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Protection of human rights during armed conflict

Ochrona praw człowieka w czasie konfliktu zbrojnego

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Abstract

The full-scale war in Ukraine, which has been going on for more than a year and a half, has led to an increasing interest in the field of international humanitarian law. However, its application to combatants and civilians does not exclude the protection guaranteed by international human rights law. The purpose of this paper is to show the influence of the principle of humanitarianism on the development of international humanitarian law and to present the challenges related to human rights protection during armed conflict. In addition, the author analyses the relationship between international humanitarian law and international human rights law, since better understanding of this issue could ensure more effective protection of those affected by the consequences of armed conflict.

Keywords: humanitarian law, armed conflicts, human rights, principle of humanity, Martens clause

Streszczenie

Trwająca od ponad półtora roku pełnoskalowa wojna w Ukrainie sprawiła, że zainteresowanie domeną międzynarodowego prawa humanitarnego wzrosło. Stosowanie tego szczególnego reżimu wobec kombatantów oraz ludności cywilnej nie wyłącza jednak ochrony gwarantowanej przez międzynarodowe prawo ochrony praw człowieka. Celem artykułu jest ukazanie wpływu zasady humanitaryzmu na historyczny rozwój międzynarodowego prawa humanitarnego i przedstawienie wyzwań związanych z ochroną praw człowieka w trakcie konfliktu zbrojnego. Analizowana jest ponadto wzajemna relacja międzynarodowego

prawa humanitarnego i międzynarodowego prawa ochrony praw człowieka – odpowiedź na pytanie o wzajemny stosunek obu tych dziedzin ma bowiem przełożenie na możliwości zapewnienia skuteczniejszej ochrony osobom dotkniętym przez skutki działań zbrojnych.

Słowa kluczowe: prawo humanitarne, konflikty zbrojne, prawa człowieka, zasada humanitaryzmu, klauzula Martensa

Humanitarianisation of international humanitarian law

The concept of humanitarianisation of international humanitarian law denotes transformations that have been taking place shaped by the principle of humanity and the development of human rights[1]. This notion may seem contradictory, as in order to fully put it into practice, all armed conflicts would have to be brought to an end. Unfortunately, the history of mankind, including the most recent history, is the history of ongoing wars, despite the efforts undertaken to prohibit states from resorting to force in their mutual relations. Although, since the establishment of the United Nations, global conflict has so far been avoided, as the data collected by the Uppsala University Institute shows, from 1946 to 2021 there had been as many as 285 armed conflicts, most of them internal[2]. All this means that standards governing military operations are still necessary, as they are the only way to limit the negative consequences of hostilities.

The principle of reciprocity has played a key role in the development of rules for the conduct of armed conflict, influencing the development of humanitarian law as well as ensuring its enforcement[3]. This mechanism, based on a simple profit-and-loss calculation, was initially the only one that ensured at least partial effectiveness of humanitarian law. Currently, however, this issue is approached in a different way. Common Article 1 to the Geneva Conventions states requires Parties to "respect and to ensure respect for the present Convention in all circumstances"[4]. The wording "in all circumstances" entails a rejection of the principle of reciprocity, emphasising the automatic application of so-called Law of Geneva, regardless of its application by the adversary. This provision is also considered a customary law standard, as confirmed by the International Court of Justice[5]. The commentary on the Geneva Conventions also emphasises the unconditional

[1] This principle underlies the Law of Geneva; its tenets based on the obligation to respect people and their dignity. It assumes the primacy of human life and health over all other values. It is referred to in Common Article 3 of the Geneva Conventions and in individual articles of each of the Conventions (Articles 12 I and II GC, Article 13 III GC and Article 27 IV GC). As an overarching rule, it can serve as a tool that fills in gaps and indicates the way in which the law of armed conflict should be interpreted. Cf.: T. Meron, *The Humanization of Humanitarian Law*, "The American Journal of International Law" 2000, Vol. 94(2); R. Kolb, R. Hyde, *An Introduction to the international law of armed conflicts, Hart Publishing*, Oxford 2008, pp. 43–50.

[2] Uppsala Conflict Data Program, https://ucdp.uu.se/encyclopedia [accessed on: 1.03.2023].

[3] T. Meron, op. cit., p. 243.

[4] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, OJ of 1956, no. 38, item 171, Article 1.

5 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Judgement of the International Court of Justice of 27 June 1986, I.C.J Reports 1986, p. 14.

and non-reciprocal nature of the obligations contained therein. States should take care of the health and lives of wounded adversaries not due to the fact that such measures could potentially save their citizens who fall in the hands of the enemy. They should do so out of "respect for the human person"[6].

