CLIMATE CHANGE AND HUMAN SECURITY DURING ARMED CONFLICT

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A. INTRODUCTION

In 2013, the city of Utrecht celebrated the 300th anniversary of the Treaty of Utrecht. The 1713 Treaty of Utrecht was the first in a series of treaties concluded by the major European powers and brought the War of the Spanish Succession to an end and therefore stability in Europe. Inspired by this treaty, the Treaty of Utrecht Foundation and Utrecht University formulated three key principles which reflect the necessary conditions for long-term peace (the Utrecht Principles). The Utrecht Principles are:

- 'respect for cultural, ethnic and religious diversity;
- harnessing the power of art and multiculturalism to create a sustainable society;
- the exchange of knowledge to promote social cohesion and renewal.'[1]

One of the dangers to sustainable societies and long-term peace is climate change. Indeed, the States Parties to the United Nations Framework Convention on Climate Change (UNFCCC)[2] have acknowledged 'that change in the Earth's climate and its adverse effects are a common concern of mankind' (preambular paragraph 1) and have expressed determination 'to protect the climate system for present and future generations' (preambular paragraph 23).[3]

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1 At <www.vredevanutrecht2013.nl/en/about/the-utrecht-principles>.

2 United Nations Framework Convention on Climate Change (UNFCCC), opened for signature on 4 June 1992, entered into force on 21 March 1994, UNTS Vol. 1771, No. 30822.

3 The term 'climate system' was defined in Article 1(3) UNFCCC as 'the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions'. This determination in the UNFCCC's preamble resembles the International Court of Justice's recognition in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons that 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn'. International Court of Justice (ICJ), Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Reports 1996 (Nuclear Weapons Advisory Opinion), para. 29.

Recently, Working Group I of the Intergovernmental Panel on Climate Change (IPCC)[4] concluded that there is a clear human influence on the climate system.[5] The Working Group reported that climate change has resulted, among other things, in the melting of the Arctic and Antarctic ice sheets and a rise in the sea level and will cause changes in the global weather cycle.[6] These consequences may result in 'dramatic ecological, social and economic changes, which threaten human security and have the potential to threaten both international peace and security and the stability, and possibly the very existence, of nation states'.[7]

While the threats of the consequences of climate change to human security already appear to be significant, these threats will likely be aggravated if the consequences of climate change cause a breakdown of international peace and security. Indeed, a breakdown of international peace and security in itself already poses a severe threat to human security, especially if such breakdown results in armed conflict.

While the relationship between (the consequences of) climate change and human security have been discussed elsewhere, this article focuses on the relationship between climate change and human security in times of armed conflict. After all, the effects of climate change are likely to increase the vulnerability of those caught up in armed conflict.[8] This article thus seeks to clarify the rules of public international law which would appear to be most relevant for the protection of the victims of armed conflict under such circumstances. These rules follow not only from international humanitarian law, which is primarily applicable in times of armed conflict (section C), but also from international human rights law (section D).

Before discussing these rules in more detail, however, this article first considers the relationship between climate change and armed conflict in general and the legal framework relevant to seeking to prevent armed conflict (section B). The article ends with a brief conclusion.

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4 The IPCC was established in 1988 by the United Nations Environmental Program (UNEP) and the World Meteorological Organization (WMO), and was endorsed by the General Assembly in Resolution 43/53 of 6 December 1988 (para. 5) on the 'Protection of Global Climate for Present and Future Generations of Mankind'. It was awarded the Nobel Peace Prize in 2007.

5 IPCC, Climate Change 2013: The Physical Science Basis, Headline Statements from the Summary for Policymakers, 27 September 2013, at: <www.climatechange2013.org/images/uploads/WG1AR5_Headlines.pdf>. The unedited version of the full report was published online on 30 September 2013. See IPCC Press Release (2013/20/PR) of 27 September 2013.

6 IPCC, Climate Change 2013, *supra* note 5.

7 R. Rayfuse and S.V. Scott, Mapping the Impact of Climate Change on International Law, in: R. Rayfuse and S.V. Scott, International Law in the Era of Climate Change 3 (Cheltenham: Edward Elgar Publishing, 2012), with reference to the Fourth IPCC Assessment Report.

8 K. Hulme, Climate Change and International Humanitarian Law, in: R. Rayfuse and S.V. Scott, International Law, *supra* note 7, pp. 191–193.

B. CLIMATE CHANGE AND ARMED CONFLICT

The link between climate change and armed conflict has been researched extensively over recent decades.[9] According to some, the debate as to the relationship between climate change and armed conflict is complicated due to an alleged lack of data and differences in methodology.[10] Others, however, conclude that there is a strong causal connection between the impact of climate change and human conflict (in the broadest sense of the word, thus ranging from individual-level violence to civil war). Therefore, 'anthropogenic climate change has the potential to substantially increase conflict around the world, relative to a world without climate change'.[11]

In 2008, the General Assembly of the United Nations expressed deep concern about the security implications of the adverse effects of climate change, including the rising sea level, and requested the Secretary-General to draft a comprehensive report on the topic 'based on the views of the Member States and relevant regional and international organizations'.[12] The following year the Secretary-General of the United Nations submitted his report on 'Climate Change and Its Possible Security Implications' (Climate Change Report).[13] He observed that although 'empirical evidence on the relationship between climate change and conflict remains sparse and largely anecdotal', and although quantitative studies fail to confirm statistically significant links between environmental factors and conflict, that does not mean these links do not exist. Rather, environmental factors may exacerbate conflict dynamics and risk through multiple and indirect pathways, interacting in complex ways with social, political and economic factors, which tend to be more direct and proximate drivers of armed conflict.[14] Climate change is thus a 'threat multiplier, namely as a factor that can work through several channels (...) to exacerbate existing sources of conflict and insecurity'.[15]

