordon, http://gordonua.com/news/politics/Avakov-V-Slavyanske-nachalas-antiterroristicheskaya-operaciya-18113.html (11 July 2014).

79 Slavyansk Today, Savgorod, https://www.youtube.com/watch?v=DDhEPpsFX7I&feature=youtu.be (11 July 2014), militant-appointed mayor of Slavyansk Ponomoryov: One of 7 APCs in the village of Semyonovka (the outskirts of Slavyansk) engaged the militants wounding one civilian; Ukraine: Casualties Resulted from Kiev Operation against Separatists in Slavyansk, Press TV, https://www.youtube.com/watch?v=uIa1a8XPvmA (11 July 2014).

80 Terrorists Seized Airport in Sloviansk Eastern Ukraine, EuroMaidan PR, https://www.youtube.com/watch?v=Pr_DqjND8po (11 July 2014), a masked and armed militant guarding a roadblock to the airfield: They seized the airfield with the purpose of ensure that not a single helicopter of the Ukrainian army lands there; Ukraine Crisis: Troops 'Liberate' Kramatorsk Airbase, BBC News Europe, http://www.bbc.com/news/world-europe-27041750 (14 July 2014); Separatists Seized Airfield in Slavyansk, Fakty, http://fakty.ua/180131-separatisty-zahvatili-aerodrom-v-slavyanske (14 July 2014); Protesters Took Control of Military Airfield in Slavyansk, http://korrespondent.net/ukraine/politics/3349239-v-slavianske-protestuuischye-vzialy-pod-kontrol-voennyi-aerodrom (14 July 2014).

81 Airlog, http://avialog.ru/aerodromes/zc1y-aerodrom-slavyansk/ (14 July 2014); Protesters Seized Control of Military Airfield, Polemika, http://polemika.com.ua/news-143374.html (14 July 2014).

82 Separatists in Slavyansk Seized Airfield and Called on Putin, Ukrainskaya Pravda, http://www.pravda.com.ua/rus/news/2014/04/14/7022395/ (14 July 2014); Slavyansk Pro-Russian Activists Call on Putin to Help Donbas, BBC Ukraine, http://www.bbc.co.uk/ukrainian/rolling_news_russian/2014/04/140414_ru_n_slovyansk_airport.shtml (14 July 2014); Russian Roulette in Ukraine (Dispatch 27), Vice News, https://www.youtube.com/watch?v=8mywTyAhlJM (15 July 2014), a Ukrainian serviceman claims that it is their [the military's] airfield; Armed Forces of Ukraine Established Enhanced Defenses of the Kramatorsk Airfield, Bigmir)net, http://news.bigmir.net/ukraine/809872-Voiska-Ykraini-vzyali-pod-ysilennyu-ohrany-aerodrom-v-Kramatorske (15 July 2014), Ministry of Defense refers to the Slavyansk airfield as "a military installation".

83 Russian Roulette in Ukraine (Dispatch 27), *supra* note 83, a Ukrainian serviceman claims that it is their [the military's] airfield; Armed Forces of Ukraine Established Enhanced Defenses, *supra* note 82; Kramatorsk: Deputy Unit Leader: The Process of Liberation of the Airfield, https://www.youtube.com/watch?v=bc9sV2nnomo (25 July 2014), a balaclavad man guarding the Slavyansk airfield answers the question whether the Slavyansk airfield is military: "it is a military airfield […] territory of the Ministry of Defense".

84 Ukrainian Jet Fighters Flying over Kramatorsk as Army Starts Military Op, RT, https://www.youtube.com/watch?v=WPlOmcyIfxA (14 July 2014); Tense Scenes at Kramatorsk Airbase in Ukraine, Telegraph, https://www.youtube.com/watch?v=oC8QSqzlILQ; Ukraine Says Donetsk 'Anti-terror Operation' under Way, BBC News Europe, http://www.bbc.com/news/world-europe-27035196 (14 July 2014); Ukrainian Crisis, *supra* note 80; Special Operation in Kramatorsk: Jets, Shots, Possibly Dead, Kiev Times, http://thekievtimes.ua/society/358848-specoperaciya-v-kramatorske-samolety-vystrely-vozmozhno-ubitye.html (15 July 2014).

85 Ukrainian Crisis, *supra* note 80; Russian Roulette in Ukraine (Dispatch 27), *supra* note 83, video shows the general in charge of the ATO in the area; Vasily Krutov Heads SBU Anti-terrorist Center, Facty, http://fakty.ua/180099-antiterroristicheskij-centr-pri-sbu-vozglavil-vasilij-krutov (15 July 2014).

86 Ukraine says Donetsk 'Anti-terror Operation' under Way, *supra* note 84; Ukrainian Crisis, *supra* note 80; Ukrainian Troops in Control of Donetsk Oblast's Kramatorsk Airfield, Ukrainian Deputy Prime Minister Says Several Hundred Russian Troops in Several Hundred Russian Troops in Ukraine, Kyiv Post, http://www.kyivpost.com/content/ukraine/turchynov-anti-terrorist-operation-has-begun-in-northern-donetsk-343563.html (15 July 2014); Ukrainian Enforcement Agencies Liberate Kramatorsk, Khartia, http://charter97.org/ru/news/2014/4/15/94668/ (15 July 2014), Ministry of Defense: "Ukrainian enforcement agencies commenced a special operation in Kramatorsk. […] Armed Forces of Ukraine are a part of it"; Armed Forces of Ukraine Established Enhanced Defenses, *supra* note 82, Ministry of Defense: "[i]n the course of antiterrorist actions, a unit of the Armed Forces of Ukraine arrived at the [Slavyansk] airfield" with the purpose of taking a series of actions to deflect possible attacks and attempts to seize the military installation by the insurgent groups".

87 Russian Subversion Group, *supra* note 68, it establishes the involvement of Russian nationals on a large scale and as key coordinators of the attack.

On 16 April 2014, the Ukrainian military entered the town of Kramatorsk in a convoy of APCs and tanks and parked outside Kramatorsk's train station[88] within some distance of the occupied buildings.[89] While the purpose of the entry of the convoy is unknown, the Ukrainian government had a lawful right to engage the military in the ATO in Kramatorsk for the contemporaneous circumstances of Kramatorsk met the ATO test as established above. It is noteworthy that the military came into contact with the local population when the latter blocked its further movement and sought to expel it from the town.[90]

On the same day, a convoy of APCs and tanks carrying members of the 25th Separate Airborne[91] Brigade based in the village of Gvardeyskoye, Novomoskovsky District of Dnepropetrovsk Province. The convoy was on its way to the Slavyansk airfield[92] when it was blocked by a mob at the village of Pchyolkino, Kramatorsk District, Donetsk Province. As established above, the circumstances of the Slavyansk airfield met the requirements of the ATO test for which reason the Ukrainian government had a mandate of the law to deploy the convoy blocked at Pchyolkino insofar as said convoy was dispatched to the Slavyansk airfield as claimed.[93]

On the same day, a crowd armed with bats, rods, Molotov cocktails and stun grenades assailed the base of Unit 3057[94] of the Ministry of Interior Troops in the City of Mariupol, Donetsk Province. Demands for weapons were made[95] but none were seized by the protesters. The troops on the base used lethal force against the protesters killing three and injuring scores of others.[96] There is no evidence that Armed Forces of Ukraine participated in the pushback with the exception of an unidentified helicopter that was deployed to the scene.[97]

On the available evidence, it is impossible to ascertain whether the attack in Mariupol was part of broader terrorist activity thus rendering it impossible to determine the satisfaction of the 'terrorist attack' prong by the circumstances of the Mariupol attack. The 'terrorist attack' prong would be satisfied by the circumstances of the Mariupol attack that meet its 'use of weapons' and 'arson' sub-prongs, were it not for the fact that the Ukrainian government had established ample precedent that the use of firebombs and stun grenades on government buildings and the fires caused by the former do not satisfy the 'use of weapons' and 'arson' sub-prongs by not prosecuting a single person who committed these acts during the riots in Kiev.[98] The 'military installations, weapons, explosives, airspace and territorial waters, and external' prong of the test is satisfied by the assailants' attempt to seize weapons. The satisfaction of the 'military installations, weapons, explosives, airspace and territorial waters, and external' prong, however, does not assist the circumstances of the Mariupol attack in surviving the ATO test. Consequently, any involvement of the military in the ATO in Mariupol on 16-17 April 2014 would have been unlawful. It is impossible to full determine whether the Ukrainian government acted lawfully during that period as the presently available evidence does not disclose the provenance of the helicopter.

The incident in Mariupol concluded the Modified and Expanded ATO, which was followed by further and rapid escalation that eventually reached the stage of all-out war.

5. Conclusion

During the Initial ATO and Modified and Expanded ATO, the Ukrainian government's adherence to the Counter-terrorism statute was, if it is possible to make such determination, overwhelmingly lawful, with scant enclaves of unlawfulness. ■

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88 Russian BTRs Standing in Kramators'k, Part I and Part II, Ukrainian Investigation, https://www.youtube.com/watch?v=dJFFAO9inis; https://www.youtube.com/watch?v=Q4FIk_GJmtc (15 July 2014), Ukrainian military APCs and tanks traveling through Kramatorsk and being stopped by unarmed locals; News of the Hour from Kramatorsk, Slavyansk; According to the Protesters, there are Reasons to Believe that a Large-scale Operation is Underway Across Donetsk Province, https://www.youtube.com/watch?v=WZ0c2Cmp4eI (25 July 2014); Ukraine Breaking News Today Military Armored Vehicles are in Kramatorsk, Novosti Mira, https://www.youtube.com/watch?v=ZTQ7fA6BbaE (25 July 2014), shows seven Ukrainian tanks moving around the town of Kramatorsk.

89 The occupied buildings lie to the northeast of the Kazyonny Torets River, whereas the train station is to the west of it. The two areas are separated by two sizable parks (Yubileyny Park and Pushkin Park), a river (Kazyonny Torets River) and an otherwise not inconsiderable distance.

90 Russian BTRs Standing in Kramators'k, *supra* note 88.

91 Kramatorsk, Resident attempt of block Ukrainian tanks; heavy gunfire, Histroika, https://www.youtube.com/watch?v=1HBN5ApoypI (16 July 2014), convoy moves under an airborne flag; Ukrainian Military Surrendered Weapons to Separatists at Kramatorsk, Ukrainskaya Pravda, http://www.pravda.com.ua/news/2014/04/16/7022729/ (16 July 2014), this identifies the military blocked at Pchyolkino as "25th Separate Dnepropetrovsk Airborne Brigade of the Infantry of Ukraine"; The Airborne Brigade Sent to Pacify Kramatorsk Will Be Disbanded for Cowardice, RBK Ves Mir, http://top.rbc.ru/politics/17/04/2014/918663.shtml (16 July 2014), Turchinov admitted that the military stopped and disarmed at Pchyolkino were 25th Separate Airborne Brigade; Russian Roulette in Ukraine (Dispatch 28), *supra* note 68, reporter says that the disarmed military will be "headed back to their base in Dnepropetrovsk".