Also in the case of internal conflict, the protection of individuals provided for by the Geneva Conventions and their Additional Protocols cannot be fully justified by the application of the principle of reciprocity. One is dealing here with the objective application of the law binding on the states rather than a contract based on reciprocity entered into for reasons of self-interest. By virtue of the requirements of humanitarianism, the standards of the Convention have become unconditional obligations of the States parties. The principle of reciprocity has furthermore become the ultimate cause of non-discrimination between warring parties with regard to just or unjust causes of conflict. The distinction between *ius in bello* and *ius ad bellum* makes humanitarian law applicable to all parties to a conflict. In practice, this allows for a neutral and uniform application of this principle, regardless on whose side 'justice' lies. This principle has gone through various stages of evolution. In the Middle Ages, so-called just causes were identified, which could be the basis for waging wars. If one side waged war in accordance with the doctrine of just war, it enjoyed privileges which the other side was deprived of. This means that the *ius ad bellum* at the time influenced the rights of the belligerent parties[7]. This approach gradually underwent change until it was finally abolished in the 19th century, when it was established that the right to wage war as part of foreign policy was the prerogative of sovereign states and should not be subject to anyone's control[8]. Consequently, the principle of equality of rights and obligations of belligerent states had to prevail. This principle has survived to the present day despite some doubts that arose at the time of the enactment of the Covenant of the League of Nations and the Charter of the United Nations (hereinafter: CUN). These doubts concerned the abolishment of the principle of freedom of states in terms of conducting warfare and the reformulation of the *ius ad bellum* into the *ius contra bellum*. For the sake of simplicity, it can be assumed that nowadays states parties to armed conflicts can be divided into those that act in accordance with international law and those that violate the provisions of the CUN. This sometimes leads to doubts as to whether, in such a case, all parties to the conflict should be treated in the same way. Undoubtedly, they will not be treated equally under general international law, where the aggressor faces different sanctions. However, the situation is different from the point of view of international humanitarian law, which does not differentiate between the positions of the belligerent parties.

The notion of the humanitarianisation of the law of armed conflict can also be linked to the Martens Clause, which is currently one of the most important concepts of humanitarian law, and references to which can be found in many court and tribunal decisions,

[6] T. Meron, op. cit., p. 248.

[7] R. Kolb, R. Hyde, op. cit., pp. 21–22.

[8] Cf. C. von Clausewitz and his famous statement that war is merely the continuation of policy with other means.

international agreements and soft law instruments. It dates back to the 19th century, when it was first proposed by Fyodor Martens, a Russian delegate to a conference held in Brussels in 1874[9]. The proposed formula was not accepted until 25 years later, when the Martens clause was included in the preamble to the Hague Conventions of 1899 and 1907[10]. The purpose of the Martens Clause was to strengthen the recently established and international humanitarian law that was full of loopholes. It was intended to ensure that both civilians and combatants were protected from the consequences of the shortcomings of the regulation at the time[11]. It requires parties to a conflict to behave in a civilised and humane manner in all situations, even if no specific, codified standards of humanitarian law at the time required it. Due to its importance, it was incorporated into the four Geneva Conventions of 1949, where it was included in the articles concerning denunciation of the conventions[12]. The Martens Clause has also been included in Article I of the First Additional Protocol describing general principles, which testifies to the growing recognition of its role as compared to its inclusion in the preamble to the Hague Convention.[13]. It is noted that the most important function of the Martens Clause is to prevent the assumption that acts not expressly prohibited by international humanitarian law are permissible. It has thus become a tool for closing the loopholes in hitherto unregulated areas[14]. It also serves as a guideline for interpreting rules described in treaties, providing a means for adapting on an ongoing way existing regulations to changing conditions and evolving technologies used in conducting armed conflicts[15]. This function has been acknowledged by the International Court of Justice, which declared the Martens clause to be an effective measure applicable in cases when technological progress is so rapid that legal standards may not keep pace with it[16]. The Martens Clause helps to ensure that "civilians and combatants remain under

[9] M. Kałduński, *On the Martens clause in international law today*, [in:] T. Jasudowicz, M. Balcerzak, J. Kapelańska-Pręgowska (eds.), *Współczesne problemy praw człowieka i międzynarodowego prawa humanitarnego*, Towarzystwo Naukowe Organizacji i Kierownictwa "Dom Organizatora", Toruń 2009, p. 297.

[10] "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience" Convention respecting the Laws and Customs of War on Land of 18 August 1907, OJ. 1927, no. 21, item 161, preamble.

[11] Cf.: A. Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, "European Journal of International Law" 2000, Vol. 11(1).

[12] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, op. cit., art. 63.

[13] Additional Protocols to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), drawn up in Geneva on 8 June 1977, OJ. 1992, no. 41, item 175, app.

[14] M. Piątkowski, *Przepisy IV Konwencji haskiej z 1907 roku w świetle wojny powietrznej*, "Polski Przegląd Stosunków Międzynarodowych" 2013, no. 3, p. 129.

[15] On the role of the Martens clause in the context of the rules of air warfare, cf. M. Piątkowski, op. cit., pp. 129–130.

[16] *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, para. 78.

the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience"[17].

Among the other functions identified in the doctrine, it should also be noted that the Martens clause should be regarded as a reminder of the need to apply human rights in situations where international humanitarian law is unable to provide adequate protection[18]. Human rights, which states are obliged to respect both during armed conflict and in peacetime, can provide a way to fill loopholes or offer better mechanisms to enforce accountability for violations of individual rights. Such an interpretation of the function of the Martens Clause is in line with the Proclamation of Tehran, which also has this clause incorporated in its content[19].

Human rights during armed conflict

The relationship between international humanitarian law and international human rights law has evolved over time. Despite the shared objectives and principles of the two, these two fields developed almost completely independently of each other for some time[20]. Over time, however, they started to converge. At the First International Conference on Human Rights, held in Tehran in 1968, a movement was created calling for human rights to be respected in times of armed conflict. The aim of this idea was to ensure better protection of individuals during armed conflict by extending the application of human rights to such situations. This was eventually reflected in the resolution Respect for Human Rights in Armed Conflicts. This document, although non-binding, gave rise to a number of processes, the consequences of which can still be observed today, such as the interest in humanitarian law issues previously neglected at the UN[21]. The resolution encouraged the Secretary-General to review the development of humanitarian law to date and to consider steps that could be taken to promote respect for this law[22]. It resulted in a large number of studies and documents on the international law of armed conflict and, as some

[17] Additional Protocols to the Geneva Conventions…, Article 1, para. 2.

[18] R. Kolb, R. Hyde, op. cit., p. 64.

[19] *Respect for Human Rights in Armed Conflicts*, UNGA resolution 2444 of 19 December 1968.

[20] Z. Galicki, *Związki międzynarodowego prawa humanitarnego z międzynarodowymi standardami ochrony praw człowieka w sytuacji konfliktu zbrojnego*, [in:] P. Grzebyk, E. Mikos-Skuza (eds.), *Pomoc humanitarna w świetle prawa i praktyki*, Wydawnictwo Naukowe "Scholar", Warszawa 2016, p. 19.

[21] The main reason for the reluctance was the belief that addressing the issue of international law of armed conflict might violate the established post-war order prohibiting the use of force in international relations. Cf.: R. Kolb, *The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, "International Review of the Red Cross" 1998, No. 324, p. 410.

[22] "Believing that the purpose of the United Nations Organization is to prevent all conflicts and to institute an effective system for the peaceful settlement of disputes, observing that nevertheless armed conflicts continue to plague humanity". The resolution reaffirmed that international humanitarian law remains an effective mechanism for the protection of individuals and that its further development is necessary given that the prohibition of the use of force in international law has not actually eradicated armed conflict. *Respect for Human Rights in Armed Conflicts*, op. cit.

point out, also ultimately led to the adoption of the Additional Protocols to the Geneva Conventions in 1977[23].

Above all, the resolution Respect for Human Rights in Armed Conflicts marked the beginning of a new phase in the relationship between international humanitarian law and human rights law. From that time, the two fields began to converge, and their development was no longer a disconnected process[24]. One of the manifestation of this were complaints of violations suffered during armed conflicts (both internal and international) brought before international courts dealing with human rights. The presented cases combined aspects of international humanitarian law and human rights law, which meant that the judges handling them tended to show a great deal of restraint. Due to the lack of jurisdiction over alleged violations of humanitarian law, courts generally refused to apply the principles of humanitarian law directly, limiting themselves to examining claims of violations of human rights. However, there were also exceptions to this, such as the case of *La Tablada*[25], where the Inter-American Commission on Human Rights decided to directly apply Common Article 3 of the Geneva Conventions. The applicants invoked the provisions of the American Convention on Human Rights and the provisions of international humanitarian law allegedly violated by Argentina during the armed recapture of the La Tablada military base in 1989. The base was attacked by a group of individuals who intended to abort an alleged military coup d'etat. The bloody fighting resulted in the deaths of many of the attackers. The victims who survived filed a complaint claiming that Argentina had carried out unlawful executions and tortured detainees. There was also an allegation of a breach of the right to defence, as a result of which the defendants had been sentenced to years of imprisonment. Argentina disputed the applicability of humanitarian law standards, pleading the absence of an internal armed conflict. According to the state party, the incident was merely a riot. The Commission ruled that the line between the two can often be blurred, making it difficult to establish the type of conflict. However, referring to the guidelines of the International Committee of the Red Cross, the Commission noted that Common Article 3 should be applied as broadly as possible, extending its application even to ambiguous situations in order to ensure the protection of individuals. The Commission concluded that the incident at the La Tablada base could not be classified as a mere riot. Such factors as the involvement of the armed forces, the scale of the violence, the exact planning, coordination and execution of the operations pointed rather to its classification as an internal armed conflict[26].