92 Movement of Ukrainian Military Was Blocked Near Kramatorsk, Druzhkovka Novosti Blogi, http://druzhko.org/tag/pchelkino/ (16 July 2014), military personnel of the convoy: They "were headed to the [Slavyansk] airfield to fortify [the Ukrainian army's] positions there"; Mutineers in Kramatorsk Inform of Ukrainian Armored Vehicles' Break to a Local Airfield Under the Air Cover of a Jet, Stringer, http://stringer-news.com/publication.mhtml?Part=37&PubID=30729 (16 July 2014), Interfax references "a representative of the mutineers" saying that the Ukrainian armored vehicles were headed to the [Slavyansk] airfield.

93 Kramatorsk, *supra* note 91; Kiev Soldier Threatens Local Residents with Grenades, Histroika, https://www.youtube.com/watch?v=8DhoZ2T1s4E (16 July 2014); Russian Roulette in Ukraine (Dispatch 28), *supra* note 68, a jet is shown as grazing the crowd at Pchyolkino.

94 D. Kolesnyk, Separatists Attacked Ukrainian Military Base in Mariupol, Info-news, http://info-news.eu/separatists-attacked-ukrainian-military-base-in-mariupol/ (16 July 2014); Names of the Dead and the Injured at the Shootout in Mariupol Have Been Revealed, Evromaidan, http://evromaidan2014.com/stali-izvestnyi-imena-pogibshih-i-ranenyih-pri-strelbe-v-mariupole/ (17 July 2014), Minister Avakov: the Ministry of Interior troops did not fire first, and they returned fire after the protesters hurled Molotov cocktails.

95 Military Unit Is under Assault in Mariupol, Prodrobnosti, http://podrobnosti.ua/society/2014/04/16/971341.html (17 July 2014); Base of a Unit of Ministry of Interior Troops is Under Attack in Mariupol, 24Daily.net, http://24daily.net/?p=30706 (17 July 2014).

96 Y. Karmanau / P. Leonard, Peaceful Pro-unity Rallies in Eastern Ukraine after Earlier Attack on Military Base Kills Three.

97 In Ukraine's Mariupol Crowd Assailed Military Unit, VL.RU, http://www.newsvl.ru/society/2014/04/17/mariupol_shturm/ (17 July 2014).

98 In fact, instead of prosecuting these individuals, the government lionized them by declaring them 'Heroes of Ukraine.'

Compensation Claims of Individuals for Violations of Rules on Conduct of Hostilities – Comment on a Judgment of the District Court Bonn, Germany – LG Bonn 1 O 460/11, 11 December 2013

Nele Achten*

Die größte Herausforderung, denen Individuen gegenüber stehen, wenn sie Schadensersatz infolge von Verletzungen des humanitären Völkerrechts einklagen wollen, ist die des richtigen *Forums*. Nach einer kurzen Zusammenfassung eines Urteils des Landgerichts Bonn über die Entschädigung von Individuen aufgrund eines von der Bundeswehr geleiteten Angriffes in Kundus (Afghanistan), wird sich der Artikel der Entscheidung des Landgerichts über die Zulassung des Falles widmen und diese mit den Zulässigkeitsentscheidungen anderer nationaler und internationaler Gerichtshöfe vergleichen. Danach geht der Beitrag auf die Frage ein, ob eine Rechtsgrundlage für die Entschädigung im internationalen – oder nationalen Recht gefunden werden kann. Am Ende dieses Beitrags werden die Voraussetzungen einer Sekundärnorm auf Entschädigung analysiert. Während für die Rechtmäßigkeit eines Angriffes eine *ex-ante* Sicht (Vorbetrachtung) von Bedeutung ist, sollte aus Sicht der Autorin das Bestehen eines Entschädigungsanspruchs aus einer *ex-post* Perspektive (Nachbetrachtung) bestimmt werden.

The main challenge individuals may encounter when claiming compensation for violations of international humanitarian law (IHL) is the question of the right *forum*. After a brief summary of a judgement of the District Court in Bonn (Germany) on the compensation of individuals for an attack led by the German military in Kunduz (Afghanistan), this article will therefore address the admissibility decision of the Court and compare it with the admissibility decision of other domestic and international courts. Subsequently, the contribution will address the question whether a legal basis to enforce the right to be compensated can be found in international or in domestic law. At the end, the requirements of a secondary norm of compensation will be analysed. While for the lawfulness of an attack the *ex-ante* (preview) perspective is relevant, in the author's view the right of compensation should be ascertained on an *ex-post* (retrospective) basis.

1. Introduction: A Right of Individuals to Claim for Compensation?

On 17th of July 2014, the Malaysian airplane MH 17 was shot down over the territory of eastern Ukraine.[1] Irrespective of the question who was responsible for the shot, the question whether the relatives of the victims are entitled to compensation remains. Which forum would be suitable to claim their right of compensation?

In 1928, the principle that reparation must be paid for any wrongful act and even "wipe out all the consequences from the illegal act" has already been acknowledged by the Permanent Court of International Justice.[2] This obligation was however traditionally understood as an obligation of the injured state and not one of an individual.[3] Furthermore, these reparations are often related to violations of the prohibition to the use of force, and do not expressly refer to violations of rules of International Humanitarian Law (IHL).[4] Article 91 Additional Protocol I (AP I), however, intends to prevent that the vanquished party has to renounce, for example in a peace treaty "all compensation due for breaches committed by persons in the service of the victor".[5] Nowadays thus, the obligation to pay reparation refers also to violations of IHL. This is as well acknowledged by the International Committee of the Red Cross (ICRC) study on customary law.[6]

However, it remains unclear who might be the beneficiary of the compensation. Concerning this matter, the Commentary of AP I states that with the codification of international human rights after the Second World War a "tendency has emerged to recognize the exercise of rights by individuals".[7] The Draft Articles on the Responsibility of States for Internationally Wrongful Acts (DARSIWA) adopted by the International Law Commission (ILC) deal only with the right of a state to invoke the responsibility of another state. However, the Commentary again clarifies that an obligation of reparation may "not necessarily accrue to that State's benefit" and

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1 J. Marcus, Malaysia Jet Crashes in East Ukraine Conflict Zone, British Broadcasting Corporation, 17 July 2014, http://www.bbc.com/news/world-europe-28354856 (Last date of access of all cited homepages 12 January 2015).

2 Permanent Court of International Justice, Case Concerning the Factory at Chorzów (Germany v Poland) (Merits) PCIJ Rep Series A No 17, 13 September 1928, http://www.icj-cij.org/pcij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf.

3 M. Sassòli, Réparation, in : V. Chetail (ed.), De la Consolidation de la Paix, Bruxelles 2009, p. 442.

4 E.-C. Gillard, Reparation for Violations of International Humanitarian Law, in: International Review of the Red Cross 85 (2003), p. 533.

5 Y. Sandoz *et al*. (eds.), Commentary on the Additional Protocols of 8 June 1977, Leiden 1987, Art. 91 Additional Protocol I, para. 3649.

6 ICRC, Study of Customary International Humanitarian Law, https://www.icrc.org/customary-ihl/eng/docs/v1_rul, 2005, Rule 150 (applicable for international and non-international conflicts): While practice in treaties, by state and international organizations can be found in this study, the ICRC however clarifies that it is "too early to conclude on any rules of customary IHL on the matter".

7 *Id*., para. 3657.

in particular in human rights treaties the individuals concerned should be regarded as the "ultimate beneficiaries".[8] An obligation to compensate was subsequently also acknowledged by the International Court of Justice (ICJ).[9] Furthermore in 2006, the United Nations General Assembly called on states to "provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of International Human Rights Law (IHRL) or serious violations of IHL".[10]
The International Law Association finally speaks about a right of the individual to be compensated.[11] However, all these documents leave unclear how such a right can be enforced, which leads us to one of the main challenges of the right to be compensated: the "ongoing search for a forum in order to obtain remedies".[12] In this vein, the first question that will have to be addressed when analysing the District Court judgment is the question of the right forum and the admissibility of the claim.

2. Short Summary of the Decision of the District Court of Bonn

On 4 September 2009, the German commander Klein gave the order to two United States (US) American pursuit airplanes within the cooperation framework of the International Security Assistance Force (ISAF) in Afghanistan to use force against two road tankers which were previously brought under control by Taliban fighters. The Taliban had tried to bring them to the other side of the Kunduz River and Commander Klein feared that they were on their way to attack the German field camp.[13] At the moment of the bombardment, they were stuck at a sand bank of the Kunduz River and as they were surrounded by persons, these were also killed in the attack. The number of civilian casualties is disputed between the parties[14] and ranges from 90 to 140 dead civilians.[15]
The Court declared the compensation cases of relatives of two killed civilians admissible on the basis that the attack was an exercise of German jurisdiction and thus Germany would be the right defendant.[16] However, it left the question open whether the German state or whether the North Atlantic Treaty Organisation (NATO) could be held responsible for the relevant attack.[17] Under German law, the question of which entity can be held responsible is a substantive question. The Court could leave this question open as it already rejected the claim on the basis of the absence of a culpable violation of IHL (rejection on substantive grounds).[18]

3. The Admissibility of a Compensation Claim in Front of a Domestic Court

The District Court Bonn declared the case admissible stating that despite the fact that the German military was acting under the United Nation (UN) mandate of ISAF, the attack was an exercise of German sovereignty.[19] Domestic courts are of crucial importance for the implementation of IHL[20] and it can therefore only be welcomed that the District Court Bonn declared the claim admissible. However, having in mind how debated the issue of admissibility is, further analysis how the court got to its conclusion would have been of great value.

After describing the reluctance of domestic courts to decide on the substantive grounds of compensation claims of individuals for violations of IHL, this paragraph will briefly address the problem of attribution and shared responsibility for operations of military forces acting under a mandate of the UN. The District Court Bonn has been deficient in analysing this important and debated question.

3.1. Reluctance of Domestic Courts to Decide on the Substantive Grounds of Compensation Claims

Most compensation claims in front of domestic courts have failed[21] and many already on the stage of admissibility. In a case in front of the Superior Court in Québec, a compensation claim was directed against a private entity with headquarter in Canada but acting on the territory of Israel. The Court declared the case inadmissible on the ground that the High Court of Justice in Israel would be in a better position to decide the case (*forum non conveniens*).[22] The Court assessed the reasons for this over more than twenty pages and asserts factors such as the accessibility of evidence, the place where the alleged injurious act occurred and also the need to have the judgment recognized in another jurisdiction.[23]

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8 International Law Commission, Report of the International Law Commission on the work of its 53th session, UN Doc. A/56/10, Chap. IV: 'State responsibility', Art. 33 DARSIWA, Commentary para. 4.

9 International Court of Justice, Legal Consequences of the Construction of a Wall (Advisory Opinion), 9 July 2004, http://www.icj-cij.org/docket/index.php?p1=3&p2=4&case=131&p3=4, p. 153: The Court acknowledges an obligation of Israel "to compensate […] all natural or legal persons having suffered any form of material damage as a result of the wall's construction".

10 UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of IHRL and Serious Violations of IHL, Resolution 60/147, UN Doc. A/RES/60/147, 21 March 2006, para. 15.

11 International Law Association, Reparation for Victims of Armed Conflict, Resolution n° 2/2010, August 2010, Art. 6.

12 C. Evans, The Right to Reparation in International Law for Victims of Armed Conflict, New York 2012, p. 33.

13 District Court Bonn: Landgericht Bonn, Kunduz case, 1 O 460/11, http://www.justiz.nrw.de/nrwe/lgs/bonn/lg_bonn/j2013/1_O_460_11_Urteil_20131211.html, 11 December 2013, para. 13.