Pursuant to Article 44 of the American Convention on Human Rights, only cases concerning violations of the Convention can constitute grounds for complaint[27]. However, the Commission considered that humanitarian law standards should also be directly ap-

[23] H.J. Steiner, P. Alston, R. Goodman, *International Human Rights in Context: Law Politics, Morals*, Oxford University Press, Oxford 2008, p. 396.

[24] R. Kolb, op. cit., p. 415.

[25] *Juan Carlos Abella v. Argentina*, Report of the Inter-American Commission on Human Rights, 18 November 1997, Case No. 11.137.

[26] Ibid, para. 155.

[27] American Convention on Human Rights of 22 November 1969, UNTS, vol. 1144, p. 123.

plicable in the above case, pointing out that the human rights instruments and the Geneva Conventions share the common goal of protecting human life and the dignity of every person[28]. The human rights instruments are applicable both in peacetime and during armed conflict, but lack rules adapted to the specific nature of armed conflict. In turn, international humanitarian law, which is designed to limit the negative consequences of armed conflict, does not apply during peace. Its standards are intended to provide stricter and more effective protection for victims of armed conflict[29].

The complementary nature of the standards of international humanitarian law and international human rights law are best reflected in concrete examples – both Common Article 3 and Article 4 of the Convention protect the right to life. While arbitrary deprivation of life by a State does fall within the Commission's substantive jurisdiction, when this has occurred in a situation of armed conflict, the Commission may not be able to consider the alleged violation solely on the basis of Article 4, due to the lack of standards for defining and distinguishing civilians from combatants. Hence, the relevant provisions of international humanitarian law should be applied as guidelines when considering complaints of human rights violations in situations of armed conflict[30]. This position is supported in the jurisprudence of the ICJ[31]. The Commission also refers to the fact that virtually all States Parties to the American Convention on Human Rights have ratified at least one of the Geneva Conventions and cites Article 29(2) of the Convention, which states that: "No provision of this Convention shall be interpreted as […] restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party". This article applies to cases where human rights instruments and instruments of international humanitarian law are applicable, and requires to take due account of and ensure the effectiveness of the latter's relevant standards. Such an interpretation is to be consistent with the purpose of this provision, which should prevent States parties from invoking the standards of the Convention to justify restrictions on more favourable or less restrictive rights guaranteed to individuals under domestic or international law. In view of the above, the Commission decided to apply the standards of international humanitarian law which, in the case in question, would provide a higher standard of protection[32].

The Commission reaffirmed its competence to apply international humanitarian law in similar cases in several subsequent reports[33]. This view, however, was not shared by the Inter-American Court of Human Rights, which consistently refused to deal with alleged violations of international humanitarian law, citing Article 44 of the Convention. On the other hand, it seems that the Commission itself has deviated from its earlier stance. In

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[28] *Juan Carlos Abella v. Argentina*, op. cit., para. 157.

[29] Ibid, para. 158–159.

[30] Ibid, para. 160.

[31] *Legality of the Threat or Use of Nuclear Weapons*, op. cit., p. 226.

[32] *Juan Carlos Abella v. Argentina*, op. cit., para. 162.

[33] Cf.: *Las Palmeras v. Colombia, Bamaca Velasques v. Gwatemala*, in: E.J. Buis, *From La Tablada to Guantanamo Bay: The Challenge of New Conflict Situations in the Experience of the Inter-American System of Human Rights Protection*, presented at Complementing IHL: Exploring the Need for Additional Norms To Govern Contemporary Conflict Situations, Jerusalem, June 1–3, 2008, p. 5.

2001, in the Riofrío Massacre case, no references to common Article 3 were made, and allegations of the murder of 13 civilians were resolved solely on the basis of Article 4 of the Convention[34].

The La Tablada ruling remains important, however. Until its adoption, no human rights authority had considered itself competent to directly apply the standards of humanitarian law. Some saw this ruling as a precedent that would pave the way to a new direction in the development of the relationship between humanitarian law and international human rights law[35]. Others, however, pointed out that the Commission should have based its ruling on the provisions of the American Convention on Human Rights, interpreted in the context of the principles of international humanitarian law. Such a solution, based on the indirect effectiveness of humanitarian law, is more common, since the enforcement of international humanitarian law still poses a number of challenges and as a mechanism appears to be less developed than the mechanism for enforcing accountability for human rights violations. Therefore, in their jurisprudence, human rights authorities resort to definitions and wording based on international humanitarian law.