14 *Id*., para. 16.

15 Bundestag, Bundestag debattiert über Kundus-Abschlussbericht (Discussion within the German parliament), www.bundestag.de/dokumente/textarchiv/2011/36783945_kw48_sp_kundus/207070, Berlin 2011.

16 District Court Bonn, *supra* note 13, para. 35.

17 *Id*., para. 93.

18 *Ibid*.

19 *Id*., para. 35.

20 See e.g. S. Weill, The Role of National Courts in Applying International Humanitarian Law, Oxford / New York 2014, p. 198: „national courts are in the process of defining their own role as enforcing organs of international law".

21 E.-C. Gillard, *supra* note 4, p. 533.

22 Superior Court of Québec, Bil'in (Village Council) and others v. Green Park International and others, 18 September 2009, No. 500-17-044030-081, http://www.ccij.ca/programs/cases/cullen-judgment-2009-09.pdf, para. 207: In the case the plaintiffs alleged Israel to violate international and Canadian law and that the defendants were assisting Israel to commit war crimes "by constructing and selling condominiums exclusively to Israeli civilians" (para. 6).

23 *Id*., paras. 212, 223, 234.

Another reason why compensation claims have failed in front of domestic courts is the immunity of states. The principle of state sovereignty does not allow bringing a claim against a state in front of the courts of another state. On this matter, the District Court Bonn states briefly but correctly that a compensation claim against the German military can be made only in front of German courts.[24] Similarly, the German Constitutional Court[25] as well as the International Court of Justice[26] had already decided that German property can neither be seized in Italy because of an Italian decision nor in Greece because of a judgement by the Greek court. An exception of the immunity of states can also not be found in the principle of universality as this principle of criminal law is so far not acknowledged internationally for civil claims against a state.[27]

All these cases demonstrate the reluctance of domestic courts to accept compensation claims of individuals for violations of IHL. Regardless of the important role of domestic courts for the implementation of humanitarian law, one might ask whether domestic courts are the right forum for it.[28] The District Court Bonn was however quite progressive in this regard. Even if an explication about how the Court got to its conclusion is missing, it declared the case admissible and had thus to decide about the substantive grounds.

3.2. The Attack in Kunduz as Exercise of German Sovereignty

While the District Court Bonn correctly declared the attack in Kunduz to be an exercise of German sovereignty, the Court does not address the question whether the fact to act under a UN mandate might change something for the question of attribution. The German military in Kunduz was operating within the structures of NATO and under the UN mandate of ISAF.[29] It could therefore be argued and the defendants did so[30] that the attack was attributable to the UN with the consequence that a German District Court would not have jurisdiction over the case.

The defendants claim was supported by a judgment of the Administrative Court Cologne, in which the plaintiffs asked for recognition of the illegality of the attack in Kunduz, and the Court declared the claim inadmissible.[31] The Administrative Court got to this conclusion by analysing the chain of command. It stated that there cannot be an exercise of German sovereignty as the Supreme Allied Commander Europe had the responsibility over the military strategy[32] and Commander Klein was much further down in the chain of command.

However, relevant for the attribution of a conduct should not be which troop contributing nation held the highest rank in a chain of command but rather who was responsible for the concrete conduct in question. Therefore, the ILC had proposed that the decisive criterion to attribute conduct of agents placed at the disposal of an international organisation by a state should be who had "effective control over the conduct".[33] The Commentary on the ILC Draft Article on the Responsibility of International Organisations (DARIO) specifies that a conduct shall be attributed "to the contributing State or to the receiving organization (…) based (…) on the factual control that is exercised over the specific conduct".[34] In the Kunduz case, it can be argued that the attack was an exercise of German sovereignty as Commander Klein had factual control. He was the one assessing the situation and giving the order to the two US American pursuit airplanes.

3.3. Joint Responsibility of the Contributing State and the UN for Conduct in Afghanistan

The question, however, is whether acting under a UN mandate might change something for the question of attribution. It can be asserted that in Afghanistan the acts and omission of the contributing states of ISAF were attributable to the UN. As developed by the European Court of Human Rights (ECtHR), it is relevant whether the UN had "effective control" or "ultimate authority and control".[35] In Afghanistan, this was the case as ISAF had its own command structure,[36] and the UN Security Council therefore had "effective control".[37]

One might, therefore, "expect the European Court to hold" that the relevant conduct was only attributable to the UN and not to the respondent state.[38] However, the United Kingdom High Court of Justice decided in the case Mohammed v. Ministry of Defence that the detention in question is also attributable to the United Kingdom.[39] A joint responsibility of

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[24] District Court Bonn, *supra* note 13, para. 35.

[25] German Constitutional Court, Distomo case, 2 BvR 1476/03, 15 February 2006, http://www.bverfg.de/entscheidungen/rk20060215_2bvr147603.html.

[26] International Court of Justice, Jurisdictional Immunities of the State, Germany v. Italy: Greece Intervening, Judgment, 3 February 2012, http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=143&p3=4.

[27] M. Sassòli, *supra* note 3, p. 445; ECtHR, Stichting Mothers of Srebrenica and others v. Netherlands, decision, 11 June 2013, Application no. 65542/12, para. 158.

[28] See "6. Political and Financial Implications of Judgments on Compensations for Individuals".

[29] UN Security Council, Resolution 1386, UN Doc. S/RES/1386, 20 December 2001.

[30] District Court Bonn, *supra* note 13, para. 28.

[31] Administrative Court Cologne: Verwaltungsgericht Köln, Kunduz case, 26 K 5534/10, 9 February 2012, https://openjur.de/u/453623.html, para. 69: The inadmissibility was based on the absence of the exercise of German sovereignty (para. 83), such as the lack of a protected interest for a declaration of illegality, e.g. the absence of danger of repetition (para. 90).

[32] *Id*., para. 74.

[33] Art. 7 Draft Articles on the Responsibility of International Organizations.

[34] International Law Commission, Report on the Work of Its Sixty-sixth Session, General Assembly, Official Records, Supplement No. 10, 2011, UN Doc. A/66/10, Chapter V 'Responsibility of International Organizations', Art. 7 DARIO, Commentary para. 4.

[35] ECtHR, Al-Jedda v. the United Kingdom, [Grand Chamber], decision, Application no. 27021/08, 7 July 2011, para. 84.

[36] UK High Court of Justice, Serdar Mohammed v. Ministry of Defence, [2014] EWHC 1369 (QB), Case No: HQ12X03367, 2 May 2014, http://www.judiciary.gov.uk/judgments/serdar-mohammed-v-ministry-of-defence-and-others/, para. 177.

[37] *Id*., para. 178.

[38] *Ibid*.

[39] *Id*., para. 187: The attribution of the detention to the UK is in particular argued upon the fact that the UK had an own detention policy diverging from that of ISAF.

the contributing state beside the UN was also acknowledged by the District Court of The Hague, which beside the UN, had held the Dutch state itself liable for having failed to prevent genocide.[40] On another occasion, the Dutch Supreme Court had explained further that the contributing state could be held liable when acting under a UN mandate if the state is "actually able to ensure compliance with the human rights".[41] If this is the case, the state has exercised jurisdiction and the domestic courts of this state can thus be addressed for eventual compensation claims. Acting under UN mandate, thus, does not change something for the question of attribution to the respondent state.

A responsibility of the state apart from the UN is very important as the UN generally benefits from absolute immunity in front of the domestic courts.[42] The judgments by the Dutch Courts, the decision of the District Court Bonn and now recently the decision of the UK High Court of Justice in the Mohammed v. Ministry of Defence case might be the beginning of a trend that in the future domestic courts will decide on violations of IHL of military forces acting under a UN mandate.

3.4. Liability of the German State: Liability of the Entity of Employment

Decisions by domestic courts will be based on domestic and international law. While deciding that the attack was an exercise of German sovereignty and the case thus admissible, the District Court Bonn, however, left open whether the German state would be the right defendant (passive legitimization). Because of a peculiarity under German law, the responsible entity for the violation can be determined on the merits of the case, and as the Court already refused the case on other grounds, it did not have to answer the question of the responsible entity. Under German civil and administrative law, the majority view however is that a conduct is attributable to the entity that employs the official.[43] In the case of German soldiers this would be the German state.[44] In the author's view, the secondment of the soldiers to the NATO troops should therefore not change something in the question of attribution.[45] Moreover, the attribution of acts to the NATO does not help the victims as there is no forum where they could claim a responsibility of NATO. Taking the German state as right defendant speaks further the Military Technical Agreement concluded between the contributing states of ISAF and the Afghan transitional government. This agreement declares every ISAF troop contributing nation responsible for the compensations of damages on its own costs.[46]

4. Legal Basis for a Compensation Claim

As developed in the introduction of this paper, it might be said that a right of compensation for individuals is slowly becoming acknowledged in the international legal doctrine as well as by states.[47] However, it remains debated whether there is a legal basis in international law or whether the right can only be enforced on the basis of domestic law. Although the DARSIWA only deal with the responsibility of one state towards another state[48], Art. 33 (2) DARSIWA recognizes the possibility of "any person or entity" to invoke the responsibility of a state. The Commentary on the Draft Articles further clarifies that it "will be a matter for the particular primary rule" to determine the exact requirements to invoke responsibility.[49] Therefore, I will now assess whether there is a primary rule of IHL that determines the requirements of responsibility of a belligerent party.

4.1. International Humanitarian Law as Legal Basis?

In particular Article 3 Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 (HR) and Article 91 AP I have to be considered in this regard. Article 3 HR, which is almost literally repeated in Article. 91 AP I, states:

"A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

Some scholars argue that the core element of this article is the individual victim's right to claim compensation and that the lack of application of this article at least for enemy nationals is insufficient to assume that the article has acquired a different meaning.[50] The provision would not leave any margin of appreciation but rather declare a clear obligation of the state to compensate individuals directly.[51]

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40 Rechtbank Den Haag, Mothers of Srebrenica against the State, C/09/295247/ HA ZA 07-2973, 16 July 2014, http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748, para. 5.1; D. Bilefsky / M. Simonsjuly, Netherlands Held Liable for 300 Deaths in Srebrenica Massacre, 16 July 2014, http://www.nytimes.com/2014/07/17/world/europe/court-finds-netherlands-responsible-for-srebrenica-deaths.html?_r=0.

41 Supreme Court of the Netherlands, The State of the Netherlands v. Nuhanović, First Chamber 12/03324 LZ/TT, 6 September 2013, http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Documents/12%2003324.pdf, p. 34, paras. 3.17.3.

42 ECtHR, *supra* note 27, paras. 94 (acknowledgement of the foregoing decision of the Dutch Supreme Court) and 154 (decision of the ECtHR itself).

43 So-called "Anstellungstheorie": W. Erbguth, Allgemeines Verwaltungsrecht mit Verwaltungsprozess- und Staatshaftungsrecht, 7.Aufl., Baden-Baden 2014, p. 496 para. 31.

44 Press release of the District Court Bonn, Zivilkammer beabsichtigt Beweisaufnahme zum NATO-Bombardement in Kunduz / Afghanistan, PM 6/13, 17 April 2013, http://www.lg-bonn.nrw.de/behoerde/presse/zt_archiv_040/Archiv-2013/index.php, p. 1; District Court Bonn, *supra* note 13, para. 93.

45 Question left open by the District Court Bonn, *supra* note 13, para. 93.

46 These agreements are not published but referred to in: C. Raap, Staatshaftungsansprüche im Auslandseinsatz der Bundeswehr?, in: Neue Zeitschrift für Verwaltungsrecht 32 (2013), p. 555.

47 ICRC, *supra* note 6, Rule 150.

48 P. Gaeta, Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?, in: O. Ben-Naftali (ed.), International Humanitarian Law and International Human Rights Law, Oxford / New York 2011, p. 312.

49 International Law Commission, *supra* note 8, Art. 33 DARSIWA, Commentary para. 4.

50 F. Kalshoven, State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of the Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and beyond, in: The International and Comparative Law Quarterly 40 (1991), p. 837.

51 A. Fischer-Lescano, Subjektivierung völkerrechtlicher Sekundärregeln. Die Individualrechte auf Entschädigung und effektiven Rechtsschutz bei Verletzungen des Völkerrechts, in: Archiv des Völkerrechts 45 (2012), p. 345.

Others, however, state that the article is silent on whether an individual "can assert his / her right against the State or the wrongdoer".[52]
Regarding violations during the Second World War, a practice has emerged that does not recognize international law as basis for compensation claims of individuals.[53] In the Distomo case,where Greek victims of the Second World War claim against the German state, the German Constitutional Court, for example, explains that the wording "if the case demands" of Article 3 HR indicates that this provision is "not self-executing".[54] As consequence Article 3 HR needs to be implemented into domestic law and cannot be as such a legal basis for a claim. However, in the Distomo decision, the Court left open whether international law has developed differently after the Second World War.[55] Only in a later judgment, the Varvarin case, the Court rejected Article 3 HR and Article 91 AP I as legal basis even for violations after the Second World War.[56]
Even if Article 91 AP I and Article 3 HR provided for a right of individuals to be compensated, these primary rights "do not necessarily translate into secondary rights as a consequence of their breach".[57] In the more recent Varvarin decision, the Court therefore considers the secondary right to be compensated as acknowledged by international law, still only conferred to the home state and not the individual.[58] This conclusion is also confirmed by state practice.[59] One argument against international law being a suitable legal basis is the lack of implementation mechanism provided for in the Geneva Conventions and its Additional Protocols.[60]
In conclusion, it can be said that the majority view is that Article 3 HR and Article 91 AP I are not self-executing, they need to be implemented into domestic law and can, thus, not be invoked by individuals.[61] The District Court Bonn is of this opinion. After citing the decisions of the German Constitutional Court, it explains that the development of international human rights law and the acknowledgment of individuals as partial subjects of international law have not changed anything on how to interpret Article 3 HR and Article 91 AP I.[62] This decision is in my view perfectly justifiable. To decide otherwise might be in line with the desire of several humanitarian and human rights scholars.[63] However, the wording of the article is not clear enough to be a ground of liability for states. To take international law as legal basis for compensation does further not find support in case law.

4.2. Domestic Norm as Legal Basis

However, as agreed upon at the United Nations General Assembly, states have a duty to "provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice".[64] The District Court Bonn correctly explains that Article 40 European Introductory Act to the Civil Code is not applicable to claims of state liability.[65] This provision is a rule that solves conflicts when different laws are applicable. But in the case of state liability, there is no conflict of norms as the principle of state sovereignty excludes the possibility to bring a compensation claim against state A before the courts of state B.[66]
Another question is whether the rules of *ius in bello* prevail as *lex specialis* over the German legal basis for liability of a state official. The District Court Bonn states that it assumes the German legal basis to be applicable for conduct of German soldiers in the framework of operations carried out abroad. The Court, however, clarifies simultaneously that it does not have to decide this question as it already declines the claim on other grounds.[67] This is regrettable as the German state as defendant had precisely claimed that the German legal basis would not be applicable for the exceptional circumstances of an armed conflict.[68] The representative of the German state explained in the proceedings that if Germany would have to fear compensation claims, every single time it deploys its soldiers, the other members of the NATO alliance could not trust Germany anymore.[69] Representatives of the German Ministry of Defense are even suggesting that the German parliament should pass a law by which it excludes the liability of the state for damages that occurred during times of armed conflict.[70] Further below, this point will be addressed in more detail and the author will argue why the German parliament should refrain from passing such a law.[71]
So far, however, it is up to the Courts to determine whether the German law of liability for state officials remains applicable even for soldiers acting abroad in military operations.

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52 L. Zegveld, Remedies for Victims of Violations of International Humanitarian Law, in: International Review of the Red Cross 85 (2003), p. 507.

53 For cases in the US and Japan: E.-C. Gillard, *supra* note 4, p. 538; L. Zegveld, *supra* note 52, p. 508.

54 German Constitutional Court, *supra* note 25, para. 21.

55 *Id*., para. 22.

56 German Constitutional Court, Bridge in Varvarin case, 2 BvR 2660/06 and 2 BvR 487/07, 13 August 2013, https://www.bundesverfassungsgericht.de/entscheidungen/rk20130813_2bvr266006.html, para. 13.

57 L. Zegveld, *supra* note 52, p. 507.

58 German Constitutional Court, *supra* note 56, para. 13.

59 P. Gaeta, *supra* note 48, p. 309.

60 C. Raap, *supra* note 46, p. 553.

61 Corte di Cassazione, Presidenza Consiglio Ministri c. Marković e altri, No. 8517, 5 June 2002, referred to in: N. Ronzitti, Compensation for Violations of the Law of War and Individual Claims, in: B. Conforti *et al*. (eds.), The Italian Yearbook of International Law, Vol. 12, Leiden 2002, p. 39.

62 District Court Bonn, *supra* note 13, para. 41.

63 See for example A. Fischer-Lescano, *supra* note 51, pp. 299-381; M. Terwiesche, Kriegsschäden und Haftung der Bundesrepublik Deutschland, in: Neue Zeitschrift für Verwaltungsrecht 23 (2004), pp. 1324–1327.

64 UN General Assembly, Basic principles on the Right to a Remedy, *supra* note 10, para. 3 c).

65 District Court Bonn, *supra* note 13, para. 47.

66 *Ibid*.

67 *Id*., para. 49.

68 C. Kornmeier, Prozess um Schadensersatz für Kunduz-Opfer: Wie unterscheidet man einen Taliban von einem Zivilisten?, 21 March 2013, http://www.lto.de/recht/hintergruende/h/lg-bonn-1-o-460-11-kunduz-luftangriff-bombardement-opfer-schadensersatz-taliban-nato/.

69 *Ibid*.

70 D. Weingärtner, Wissenschaft und Praxis im Dialog: Fachgespräch zur Schadenshaftung im Auslandseinsatz, Event note (Deutsche Gesellschaft für Wehrrecht und humanitäres Völkerrecht – German Society for military and humanitarian law), 2 July 2013http://dgwhv.de/media/2013%20Fachgespr%C3%A4ch%20Staatshaftung/2013%20Fachgespr%C3%A4ch%20zur%20Schadenshaftung.pdf; C. Raap, *supra* note 46, p. 555.

71 See "6. Political and Financial Implications of Judgments on Compensations for Individuals".

This matter was expressly left open by the German Constitutional Court.[72]
The German norm of state liability is applicable if there is no conflict of norms with a provision of *ius in bello*. Similar as for the relation of IHL and IHRL, IHL is not *lex specialis* as a branch. Which provision prevails depends on the particular rule in question.[73] If we do not acknowledge Article 3 HR and Article 91 AP I as legal basis for compensation claims, there is no conflict of norms and the legal basis of domestic law is applicable. If on the other hand, we do see a legal basis for compensation in Article 3 HR and Article 91 AP I, the question arises whether the requirements for liability are the same in international and domestic law.

5. (Non-)Requirement of Fault and the Lawfulness of the Attack

One distinct criterion in German domestic law is the criterion of fault, which is not necessary under the international law of state responsibility. After addressing this question, the following paragraph will analyse the decision of the District Court Bonn in relation to violations of the principle of distinction and the principle of proportionality. Finally, this paragraph will address the question whether the identified *ex-ante* perspective shall also be applicable for the secondary right of compensation or whether the purpose of paying compensations requires an analysis on an *ex-post* perspective of the facts.

5.1. The Requirement of Fault in German Domestic and International Law of State Responsibility

The German norm providing for liability of the state requires that the state official acted either with intent or negligence.[74] Pursuant to Article 2 DARSIWA, the only requirement for state responsibility in international law, in contrast, is that the act or omission is attributable to the state and that it constitutes a breach of an international obligation of the state. However, the ILC came to the conclusion that due to the heterogeneity of secondary rules there is "no general rule, principle, or presumption about the place of fault".[75] The ILC, therefore, decided to take a neutral position and the Draft Articles, thus, do not make any reference to a requirement of fault or intent. The Commentary on the DARSIWA, though, clarifies that such a requirement depends on the interpretation and application of the primary rule.[76] For this reason the article now turns to the requirements that can be found in the rules on conduct of hostilities.

5.2. Violation of the Principle of Distinction

The principle of distinction states that the civilian population shall not be object of attack during armed conflicts.[77] The District Court Bonn explains in this regard that a violation of this principle is only possible if a commander had positive knowledge about the presence of civilians.[78] Positive knowledge must, therefore, of course be ascertained on an *ex-ante* basis of what the commander knew when he or she was conducting the attack. The District Court Bonn did not find a violation of this principle as the responsible Commander Klein did not have positive knowledge that his object of attack was civilians.[79] This argument was also not brought forward by the claimants.[80]

5.3. Violation of the Principle of Proportionality

Similarly, the principle of proportionality has been analysed by the District Court Bonn. The principle of proportionality states that the expected incidental loss of civilian life should not be excessive in relation to the anticipated military advantage. A violation of this principle has, thus as well, to be ascertained from an *ex-ante* perspective. The District Court Bonn did not find a violation of this principle based on the fact that at the moment of giving his order, Commander Klein did not have to know that he was conducting an attack on civilians.[81] The Court analyses broadly the presented evidence and comes to the conclusion that as the Commander did not expect civilian damage, there was also no balancing act necessary between the military advantage and the loss of civilian life.[82]
However, I will now turn to the question whether the criteria might be different if we evaluate the payment of compensations.

5.4. Criteria for the Right of Compensation

The obligation to compensate might also occur if on an *ex-ante* basis no violation can be found. It should be borne in mind that the ratio of IHL is to have some minimum rules even in times of armed conflict. Rules of compensation for violations of IHL were never the purpose of this regime. A look into other branches of law might therefore be useful when searching for an answer for the criteria for the right of compensation.
It could be argued that for the evaluation of the compensation claim, similar to domestic police law, an *ex-post* perspective should be relevant.[83] The right of compensation has to be ascertained on the basis of what actually has happened and not what the responsible persons considered necessary in

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72 German Constitutional Court, *supra* note 56, para. 14.

73 M. Milanovic, Norm Conflicts, International Humanitarian Law and Human Rights Law, in: O. Ben-Naftali (ed.), International Humanitarian Law and International Human Rights Law, Oxford / New York 2011.

74 Art. 34 of the German constitution in combination with § 839 German Civil Code (so-called "Amtshaftungsanpruch").

75 O. Diggelmann, Fault in the Law of State Responsibility – Pragmatism a*d infinitum*?, in: German Yearbook of International Law, Vol. 49, Berlin 2005, p. 300.