An example is the judgement of the European Court of Human Rights (hereinafter: ECHR) in the case of *Isayeva, Yusupova, Bazayeva v. Russia*[36]. The case concerned events taking place in Chechnya where, in 1999, as a result of the bombing of a refugee convoy by Russian aircraft many civilians were killed, including the families of the three applicants. While it is often the case that victims of violations of humanitarian law do not have the opportunity to seek redress, in this case fundamental human rights were violated at the same time[37]. The most important allegation raised was the violation of Article 2 of the European Convention on Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter: ECHR), which guarantees the protection of the right to life[38]. The allegation concerned the way in which the missile strike was planned, controlled and executed. In the applicant's view, the violation of the right to life was intentional, as the authorities must have been aware of the presence of a large number of civilians on the road from Grozny, as evidenced by the fact that earlier in the day the planes had been circling relatively low over the refugee convoy[39]. The missile strike on an area close to the densely populated city, which had not been evacuated, also violated basic principles of humanitarian law. First of all, one should mention here the

[34] *Riofrió Massacre – Colombia*, Report of the Inter-American Commission on Human Rights of 6 April 2001, Case No. 11.654.

[35] Z. Liesbeth, *La Tablada comment*, "International Review of the Red Cross" 1998, No. 324, pp. 505–511.

[36] *Isayeva, Yusupova and Bazayeva v. Russia*, Judgement of the European Court of Human Rights of 24 February 2005, complaints no. 57947/00, 57948/00 and 57949/00, para. 168–200. It should be added that this is not the first case of this kind dealt with in Strassburg. The Court was presented with similar issue before, dealing with complaints against Turkey. The judgement in question demonstrates the Court's consistency. There are numerous references to previous rulings of the Court provided in support of the judgement.

[37] The applicants have been granted the reparations awarded by the ECHR, but as a result of the expulsion of the Russian Federation from the Council of Europe on 16 September 2022, individuals can no longer bring complaints against this state before the ECHR.

[38] Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, OJ. 1993, no. 61, item 284, art. 2.

[39] *Isayeva, Yusupova and Bazayeva v. Russia*, op. cit., para. 155.

principle of distinction, which prohibits indiscriminate attacks, directed against targets other than military ones. However, the Court deemed it was not competent to deal with such issues. It limited itself to considering the allegations of violations of the provisions contained in Article 32 of the Convention. With respect to the alleged violation of the right to life, the Russian side referred to the exception under paragraph 2a, which states that "deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary in defence of any person from unlawful violence". The Court rejected this argument. The events in question took place in an area that was a battleground between Chechen troops and Russian armed forces. While the actions of the Chechens could be considered a threat to health and life, they did not justify the State resorting to methods with equally drastic consequences for the civilian population. In order for the exception under Article 2(2a) to be invoked, the State's action must meet certain clearly defined requirements. First of all, the use of force that eventually leads to the loss of human life must be absolutely necessary. In the Court's view, this means that the operation should be planned and controlled in such a way as to minimise civilian casualties as far as possible[40]. Such wording clearly refers to the language of humanitarian law and reflects the customary principle of proportionality. Although the Court did not apply humanitarian law explicitly, it made use of it to ensure that the relevant provisions protecting human rights were interpreted appropriately in the context of an armed conflict. By conducting a strike from a high altitude in a populated region with missiles that cannot be precisely guided, Russia clearly breached its duty to ensure the protection of civilians. Given the above, the ECHR ruled that Russia had violated Article 2 of the Convention. The issue of interpreting Article 2 in the context of the principles of international humanitarian law is also likely to be considered by the ECHR in cases involving the armed conflict in eastern Ukraine and the downing of flight MH17, as the November 2022 Grand Chamber decision makes clear[41].

Aspects of the analysed case demonstrate the interplay between international human rights law and international humanitarian law. International humanitarian law provides human rights authorities with legal instruments to resolve human rights violations during armed conflicts. It gives victims of armed conflict the opportunity to assert their rights before international bodies established to resolve individual complaints related to human rights violations.

Relationship between international humanitarian law and international human rights law standards

Both international humanitarian law and international human rights law aim to ensure the protection of the dignity and lives of individuals, albeit from a different perspective, resulting from the different nature of each area of law. Despite the widespread consensus

[40] Ibid, para. 171.