76 J. Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries, Cambridge 2002, Introduction, p. 13.

77 See Art. 51 (2) AP I, Art. 13 (2) AP II, such as ICRC, Study on Customary IHL, *supra* note 6, Rule 1.

78 District Court Bonn, *supra* note 13, para. 60.

79 *Ibid*.

80 *Ibid*.

81 *Id*., para. 80.

82 *Id*., para. 84.

83 *Id*., p. 166.

the situation of urgent action. If the facts proof that the attack was not proportional, compensation would have to be paid regardless of how the commander has interpreted the situation previously.
The District Court Bonn does not consider this possibility at all. In the authors view, however, such an interpretation would be much more in line with the nature state responsibility should have.
While there are different theories about the objective or subjective nature of state responsibility, in the authors view, the most convincing theory is the one that "provides risk responsibility for breaches of international law arising from active conduct and fault responsibility for breaches by omission".[84]
For breaches by omission the subjective component of fault should be necessary. The officials at least need to know that some kind of action would have been necessary. Only if they know but still do not take any action, as for example in the case of Srebrenica, they can be held responsible for not having accomplished the duty to protect.
On the other hand, an objective risk responsibility is more adequate for active conduct. As in the Kunduz case, it might be that the official did not act with any fault at the moment of his conduct as the analysis of legality of the conduct is done on an *ex-ante* perspective. This is necessary, because the official must remain capable to react towards danger as it seems necessary from his standpoint and with best knowledge he could gather. However, this does not impede that once the situation of danger is over an evaluation of the real circumstances has to be done. In order to be able to react effectively against imminent danger, the state thus has broader rights in the sense that the *ex-ante* standpoint of the official is relevant, but it has to pay for it with the risk that it might have to pay compensation for something that at the moment of the action was legal.
This objective approach, where the obligation to pay compensation does not require fault, can be observed as well for compensation claims in front of international fora such as the United Nations Compensation Commission or the Eritrea-Ethiopia Claims Commission. While the basis on which these bodies award compensation varies, a violation of a rule with fault was never required.[85] Not only because of this but also because the adequate forum was already given through the establishment of the international body, individuals have been more successful to claim compensation before these international fora.[86]
The approach of risk responsibility where the state can be held responsible for what happened and not what the respective person thought would happen is also supported by the ECtHR. A state can be held responsible in front of this Court if a convention right is violated regardless of the existence of a fault of the respective official.[87]

6. Political and Financial Implications of Judgments on Compensations for Individuals

After having analyzed the difficulties domestic courts might face, when judging on violations of IHL, one might wonder whether compensation of individuals for such violations are appropriate and whether domestic courts are the right forum for claims.
It might neither be appropriate nor possible to compensate every single individual after mass violations of IHL and IHRL with the involvement of several states as it was during the Second World War. A state that committed such mass violations might financially not be capable to pay full remuneration.[88] The author, therefore, is of the opinion that it might be justifiable that the German Constitutional Court decided against the existence of an individual right for compensation for violations of IHL during the Second World War.[89] In this case, remuneration between states might have been more appropriate, considering as well the still quite weak position of individuals in international law at the first half of the 20th century.
However, the question whether domestic courts are an appropriate fora for compensation claims has to be answered differently if it concerns violations by military forces that were acting under a UN mandate to maintain international peace and security. Unfortunately, the UN are also reluctant to accept compensation claims of individuals. For violations of IHL in Congo the UN for example concluded agreements with states whereby individuals could obtain compensation only through the diplomatic protection of their national state.[90]
As stated above, the German Ministry of Defense seems to quest that the parliament passes a law excluding the liability of the state for damages that occurred during times of armed conflict.[91] The argument put forward for such an exclusion is that a similar legal basis of responsibility would not exist in the countries of German coalition partners and that, thus, Germany would always be the only state that could be held responsible for eventual wrongdoings,[92] where German soldiers are involved in while the wrongdoings of other soldiers would remain without any consequence. The judgments of the Dutch Courts, however, show that a similar legal basis of liability also exists under Dutch law.
The German parliament should refrain from passing any such law. One wonders about the real intention behind the intent of the Ministry of Defense to restrict compensation claims. While there might have been the fear of an excessive financial burden for violations during the Second World War, this fear cannot count anymore for violations of IHL by German soldiers during their operations abroad.[93] The fear of

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84 O. Diggelmann, *supra* note 75, p. 303.

85 *Id*., p. 540: The requirement in the Eritrea-Ethiopia Claims Commission was simply to find a violation of IHL, while for Kuwait it sufficed to proof a loss arising as a direct result of Iraq's invasion.

86 E.-C. Gillard, *supra* note 4, p. 539.

87 F. Bydlinski, Methodological Approaches to the Tort Law of the ECHR, in: Tort Law in the Jurisprudence of the European Court of Human Rights, Berlin / Boston 2011, p. 54.

88 M. Sassòli, *supra* note 3, p. 449.

89 German Constitutional Court, *supra* note 25, para. 20.

90 N. Ronzitti, *supra* note 61, p. 47.

91 C. Raap, *supra* note 46, p. 555.

92 D. Weingärtner, *supra* note 70.

93 Even if counting with 100 victims in the Kunduz case, the total amount of compensation would come only to 2 Million Euros: C. Rath, Der geforderte Schadensersatz ist nicht aussichtslos. Ein wichtiger Präzedenzfall, Tageszeitung TAZ, September 2011, https://www.taz.de/Kommentar-Zivilklage-Kundus/!77317/.

judicial decisions of such political nature is however understandable, and there is a real risk that violations of the *ius in bello* principle are used to make claims of disproportionate use of force under *ius ad bellum*.[94]

7. Conclusion

The judgment of the District Court Bonn in November 2013 was progressive in the sense that it declared the case admissible despite the fact that the alleged violation of IHL took place during operations under a UN mandate. While domestic courts have often been reluctant in declaring such claims admissible, the recent judgments of Courts in the Netherlands, the UK and finally the judgment of the District Court Bonn may indicate a new trend. It remains to be seen, if this trend is confirmed by judgments of other Courts in the near future. In any way many issues of substantial nature are completely unclear in this area and the situation of individuals is far from being satisfactory.

This is in particular unfortunate as the compliance with IHL and its enforcement might influence the political perception of military missions and, thus, the future contribution of states to peacekeeping operations. Furthermore, states should bear in mind that we do not speak about compensations for every dead person in a conflict, but only those who actually claim compensation on the ground of a violation of IHL.

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[94] L. Blank, A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities, in: Research Journal International Law 43 (2010-2011), pp. 707–738.

Verbreitung des Humanitären Völkerrechts – Tagung des Landesverbandes Berlin des Deutschen Roten Kreuzes, 5. Dezember 2104 in Berlin

Yaroslavna Sychenkova / Simon Rau*

Am 5. Dezember 2014 fand die jährliche Tagung des Landesverbandes Berlin des Deutschen Roten Kreuzes (DRK) mit Unterstützung des Instituts für Friedenssicherungsrecht und Humanitäres Völkerrecht (IFHV) der Ruhr-Universität Bochum statt. Zu den Kernaufgaben des Roten Kreuzes gehört die Verbreitung des Humanitären Völkerrechts. Diese sollte mit dieser Tagung vorangetrieben werden.

Zu Beginn hieß der Präsident des DRK Berlin, Dr. h.c. Uwe Kärgel, die Teilnehmer willkommen und dankte insbesondere der Landeskonventionsbeauftragten, Dr. Jana Hertwig, die die diesjährige Tagung organisiert hat. Nach einigen Begrüßungsworten von Dr. Hertwig begann der erste inhaltliche Block, der die Grundlagen des Humanitären Völkerrechts vermittelte. Dr. Robert Frau, akademischer Mitarbeiter am Lehrstuhl für öffentliches Recht, insbesondere Völkerrecht, Europarecht und ausländisches Verfassungsrecht der Universität Viadrina Frankfurt (Oder), begann die Einführung mit Ausführungen zu der Balance zwischen militärischer Notwendigkeit und Humanität, welche dem Humanitären Völkerrecht zugrunde liege. Nach der Erklärung der Grundprinzipien des humanitären Völkerrechts, vor allem des Unterscheidungsgrundsatzes und Proportionalitätsprinzips, ging Dr. Frau auf die Anwendung des Humanitären Völkerrechts in internationalen und nicht-internationalen bewaffneten Konflikten ein. Anhand der Konflikte in Palästina, Syrien und Libyen erklärte er, dass für diese zwei Konflikttypen unterschiedliche Rechtsrahmen anwendbar seien. Weiter gelte das Zusatzprotokoll (ZP) I zu den Genfer Konventionen in internationalen bewaffneten Konflikten und das ZP II in nicht-internationalen bewaffneten Konflikten. Da die Zusatzprotokolle von der Staatengemeinschaft jedoch nicht gleichmäßig ratifiziert sind, könne die Bestimmung des anwendbaren Rechtsrahmens schwierig sein.

Anschließend berichtete Katja Schöberl, Referentin im Team Internationales Recht / Internationale Gremien des DRK Generalsekretariats in Berlin, in ihrem Vortrag über neuere Entwicklungen im Humanitären Völkerrecht. Eine im Jahr 2011 bei der 31. Internationalen Rotkreuz- und Rothalbmondkonferenz beschlossene Resolution setze einen Schwerpunkt auf den Schutz von Personen in nicht-internationalen bewaffneten Konflikten. Dabei gehe es unter anderem um Personen, die unmittelbar an Feindseligkeiten teilnehmen und deren rechtlicher Status umstritten ist, vor allem, wenn sie durch die Gegenpartei in Gefangenschaft genommen werden. Ein anderer Schwerpunkt der Resolution liege auf der Durchsetzung des Humanitären Völkerrechts. So werde zwischen der Staatengemeinschaft und der Internationalen Rotkreuz- und Rothalbmond-Bewegung (IKRK) ein Dialog bezüglich weiterer Maßnahmen zur Durchsetzung des Humanitären Völkerrechts geführt. Ein weiterer aktueller Diskurs betreffe die Auswirkungen des technischen Fortschritts auf das Humanitäre Völkerrecht. Die völkerrechtliche Einordnung von „cyber wars“ als neuer Kriegsform sowie von automatisierten Waffensystemen stellten in dieser Hinsicht große Herausforderungen dar.

Nach der ausführlichen Einführung bereitete der nächste Beitrag einen Abstecher in die Geschichte des Rotkreuz-Museums in Berlin vor. Herr Hans-Joachim Trümper, Leiter und einer der Gründer des Museums, konnte von der Geschichte des Museums lebhaft erzählen. In Zusammenarbeit mit anderen Freiwilligen sammelte er jahrelang unterschiedliche Dokumente und Materialien über die Geschichte des DRK. Die Sammlung konnte schließlich ihr konstantes Zuhause in den Räumlichkeiten des DRK Berlin finden. Nach der Einführung folgte ein von Trümper geführter Museumsrundgang.

Danach folgte der Bericht von Dr. med. Bernward auf dem Kampe, European Master of Humanitarian Assistance, M.A. Friedens- und Konfliktforschung, Facharzt für Allgemeinmedizin und Lehrbeauftragter an der Philipps-Universität Marburg und der Otto-von-Guericke-Universität Magdeburg, über einen Hilfseinsatz im haitianischen Port au Prince nach dem Erdbeben am 12. Januar 2010.