[41] *Ukraine and the Netherlands v. Russia*, Judgement of the European Court of Human Rights of 30 November 2022, complaints no. 8019/16, 43800/14 and 28525/20, para. 720.

that both branches of law are applicable in situations of armed conflict, their relationship to each other remains problematic[42]. The most commonly adopted approach is based on treating humanitarian law as *lex specialis* to the general norms of international human rights law. This position is based on the advisory opinion of the International Court of Justice (hereinafter: ICJ) on the legality of the threat or use of nuclear weapons[43]. When analysing the various sources of international law that might be applicable in determining the legality of the issue in question, the Court addresses a number of other relevant issues, including the relationship between international humanitarian law and human rights law. For example, the judges considered whether the possible use of nuclear weapons would violate the right to life guaranteed by Article 6 of the International Covenant on Civil and Political Rights (hereinafter: ICCPR). The ICJ commented in general terms on the relationship between the human rights protection system and international humanitarian law, in an attempt to reconcile these seemingly contradictory legal areas: one protecting human life and the other regulating armed conflict. The ICJ emphasised that the principles of human rights protection still apply in situations of armed conflict, the exception being clauses allowing the suspension of certain rights in a state of public danger[44]. However, this is subject to an established procedure, with derogation clauses only allowing for the suspension of certain provisions (there are rights which cannot be abrogated)[45]. Such rights include the right to life guaranteed by Article 6 of the ICCPR. This raises the question of how the obligation to protect human life can be reconciled with the situation of an armed conflict. While the right to life, like other fundamental rights, remains in force during armed conflicts, in such cases, the problem of what constitutes an "arbitrary deprivation of life" under Article 6 of the ICCPR is to be determined by the application of a *lex specialis* – international humanitarian law. Such a position is in line with the findings of the Inter-American Commission on Human Rights, which recognised the validity of the specific standard attributed to the provisions of Common Article 3 of the Geneva Conventions[46]. In the opinion analysed, one can discern a reference to the classic conflict of laws rule, which gives precedence to the application of a more specific law over the general law governing the case in question.

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[42] E. Benvenisti, *Belligerent occupation*, [in:] *Max Planck Encyclopedia of Public International Law*, www.mpepil.com [accessed on: 1.03.2023], para. 13–16.

[43] The opinion itself does not provide a clear answer to the question posed and it is apparent that the Court is very cautious with regard to the issue that arouses great controversy. The Court ruled that "a threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict particularly those of the principles and rules of international humanitarian law". In principle, however, the threat or use of nuclear weapons violates fundamental principles of humanitarian law, as the Court itself acknowledged. Nonetheless, it ultimately ruled that it was not in a position to establish unequivocally, on the basis of the existing state of international law and the facts presented, whether the use of nuclear weapons in a situation where a particular State would be exercising its right of self-defence in the face of a "grave threat to its existence" would be legal under international law. *Legality of the Threat or Use of Nuclear Weapons*, op. cit., para. 24–25.

[44] International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966, OJ. 1977, no. 38, item 167, art. 15.

[45] Cf. M. Przybysz, *Zastosowanie praw człowieka w realiach konfliktu zbrojnego*, "Przegląd Prawa Konstytucyjnego" 2010, no. 1, p. 73.

[46] *Juan Carlos Abella v. Argentina*, op. cit., para. 161.

A similar position is reflected in the Advisory Opinion, concerning the construction of a wall in the Occupied Palestinian Territory, in which the ICJ additionally points to three possible scenarios: there are standards that belong exclusively to the domain of international humanitarian law (for example, standards governing the rights of prisoners of war), there are standards that belong exclusively to the domain of international human rights law (including the majority of the so-called second-generation rights), and there are standards that belong to both domains. This was the case based on the facts under review, which led the ICJ to conclude that international humanitarian law must be applied as *lex specialis*[47].

One may wonder, however, whether this approach is not oversimplified[48]. The literature on the subject of the relationship between the two fields increasingly refers to the notion of 'complementarity', which, as pointed out by M. Przybysz, refers to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, allowing for an interpretation that takes into account "any relevant rules of international law applicable in the relations between the parties"[49]. Instead of applying the conflict of laws rule providing for the primacy of rules of international humanitarian law, it is sometimes proposed to use both fields of law so that, by complementing each other, they allow for the correct interpretation. This technique, sometimes referred to as *renvoi* or cross-reference, is successfully applied in jurisprudence. The examples of the above can be found, for example, in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY) in the *Kunarac* case[50]. The ICTY drew on the jurisprudence of the European Court of Human Rights to define the concept of torture in the context of armed conflict. The prohibition of torture constitutes a peremptory norm (*ius cogens*) and is valid both in peacetime and during armed conflict. In the case in question, the ICTY pointed out that there was a need to draw on "instruments and practices developed in the field of human rights law"[51]. This is the opposite of a case where human rights authorities deal with violations of human rights, while also resorting to references to international humanitarian law. The ICTY cited three conventions for the definition of the concept of torture, noting that these conventions

[47] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, para. 106.

[48] Cf. M. Sassoli, L. Olson, *The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts*, "International Review of the Red Cross" 2008, Vol. 90(871), p. 5. Sassoli undoubtedly agrees with the ICJ on the applicability of international humanitarian law as *lex specialis* to human rights. He notes, however, that human rights can also constitute specific standards to the more general provisions found in international humanitarian law. He therefore suggests that, where both branches of law are simultaneously applicable to a given situation, the problem should be resolved in accordance with the principle *lex specialis derogat legi generali*. What distinguishes this view from the ICJ's position is the rejection of the a priori attribution to international humanitarian law of the characteristics of *lex specialis*. Instead, Sassoli proposes to determine the degree of specificity of the provisions of international humanitarian and human rights law on a case-by-case basis and make a choice based on such analysis. He justifies the use of a more specific norm, explaining that it is closer to the subject matter in question and takes better account of the context specific to the particular situation.

[49] M. Przybysz, op. cit., p. 77.

[50] *Prosecutor v. Kunarac*, Judgement of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia of 22 February 2001, Case No. IT-96-23-T, para. 465–471.

[51] Ibid, para. 467.

constitute instruments for the protection of human rights[52]. Such references can be used due to the similarity of "objectives, values and terminology", which makes international humanitarian law increasingly interconnected with international human rights law in many aspects. Subsequently, however, the ICTY emphasised that, when resorting to such solutions, the specific nature of international humanitarian law and certain structural differences between the two fields of law must always be taken into account.

What comes to the fore with regard to the differences is the entirely different role of the state. Human rights were created primarily to protect individuals from abuse by their own state. In contrast, international humanitarian law imposes restrictions on the way in which hostilities are conducted in order to minimise their negative consequences and protect individuals from the actions of a foreign state[53]. Moreover, state responsibility for violations of humanitarian law is often secondary, as specific individuals bear criminal responsibility for their actions. The ICTY further stressed that in order for such liability to arise, state participation in the crime committed is not relevant, nor can such participation constitute grounds for defence for the perpetrator. In view of the above differences, it is important not to adopt too hastily concepts and notions developed to be applicable in a different legal context. The ICTY concluded that concepts specific to the international human rights protection system can only be transposed into international humanitarian law if they take into account its specific nature.

Another case where such references may be made is the area of due process rights. These rights are precisely defined in the jurisprudence of the ECHR. Such guarantees can also be found in instruments of international humanitarian law, including Common Article 3 of the Geneva Conventions. Nevertheless, the wording "procedural guarantees deemed necessary by civilised nations" contained therein remains vague and hence the reference to human rights instruments or jurisprudence based on them seems fully justified[54]. A similar approach to the relationship between the two laws was presented by the Human Rights Committee, which opposed an approach based on the application of the international humanitarian law as *lex specialis*[55]. Rather than choosing one over the other, the Committee proposed a simultaneous and harmonised application of the two. Similar to the ICTY in the *Kunarac* case, the Committee referred to shared objectives and values and the need for the standards belonging to both fields to be interpreted in such a way as to reinforce their mutual effectiveness.

[52] Ibid, para. 466.

[53] Cf. Z. Galicki, op. cit., p. 19.

[54] R. Kolb, R. Hyde, op. cit., p. 271.

[55] "While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive", Human Rights Committee, General Comment No. 31, CCPRC21 Rev. 1 Add. 13, para. 11.

Conclusion – human rights violations during the war in Ukraine

The issue of the relationship between the two laws examined has re-emerged in the wake of the Russian aggression against Ukraine. As in the case of other conflicts, international human rights standards apply in addition to the protection granted under international humanitarian law. Although as of September 2022, the Russian Federation is no longer a party to the ECHR, proceedings initiated before that date are still pending. In accordance with the ECHR's resolution of 22 March 2022, the Court will be hearing complaints concerning alleged violations by Russia that occurred before 16 September 2022. The Court's Grand Chamber is currently hearing interstate complaints brought against Russia by Ukraine and the Netherlands, among others[56]. Russia is also bound by a number of other human rights treaties that apply to territories under its "effective control", which include the occupied areas of Ukraine[57]. Moreover, pursuant to Article 43 of the Hague Regulations, the occupant is obliged to respect the law in force in the occupied country, which also includes all human rights agreements ratified by Ukraine[58]. The above means that the issue of the relationship between the standards of international humanitarian law and international human rights law is likely to be involved in the rulings of international courts in the near futurew and be the subject of considerations in the doctrine. The application of the provisions of international human rights law constitutes an additional protection for the victims of the violations that have occurred and continue to occur during the war in Ukraine.

Bibliography

Benvenisti E., *Belligerent occupation*, [in:] *Max Planck Encyclopedia of Public International Law*, www.mpepil.com [accessed on: 1.03.2023].