Damals seien viele humanitäre Organisationen nicht über die seit Langem existierenden Auseinandersetzungen zwischen der haitianischen Regierung und verschiedenen bewaffneten Gruppen informiert gewesen. Gegen diese Gruppen sei die United Nations Stabilisation Mission in Haiti vorgegangen und sei deshalb nicht mehr als neutraler Akteur angesehen worden. Folglich sei es für die mit den Vereinten Nationen (VN) assoziierten Akteuren und Nichtregierungsorganisationen (non-governmental organization, NGO) unmöglich gewesen, in den von bewaffneten Gruppen kontrollierten Landesteilen zu operieren. Dagegen sei es neutralen Akteuren wie dem IKRK möglich gewesen, den Zugang zu diesen Regionen zu erhalten. Diese Möglichkeit stünde auch kleineren NGOs offen, sie erfordere aber eine genaue Kenntnis der Lage und die Bewahrung der eigenen Neutralität. Allerdings könne ein solches Vorgehen eine Organisation der Kritik einer Legitimation bewaffneter Gruppen aussetzen. Humanitäre Akteure sollten auf Transparenz achten und sich auf ihr ausschließlich humanitäres Mandat berufen, um solche Kritik zu vermeiden.

Im Anschluss gaben Dorota Dziwoki, Leiterin des Teams Suchdienst beim Generalsekretariat des DRK, und Judith Klimin, Leiterin des Suchdienstes/Landesauskunftsbüros des DRK Berlin, eine Einführung in die Gefangenenbesuche durch das IKRK und den Suchdienst des Roten Kreuzes und des Roten Halbmondes.

Dziwoki erklärte, Gefangenenbesuche, die das Verschwinden, Töten, Foltern und Misshandeln von Inhaftierten verhindern sollen, fänden nur unter bestimmten Bedingungen statt. So müsse der Besuch aller Gefangenen und Gefängnisse möglich sein und Gespräche mit den Gefangenen müssten mit diesen allein geführt werden. Alle Gefangenen müssten registriert und bei Bedarf ein erneuter Besuch ermöglicht werden. Danach werde ein Bericht vom Besuch erstellt, der mit den Behörden geteilt werde. In einem vertraulichen Dialog versuche das IKRK dafür zu sorgen, dass die Haftbedingungen dem Humanitären Völkerrecht entsprechen.

Vom IKRK besuchte Gefangene hätten die Möglichkeit, ihre Familien zu kontaktieren. Klimin berichtete von einer Klientin, die nur über das Rote Kreuz zu ihrem Freund im US-Gefängnis Bagram in Afghanistan Kontakt halten könne.

Danach analysierte Prof. Dr. Hans-Joachim Heintze vom IFHV das Verhältnis von Hu-

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manitärem Völkerrecht und Menschenrechten.
Im Nuklearwaffengutachten des Internationalen Gerichtshofs sei festgestellt worden, dass Humanitäres Völkerrecht im Verhältnis zu Menschenrechten *lex specialis* darstelle. Manche Völkerrechtler entwickelten daraus eine Separationstheorie, nach der in einem bewaffneten Konflikt nur die Menschenrechte anwendbar seien, die auch im Humanitären Völkerrecht kodifiziert sind.
Prof. Dr. Heintze illustrierte jedoch anhand von Artikel 77 ZP I und dem Zusatzprotokoll zur VN-Kinderrechtskonvention, dass humanitäres Völkerrecht und menschenrechtliche Garantien oft gleichzeitig anwendbar seien. Artikel 77 ZP I verbiete die unmittelbare Teilnahme von unter 15-Jährigen an Feindseligkeiten. Das erste Zusatzprotokoll zur VN-Kinderrechtskonvention erhöhe dieses Mindestalter auf 18 Jahre und verbiete die verpflichtende Einziehung von unter 18-Jährigen. Die Rekrutierung unter 18-Jähriger sei somit durch ein menschenrechtliches Instrument verboten, doch es sei abwegig anzunehmen, dass Artikel 77 ZP I als *lex specialis* diesem vorgehe.
Andreas Schüller, LL.M. vom European Center for Constitutional and Human Rights (ECCHR) beleuchtete anschließend die Strafverfolgung schwerer Verstöße gegen das Humanitäre Völkerrecht.
Kriegsverbrechen wie Folter oder Angriffe auf die Zivilbevölkerung könnten nach dem Weltrechtsprinzip in allen Staaten strafrechtlich verfolgt werden. Die Genfer Konventionen verlangten eine Kriminalisierung dort beschriebener schwerer Verstöße in nationalen Rechtsordnungen, wie zum Beispiel im deutschen Völkerstrafgesetzbuch (VStGB) und deren Strafverfolgung. Eine solche sei teilweise auch durch internationale Tribunale wie dem Internationalen Strafgerichtshof für das ehemalige Jugoslawien oder dem Internationalen Strafgerichtshof möglich. Dennoch blieben viele Kriegsverbrechen ungeahndet. Deshalb habe das aktuelle erste Verfahren nach dem VStGB große Bedeutung. Den Angeklagten werde Vorgesetztenverantwortlichkeit für von Angehörigen der kongolesischen *Forces Démocratiques de Libération du Rwanda* (FDLR) verübte Völkerstraftaten vorgeworfen. Doch seien ihre Befehlsgewalt und ihr Wissen über die Taten schwer zu beweisen.
Ein anderer Fall betreffe die Bombardierung zweier Tanklaster im afghanischen Kunduz auf Befehl des deutschen Oberst Georg Klein, bei der viele Zivilisten gestorben seien. Die Ermittlungen seien eingestellt und ein vom ECCHR unterstütztes Klageerzwingungsverfahren als unzulässig abgelehnt worden. Zwar sei die Faktenlage umstritten, doch hätte diese in einem Gerichtsverfahren ermittelt werden und auch Klarheit über die Rechtslage bei Luftangriffen bringen können.
Andere Fälle des ECCHR beträfen die Tötung von Terrorverdächtigen durch Drohnenangriffe, die Folterung von Gefangenen durch britische Truppen im Irak und die Begehung von Kriegsverbrechen am Ende des Bürgerkrieges in Sri Lanka und im syrischen Bürgerkrieg. Alle Fälle hätten gemeinsam, dass es aufgrund staatlicher Beteiligung keine Aufklärung und Strafverfolgung gebe. Das ECCHR dringe auf aktivere Strafverfolgung, die die Respektierung des Humanitären Völkerrechts verbessern könnte.
Abschließend verabschiedete Frau Margret Diwell, Vizepräsidentin des Berliner Roten Kreuzes, die Anwesenden und dankte auch allen Beteiligten.
Dem DRK Landesverband ist es mit der Tagung gelungen, eine allgemeine Einführung in das Humanitäre Völkerrecht mit einem breiten Spektrum hochkarätiger Beiträge zu aktuellen Fachdebatten zu verknüpfen. Es lässt sich resümieren, dass die Veranstaltung dem Anspruch, einen Beitrag zur Verbreitung des Humanitären Völkerrechts zu leisten, voll gerecht geworden ist.

Organizational Perspectives on Environmental Migration. International Expert Workshop, 7-8 November 2014 in Rome, Italy

Kerstin Rosenow-Williams*

On 7-8 November 2014, 23 participants took part in the international expert workshop "Organizational Perspectives on Environmental Migration" in Rome, Italy. The workshop was jointly organized by Francois Gemenne (University of Liège, Belgium / Sciences Po, Paris, France) and Kerstin Rosenow-Williams (Ruhr University Bochum, Germany).
The aim of the workshop was to connect researchers and practitioners from various types of organizations that are engaged in the topic of environmental migration. Various civil society organizations are currently devoted specifically to the plight of environmental migrants, both in industrialized countries and in developing countries. In addition, most large international non-governmental organizations (INGOs) and international organizations (IOs) have also developed advocacy work with regard to environmental migration.
While research in this field has received increased attention both in policy and academic circles, the role of (international) non-governmental organizations (NGOs) or IOs has remained under researched. To-date, only a few studies have analyzed the influence and rhetoric of advocacy groups in the debates on environmental migration. The workshop, therefore, addressed the questions: what is their role in shaping the discourse on environmental migration? How do they interact with other organizations? And how can organizations address the topic of environmental migration efficiently in order to reach the targeted audiences (for example, the general public, policy makers, migrants or other stakeholders both in the countries affected by environmental migration internally and destination countries worldwide)?
To both address and close this research gap, the workshop united researchers who work on these questions from various disciplinary contexts (sociology, political science, geography, anthropology, law, conflict studies, *et cetera*) and from various institutional contexts. Organizational representatives from the following organizations, among others, presented their work: The International Organization of Migration (IOM), the United Nations Convention to Combat Desertification (UNCCD), the Norwegian Refugee Council (NRC), the UK-based NGO Climate Change and Migration Coalition, and Equity Bangladesh, a local NGO from Dhaka.

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The 23 participants came from thirteen different countries and three different continents. They participated in well-informed, up-to-date and lively discussions that comparatively addressed the organizational challenges and possible solutions for people being displaced by environmental or climate change-related factors.

The workshop benefited from the support of the Academia Belgica and was funded by the COST Action "Climate Change and Migration: Knowledge, Law and Policy, and Theory", which provides opportunities for experts, practitioners, researchers and policy-makers to exchange, develop and improve on knowledge and tools surrounding issues of climate change and environmental migration.[1]

1. Panel: Analyzing Actors within the Complex Regime of Environmental Migration

The first panel focused on the rhetorical developments within the environmental migration discourse. Angela Pilath (University of Oxford, UK) presented her paper entitled "The Politics of Environmental Displacement: How Knowledge Actors Navigate the Contested Nature of the Regime Complex". Based on a rational choice framework and the three concepts of expert, network, and leadership authority, she analyzed the question "whose ideas matter?" in the context of the evolution of the 2010 Cancun Agreement paragraph 14 (f), in which nation states pledged for the first time to undertake "[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels".[2] Second, Emilie Chevalier (University of Limoges, France) presented a joint research project with the Australian-based researchers Hedda Ransan-Cooper, Carol Farbotko, Karen McNamara and Fanny Thornton entitled "For What Means, to What Ends: Analyzing Six Framings of Environmental Migration". The aim of this analysis is to link the frames used in environmental migration discourse to different models of governance. The researchers concluded that frames such as "victims" or "security threats" often reproduce dominant political orders. At the same time, they highlighted the striking absence of the voices of migrants themselves within this contested discursive arena. Julia Blocher (University of Liège, Belgium), completed the panel with her presentation on "Where Are the 'Climate Refugees'? Organizations' Influence on Alarmist Narratives". She depicted the evolution of the environmental migration discourse and its impact on European policy discussions, which have only recently addressed the issue of external migration in the European Union (EU). Lars Thomann (International Fund for Agricultural Development, IFAD, and Food and Agriculture Organization of the United Nations, FAO, Rome, Italy) unfortunately could not attend the workshop to present his paper on "Environmental Migration: A Concept Between Complexes and Complexities".

2. Panel: The Role of Courts

In the second panel, the role of courts as key actors in advancing the rights of environmental migrants was critically discussed. Thea Coventry (Maastricht University, The Netherlands) introduced her analysis of "Complementary Protection: The Role of Courts in Expanding Protection in Asylum Regimes to 'Environmental Refugees'", focusing on the common law countries of New Zealand, Australia and Canada, while Charlotte Lülf (Ruhr University Bochum, Germany) presented an analysis entitled "Judicial Trendsetting? European Courts as Pacemakers for Defining, Redefining and Potentially Expanding Climate Refugee Protection in European Asylum Laws". Both presenters jointly discussed the strategies the analyzed courts have used to find legal solutions for the claims raised by people crossing international border due to environmental or climate change-induced changes in their countries of origin. As the 1951 Refugee Convention and its 1967 Protocol are not applicable in these cases, issues of complimentary and subsidiary protection under international human rights law, EU asylum law and the EU qualification directive were comparatively assessed. The discussions focused on how academic actors as well as other groups such as the media, INGOs, IOs, or local NGOs can have an effect upon individual court decisions. An international law framework that recognizes state responsibility for persons displaced because of natural disasters or environmental degradation is however not yet in place and not likely to develop in the near future. Therefore, individual court cases, which generate public discussion and which might eventually influence governments' policy positions, remain the main source of legal analysis and legal development.

3. Panel: The Role of International Organizations

The third panel focused on the role of different IOs in addressing the issue of environmental migration. First, Sinja Hantscher (University of Münster, Germany) discussed "The Environmental Migration Discourse by the United Nations High Commissioner for Refugees: A Securitization or a Politicization of Environmentally Displaced Persons?" Based on an analysis of documents from 2009 to 2014, she depicted the evolution of a securitization strategy implemented by the High Commissioner for Refugees, António Guterres, in, for example, his speeches to the United Nations (UN) Security Council. Second, Nina Hall (Hertie School of Governance, Berlin, Germany) introduced her paper: "A Catalyst for Change? The Inter-Agency Standing Committee (IASC) and the Humanitarian Response to Climate Change". In this context, she outlined the increasing cooperation among humanitarian actors within this policy field while highlighting the special role of the IASC as a catalyst for cooperation and coordination. Third, Kerstin Rosenow-Williams (Ruhr University Bochum, Germany) continued the analysis of humanitarian engagement with her paper on "Environmental Migration as a Humanitarian Challenge: Discussions within the International Red Cross / Red Crescent Movement". She outlined the decisive changes at the turn of the 21st century that led humanitarian organizations to acknowledge the dangers posed by climatic changes to the most vulnerable populations while elucidating the consequences that this redefinition of the humanitarian mandate entails at the level of organizational learning, restructuration and advocacy work. Finally, Jesús Marcos Gamero Rus (University of Madrid, Spain) discussed "The International Labour Organization (ILO) and the World of Work Organizations Integration in the Discourse and Responses on Environmental Migration". He stressed the lack of the social dimension in the current discourse but suggested that the Just Transition Initiative, proposed by ILO, could be useful for environmental migrants, underlining their status as workers being displaced from their country of origin.

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[1] See http://www.cost.eu/domains_actions/isch/Actions/IS1101 (accessed on 15 March 2015).

[2] United Nations, Framework Convention on Climate Change, Cancun Adaptation Framework, Part of the Cancun Agreements at the 2010 Climate Change Conference in Cancun, Mexico (COP 16), New York 2010, paras. 11-35, http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=4> (accessed 24 March 2015).

4. Panel: The Point of View of Practitioners

The first day of the workshop ended with a panel that discussed the practical point of view of INGOs and IOs through the eyes of their representatives. First, Mariam Traore Chazalnoel (IOM, Geneva, Switzerland) introduced "The International Organization for Migration Contribution to the International Debate on Environmental Migration". The paper is co-authored with Dina Ionesco, IOM Policy Officer, Focal Point for Migration, Environment and Climate Change. It outlines IOM's institutional approach on migration, environment and climate change, analyzing how these issues have gradually gained prominence within the Organization, such that now they are considered as a critical area for action. Afterwards Barbara Bendandi, Clara Crimella (both IOM, Rome, Italy) and Sven Walter (Global Mechanism of the UNCCD, Rome, Italy) presented an analysis of the "UNCCD-IOM Partnership: Addressing Land, Sustainable Development and Human Mobility" that outlined the benefits of such inter-agency cooperation. With regard to the issues of desertification, land degradation and drought and human mobility in West Africa, they presented a project that the two organizations are implementing in partnership in Burkina Faso, Niger and Senegal. The project analyses the nexus between sustainable land management, a secure environment and migration and aims at exploring innovative financing mechanisms to promote sustainable land management in the migrants' countries of origin, in particular remittances and diaspora investments. Afterwards Lena Brenn (Norwegian Refugee Council, Oslo, Norway) outlined for the NRC "Displacement in the Context of Climate Change, Disasters, and Environmental Degradation: an Operational Organization's Perspective". In her presentation, she also described the newly established links between the NRC and the Nansen Initiative on disaster-induced cross border displacement.[3] Finally, Alex Randall (Climate Change and Migration Coalition, Oxford, UK) asked in his talk "Mobilizing Action on Climate Change and Migration" how to handle three essential dilemmas faced by advocacy organizations working on environmental migration. He discussed the ambiguous relationships between various types of NGOs that are active in the topic but pursue different agendas and therefore use different rhetoric. The ambiguous relationships between security oriented actors, environmentalists and the development and remittances oriented framing of the issue were particularly discussed.

5. Panel: On the Frontlines: Analyzing Actors in Bangladesh

The second day of the workshop started with a panel on the regional case study of Bangladesh. As the world's most densely populated country, Bangladesh is also very much at risk from climatic changes and various hazards. Sayed Aminul Haque (Equity and Justice Working Group, Dhaka, Bangladesh) presented his NGO's point of view on "Climate Induced Migrants: Need for a Dignified Recognition under a New Protocol. Perspectives from Bangladesh". He outlined the various governmental policies and plans related to climate change and disasters that have been developed since 2009 while highlighting the lack of implementation with regard to migration issues. In this context, he described his NGO's engagement within the Climate Justice Campaign. The campaign lobbies for adequate international compensation, new international protocols for climate-induced migration and a better integration of these issues in the national development plans of Bangladesh. Second, Mohammad Hafijul Islam Khan (Centre for Climate Justice-Bangladesh, Dhaka, Bangladesh) discussed "A Micro Appraisal on Organizational Gaps and Challenges to Deal with Climate Change and Environmental Migrants". He also referred to various national adaptation plans and the multitude of international donors and INGOs in the country. He noted that community-based adaption projects have been developing since the 1990's in reaction to the slow developments at both the international and national level. Third, Robert Stojanov (Charles University in Prague, Czech Republic) presented a case study co-authored with Ilan Kelman, Barbora Duží and David Procházka on "Local Expert Perception of Environment and Population Dynamics in Bangladesh: Any Different Perspective of Non-Governmental, Public and Academic Sectors?" He stressed that the government of Bangladesh actually supports migration as a source of potential remittances instead of providing an active social policy to those affected by environmental degradation and impacts of climate change.

6. Panel: The Role of Advocacy Work

The last panel of the workshop discussed the potentials and limitations of advocacy work on the topic of environmental migration. Innocent Chirisa (University of Zimbabwe, Harare, Zimbabwe) introduced the topic of "Civil Society Advocacy and Environmental Migration in Zimbabwe: Case in Public Policy and Spatial Planning". He underlined the strong influence of the state on migration movements and on the availability of information. Moreover, he discussed the impact of colonialization on current and past migration patterns pointing out the large diaspora of five million Zimbabweans living outside of their country of origin. Afterwards, Benoit Mayer (Tel Aviv University, Israel) presented his analysis entitled "'Environmental Migration' as Advocacy: Is It Going to Work?" With regards to the concept of norm entrepreneurs, he discussed four different narratives currently being used in global advocacy work on environmental migration: humanitarian assistance, (forced) migration, sustainable development and international security. The last presentation was given by Sarah Nash (University of Hamburg, Germany) entitled "Towards an 'Environmental Migration Management' Discourse. A Discursive Turn in Environmental Migration Advocacy?" In her analysis, she highlighted aspects of the emerging discourse which portrays properly managed migration as a positive phenomenon. This discourse draws greatly on the 'triple-win' argument in which migration is seen to benefit migrants, sending states and receiving states. The environmental migration management discourse takes this further, with migration seen as a potential climate change adaptation strategy which reduces vulnerability, largely through the generation of remittances. Many stakeholders appear to be consciously moving towards this discourse in order to avoid securitization of migration. However, this discourse has not yet reached saturation, and the security discourse is ever-present and continues to be influential.

The workshop was very well received by the participants due to the collaborative and informed exchange of ideas and different points of views. The strong participation from INGOs, IO and NGOs and their exchange with academic scholars as well as the broad regional backgrounds of the participants especially helped in the discussion and development of new perspectives and insights. The final papers will be published in 2015 in an edited volume entitled "Organizational Perspectives on Environmental Migration". The organizers thank all participants and donors for their support.

[3] See http://www.nanseninitiative.org/ (accessed on 27 November 2014).

150 Jahre Genfer Konvention – Zusammenarbeit von Verbreitungsarbeit und Rotkreuzmuseen

Christian Schad*

Das Henry-Dunant-Museum in Heiden entwickelte zum Thema „150 Jahre Humanitäres Völkerrecht“ ein anschauliches Museumskonzept. Dazu wurde eine Expertengruppe aus Wissenschaft und Praxis der Verbreitungsarbeit von der Museumsleitung zur Beratung und Konzeption einberufen. Die Besucher der Sonderausstellung sollten die Möglichkeit bekommen, sich auf eine selbstbestimmte Weise und medial interaktiv mit den Inhalten rund um das Kriegsvölkerrecht auseinandersetzen. Unter dem doppelsinnigen Motto: „Was zählt der Mensch?!“ wurde die Ausstellung am Weltrotkreuztag in Heiden eröffnet.

Die Ausstellungkonzeption sollte historische Zusammenhänge, politische Dimensionen, ethische Grundlagen und individuelle soziale Verantwortung vermitteln.

Im Ausstellungsraum fanden die Besucher Bilder zu den Themen der Sonderausstellung vor: Krieg, Humanitäres Völkerrecht und persönliches Engagement. Mit einer Rotkreuz-Armbinde versehen, betritt man das Rotkreuzzelt. Auf den ersten Blick wirkt die Sonderausstellung im Rotkreuz-Landesmuseum zur Genfer Konvention ernüchternd. Erst mit einem Tablet-Computer und Kopfhörern ausgestattet, eröffnet sich dem Besucher, was sich hier dank moderner Technologie Spannendes verbirgt. Der Besucher richtet sein Tablet auf eines der Bilder und aktiviert damit Sprachaufnahmen, visuelle Effekte und Filmsequenzen. Reale und virtuelle Welt verschwimmen in verblüffender Weise. Sie bieten zahlreiche Einblicke und Information rund um das Thema.

Wurde beispielsweise ein Bild von der Schlacht in Solferino mit einem Tablett fokussiert, wurde die historische Situation dort weiter visualisiert. Gleichzeitig eröffneten die Bilder den Blick auf heutige, aktuelle Kriegssituationen. So blieb die Schlacht nicht als historisches Geschichtswissen abstrakt, sondern schuf aktuelle Bezüge.