Cassese A., *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, "European Journal of International Law" 2000, Vol. 11(1).

Droege C., *The interplay between international humanitarian law and international human rights law in situations of armed conflict*, "Israel Law Review" 2007, Vol. 40(2).

Galicki Z., *Związki międzynarodowego prawa humanitarnego z międzynarodowymi standardami ochrony praw człowieka w sytuacji konfliktu zbrojnego*, [in:] P. Grzebyk, E. Mikos-Skuza (eds.), *Pomoc humanitarna w świetle prawa i praktyki*, Wydawnictwo Naukowe "Scholar", Warszawa 2016.

[56] The complaint was declared accepted and the ECHR held that the eastern areas of Ukraine controlled by separatists since 2014 are under the jurisdiction of Russia. *Ukraine and the Netherlands v. Russia*, op. cit.

[57] Both Ukraine and the Russian Federation are parties to the 7th UN Convention: Convention on the Elimination of All Forms of Racial Discrimination, ICCPR, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities.

[58] E. Benvenisti, op. cit., para. 14.

Kałduński M., *On the Martens clause in international law today*, [in:] T. Jasudowicz, M. Balcerzak, J. Kapelańska-Pręgowska (eds.), *Współczesne problemy praw człowieka i międzynarodowego prawa humanitarnego*, Towarzystwo Naukowe Organizacji i Kierownictwa "Dom Organizatora", Toruń 2009.

Kolb R., Hyde R., *An Introduction to the international law of armed conflicts*, Hart Publishing, Oxford 2008.

Kolb R., *The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, "International Review of the Red Cross" 1998, No. 324.

Liesbeth Z., *La Tablada comment*, "International Review of the Red Cross" 1998, No. 324.

Meron T., *The Humanization of Humanitarian Law*, "The American Journal of International Law" 2000, Vol. 94(2).

Piątkowski M., *Przepisy IV Konwencji haskiej z 1907 roku w świetle wojny powietrznej*, "Polski Przegląd Stosunków Międzynarodowych" 2013, No. 3.

Przybysz M., *Zastosowanie praw człowieka w realiach konfliktu zbrojnego*, "Przegląd Prawa Konstytucyjnego" 2010, No. 1.

Sassoli M., Olson L., *The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts*, "International Review of the Red Cross" 2008, Vol. 90(871).

Steiner H.J., Alston P., Goodman R., *International Human Rights in Context: Law Politics, Morals*, Oxford University Press, Oxford 2008.

Uppsala Conflict Data Program, https://ucdp.uu.se/encyclopedia [accessed on: 1.03.2023].

Legal acts

American Convention on Human Rights of 22 November 1969, UNTS, vol. 1144.

Convention respecting the Laws and Customs of War on Land of 18 August 1907, OJ. 1927, no. 21, item 161.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, OJ of 1956, no. 38, item 171, app.

Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, OJ. 1993, no. 61, item 284.

International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966, OJ. 1977, no. 38, item 167.

Additional Protocols to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), drawn up in Geneva on 8 June 1977, OJ. 1992, no. 41, item 175, app.

Respect for Human Rights in Armed Conflicts, UNGA resolution 2444 of 19 December 1968.

Case law

Buis E.J., *From La Tablada to Guantanamo Bay: The Challenge of New Conflict Situations in the Experience of the Inter-American System of Human Rights Protection*, presented at Complementing IHL: Exploring the Need for Additional Norms To Govern Contemporary Conflict Situations, Jerusalem, June 1–3, 2008.

Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Judgement of the International Court of Justice of 27 June 1986, I.C.J Reports 1986.

Human Rights Committee, General Comment No. 31, CCPRC21 Rev. 1 Add. 13.

Legality of the Threat or Use of Nuclear Weapons, International Court of Justice Advisory Opinion of 8 July 1996, I.C.J. Reports 1996.

Juan Carlos Abella v. Argentina, Report of the Inter-American Commission on Human Rights, 18 November 1997, Case No. 11.137.

Prosecutor v. Kunarac, Judgement of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia of 22 February 2001, Case No. IT-96-23-T.

Riofrió Massacre – Colombia, Report of the Inter-American Commission on Human Rights of 6 April 2001, Case No. 11.654.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice Advisory Opinion of 9 July 2004, I.C.J. Reports 2004.

Isayeva, Yusupova and Bazayeva v. Russia, Judgement of the European Court of Human Rights of 24 February 2005, complaints no. 57947/00, 57948/00 and 57949/00.

Ukraine and the Netherlands v. Russia, Judgement of the European Court of Human Rights of 30 November 2022, compliants no. 8019/16, 43800/14 and 28525/20.