Das Gemälde mit der Genfer Konferenz von 1864 löste ein Lexikon aus, welches informative Beiträge zur Genfer Konvention und dem Humanitären Völkerrecht anbot. Mittels der Tablets wurden filmische Beiträge des Internationalen Komitees des Roten Kreuzes gezeigt. Abrufbar war auch ein Interview des Präsidenten Peter Maurer zu aktuellen Herausforderungen zur Durchsetzung des humanitären Völkerrechts. Die Ausstellung, die im Henry-Dunant-Museum im Jubiläumsjahr 2014 gezeigt wurde, übertraf die Erwartungen, die Besucherresonanz war äußerst positiv. Das Konzept, interaktiv zu arbeiten, wurde von den Besuchern gerne angenommen. Insbesondere junge Menschen kamen mit den neuen Medien gut zurecht.

Die Sonderausstellung wurde zudem als Wanderausstellung konzipiert. So entstand die Idee, diese auch im Rahmen der Konventionsarbeit im Landesverband Baden-Württemberg zu präsentieren, denn die Königreiche Baden wie Württemberg gehörten historisch gesehen zu den Erstunterzeichnern der ersten Genfer Konvention von 1864.

Im Jahr 2013 neu eröffneten Rotkreuz-Landesmuseum in Geislingen wurde die Ausstellung zum ersten Mal außerhalb der Schweiz gezeigt. Auch hier konnten sich die Besucher die Inhalte interaktiv erarbeiten. So explodiert etwa beim Betreten eines Teppichs eine Tretmine unter den Füßen des erschrockenen Besuchers. Der verblüffte Betrachter realisiert, dass der von afghanischen Frauen handgeknüpfte Teppich Panzer als Motive zeigt.

Dies sei ein Versuch der leidgeprüften Frauen, Jahrzehnte der Kriegserfahrung in ihrem Land zu bewältigen, so Josef Büchelmaier, der Verantwortliche der Sonderausstellung. Deutlich wird immer wieder, dass die konzeptionellen Überlegungen der Ausstellungsmacher greifen: Die Ausstellung berührt unmittelbar. Die Entscheidung, zugunsten moderner Medien auf klassische Stellwände zu verzichten, macht die Sonderausstellung attraktiv. Begleitende Vorträge während der Sonderausstellung stießen auf reges Interesse.

Am 22. August 1864 unterzeichneten Vertreter aus zwölf Ländern in Genf die erste Genfer Konvention, welche die Versorgung, Aufnahme und den Schutz verwundeter Soldaten sowie medizinischen Personals im Krieg regelt. Für die Rotkreuz-Bewegung ist sie Grundlage ihres Handelns. Es ist die Geburtsstunde des humanitären Völkerrechts. Der Präsident des DRK-Landesverbandes Baden-Württemberg, Dr. Lorenz Menz, bezeichnete sie bei der Eröffnung der Sonderausstellung als „Bollwerk gegen die Barbarei“. Angesichts der aktuellen Krisen auf der Welt zeige sich die enorme Aktualität des Themas. Es stelle sich angesichts der zahlreichen Kriege und der unmenschlichen Brutalität die Frage nach dem Wert jedes einzelnen Menschen.

Die Vermittlung der Genfer Konventionen gehört zu den zentralen Aufgaben des Roten Kreuzes.

Alle an der Arbeit des Roten Kreuzes Interessierten sollten mit der Geschichte, den Werten und den Zielen ihres Verbandes vertraut gemacht werden. So kann eine Identifikation mit den zahlreichen Aufgabenbereichen gelingen. Dies ist eine der Aufgaben des Einführungsseminars. Die Sonderausstellung bietet einen zusätzlichen Mehrwert, dieses Seminar im Landesmuseum durchzuführen, um die Geschichte dieser humanitären Organisation und das Völkerrecht unmittelbar zu vermitteln. Können Teilnehmer die Gründungs- und Organisationsgeschichte zunächst im Seminar erarbeiten, haben sie anschließend die Möglichkeit, die gerade vermittelten Inhalte im Museum anzuschauen.

Die Konventionsarbeit mit der Arbeit der Museumspädagogik zu verbinden, ist ein hervorragendes Beispiel gelungener innerverbandlicher Zusammenarbeit. Es ist daher zu wünschen, dass diese Zusammenarbeit ausgebaut wird. ■

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Stephan Hobe, Einführung in das Völkerrecht, Narr Franck Attempo Verlag / UTB, Tübingen / Basel 2014, 10. Auflage, 664 Seiten, 34,99 €

Manuel Brunner*

Stephan Hobe legt die inzwischen zehnte Auflage der von Otto Kimminich begründeten „Einführung in das Völkerrecht" vor. Das Buch bezieht einen Großteil seines Reizes aus der verständlichen Sprache, in der es gehalten ist, und seiner inhaltlichen Vollständigkeit.

Obwohl es sich ausweislich des Titels um eine Einführung handelt, werden alle Teilgebiete des Völkerrechts besprochen, was auch den Umfang von mehr als 650 Seiten erklärt. Das Buch ist in fünfzehn sinnvoll unterteilte inhaltliche Kapitel gegliedert. Besonders viel Platz nehmen hierbei die Lehre von den Völkerrechtssubjekten, die Rechtsquellen des Völkerrechts, die Grundprinzipien der zwischenstaatlichen Beziehungen, das Wirtschaftsvölkerrecht sowie das humanitäre Völkerrecht ein. Ein längeres Kapitel wird auch dem in der völkerrechtlichen Praxis immer bedeutsameren Völkerstrafrecht zuteil. Den einzelnen Kapiteln und Unterkapiteln ist stets ein breiter, teils etwas überbordend wirkender Literaturblock beigegeben, der stets zum vertieften Einstieg in das jeweils zuvor dargestellte Rechtsproblem einlädt.

Inhaltlich ist das Buch auf dem aktuellsten Stand. Die Krise in der Ukraine hat bereits ebenso wie die aufgrund des globalen Klimawandels drängenden Rechtsprobleme hinsichtlich der Raum- und Ressourcenfragen in der Arktis, die Bedeutung der G8 und der G20 für das internationale Wirtschaftssystem sowie die Nutzung von unbemannten bewaffneten Luftfahrzeugen (sogenannte Drohnen) zur Durchführung von gezielten Tötungen Eingang gefunden. Entsprechend der Konzeption des Buches als Einführung in das Rechtsgebiet wird allerdings nicht jede aktuelle Entwicklung einer Bewertung durch Hobe zugeführt. Vielmehr werden dem Leser, dem Anspruch eines solchen Werkes angemessen, die einzelnen Entwicklungslinien und offenen Rechtsfragen, die das Völkerrecht zu Genüge bereithält, vor Augen geführt und so zu einer Weiterverfolgung der jeweiligen Thematik angeregt.

Das sechzehnte und letzte Kapitel trägt die Überschrift: „Wichtige Fälle der internationalen Rechtsprechung". Hobe leistet hier etwas überaus Sinnvolles. Er bietet einen Prospekt von insgesamt 29 das moderne Völkerrecht prägenden Judikaten des Ständigen Internationalen Gerichtshofes, internationaler Schiedsgerichte, des Internationalen Gerichthofes sowie des Internationalen Strafgerichtshofes für das ehemalige Jugoslawien. Jede Entscheidung wird einer Einordnung hinsichtlich ihrer Bedeutung und Stellung im System des Völkerrechts unterzogen. Das Kapitel schließt mit einer Aufstellung von Übungsfällen, die aus den bekannten Ausbildungszeitschriften für Studierende JuS, JA und JURA stammen. Hier ist ein kleiner Kritikpunkt anzubringen: Die gelisteten Fälle gehen zum Teil zurück bis in die frühen 1970er Jahre. Es ist bei einigen der genannten Fallbearbeitungen älteren Datums daher zweifelhaft, ob sie noch den geltenden Stand des internationalen Rechts wiedergeben. Hier besteht gewiss Potential für eine kleine Entschlackung in der elften Auflage des Werkes.

Insgesamt gelingt Hobe mit der Neuauflage der „Einführung in das Völkerrecht" ein hervorragendes Lehrbuch, welches sich primär an eine im Studium befindliche Leserschar richtet. Aufgrund seines durchdachten, didaktischen Stils kann es auch Nicht-Juristen, die sich mit dem Völkerrecht zu befassen haben, empfohlen werden.

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Hans Schwarz / Carin Hell (Hrsg.)

150 Jahre Genfer Konventionen

Münsteraner Rotkreuz-Schriften zum humanitären Völkerrecht

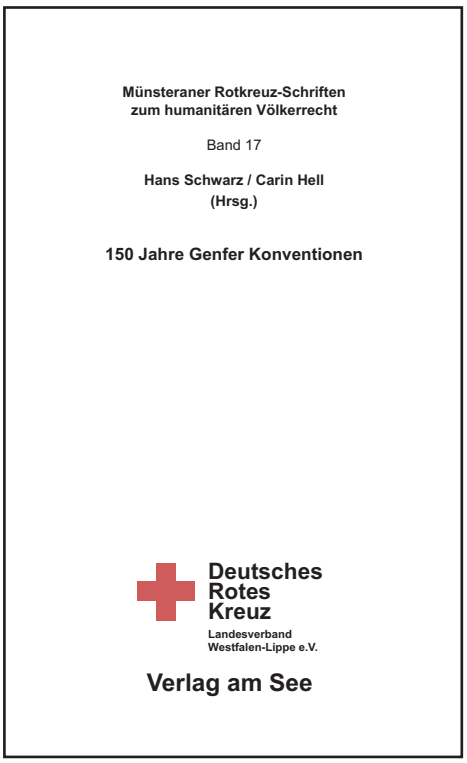
Band 17

„Die Geste Dunants wiederholt sich jeden Tag an ungezählten Orten dort, wo sich Männer und Frauen über einen leidenden Menschen beugen, ohne zu fragen, woher er kommt oder was er tut, sondern einzig: Was fehlt Dir?“. In diesen dürren Worten von Pierre Boissier, ehemaliger Direktor des Henry-Dunant-Institutes und Mitglied des Internationalen Komitees vom Roten Kreuz, bündeln sich Entstehungsgeschichte und Entstehungswirklichkeit einer weltumspannenden humanitären Bewegung.

Als Hüterin des humanitären Völkerrechtes bietet das Rote Kreuz inmitten der ideologischen Gegensätze und der politischen Auseinandersetzungen einen Sammelpunkt für alle jene Menschen an, die sich dem notleidenden Nächsten zuwenden möchten. Das DRK in Nordrhein-Westfalen ist ein Teil dieser weltumspannenden Bewegung. In seinen Rotkreuzgemeinschaften, Ortsvereinen und Kreisverbänden wiederholt sich die eingangs beschriebene Geste von Henry Dunant jeden Tag.

Aus Anlass der 150. Wiederkehr der Unterzeichnung der ersten Genfer Konvention fand am 22. August 2014 in der Villa Horion in Düsseldorf ein Festakt statt. Mit dem vorliegenden Band möchten wir die bei dem Festakt gehaltenen Vorträge zusammenfassen und damit einer breiten Öffentlichkeit zugänglich machen.

Hans Schwarz ist Präsident des Deutschen Roten Kreuzes, Landesverband Nordrhein e.V. Carin Hell ist Vizepräsidentin des Deutschen Roten Kreuzes, Landesverband Westfalen-Lippe e.V.



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