Indeed, the above-mentioned consequences of climate change may endanger the existence of low-level countries, in particular small island states and delta regions, which are often densely populated.[16] Further, the melting of the ice sheets will make it technically and economically possible to exploit natural resources in the polar regions,

9 See for a short overview of political science studies and econometric literature, C. Gray, Climate Change and the Law on the Use of Force, in: R. Rayfuse, S.V. Scott, International Law, *supra* note 7, pp. 219–222.

10 J. Scheffran et al., Climate Change and Violent Conflict, 336 Science (2012).

11 S. Hsiang et al., Quantifying the Influence of Climate on Human Conflict, 341 Science 12 (2013).

12 A/RES/63/281 of 30 June 2008.

13 A/64/350, Climate Change and Its Possible Security Implications, Report of the Secretary-General of 11 September 2011.

14 Climate Change Report, paras 64 and 67.

15 Climate Change Report, para. 13.

16 Climate Change Report, para. 75. See also preambular paras 12 and 19 of the UNFCCC with reference to A/RES/44/206 of 22 December 1989.

and open shipping routes through the Arctic (the Northeast Passage), thus stimulating states to strengthen their territorial claims in the area.[17] And the occurrence of extreme weather events may increase the risk of conflict between states which rely on shared resources, such as trans-boundary water resources.[18]

In view of these potential risks, the Security Council of the United Nations debated the impact of climate change on peace and security in 2007 and 2011. After all, pursuant to Article 24 of the UN Charter the Security Council's primary responsibility is the maintenance (and if necessary the restoration) of international peace and security. In 2011, the President of the Security Council released a Presidential Statement on behalf of the Council,[19] in which the Council reaffirmed its primary responsibility for the maintenance of international peace and security and stressed the importance of conflict prevention strategies. The President of the Council further recognised the responsibility for sustainable development issues, including climate change, conferred upon the General Assembly and the Economic and Social Council.[20]

Contrary to UN Secretary General Ban Ki Moon,[21] the Security Council did not qualify climate change as a threat to international peace and security. As a matter of fact, the states which participated in the discussion were even divided on the question whether climate change as such was within the jurisdiction of the Security Council in the first place. Although the Security Council has the discretion to qualify a situation as a threat to international peace and security and although it has indeed taken a wide view of this concept (arms proliferation, terrorism, threat to human security),[22] and most states have indeed recognised the threats posed by climate change, a number of states doubted whether the Security Council was the appropriate forum to discuss climate change.[23]

17 Climate Change Report, para. 76.

18 Climate Change Report, para. 74.

19 S/PRST/2011/15 of 20 July 2011.

20 Subsequently, the Council underlined the General Assembly's reaffirmation of the importance of the UN Framework Convention on Climate Change and expressed its concern that possible adverse effects of climate change may aggravate certain existing threats to international peace and security; expressed its concern about the security implications of the loss of territory due to sea level rise; and generally noted that possible security implications of climate change may be important for the Security Council in relation to matters of international peace and security that are under its consideration. The Council therefore requested the Secretary-General to ensure that this contextual information would be submitted to the Council.

21 The Secretary-General referred to the fact that hundreds of millions of people were in danger of food and water shortage and that environmental refugees were 'reshaping the human geography' of the planet. S/PV.6587, Meeting of the Security Council of 20 July 2011, p. 2.

22 N. Krisch, Article 39, in: B. Simma *et al.*, The Charter of the United Nations; A Commentary, Volume II, Third Edition (Oxford: Oxford University Press, 2012), paras. 4–6, 12–39.

23 See, for example, the statement made by the People's Republic of China. China recognised that climate change poses a common challenge for all countries which affects human survival and development. Further, China stated: 'Climate change may affect security, but it is fundamentally a sustainable development issue. The Security Council lacks expertise in climate change and the

Indeed, the Security Council usually deals with current conflicts or more imminent threats to international peace and security,[24] and generally becomes involved when a concrete dispute between states or within a state materialises. Furthermore, it may be difficult to envisage what measures the Security Council should take in order to implement its responsibility to maintain international peace and security in relation to such a general and distant threat. As the President of the Security Council recognised in his statement, the Economic and Social Council and the General Assembly are primarily responsible within the United Nations for discussing climate change and the measures necessary for preventing or mitigating its consequences. The Security Council should only become involved when specific threats to international peace and security materialise.

C. CLIMATE CHANGE AND THE PROTECTION OF THE VICTIMS OF ARMED CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW

If an armed conflict materialises, irrespective of its causes and the reasons for using force[25], human security is primarily safeguarded by the law of armed conflict or *jus in bello*. Indeed, the outbreak of an armed conflict will trigger the application of this special regime of public international law. The law of armed conflict has gradually been codified since the mid-19th century and imposes limitations on the rights of states to use military force. As such, it aims to alleviate 'as much as possible the calamities of war', as befits civilised nations.[26]

The law of armed conflict is generally based on four fundamental principles, namely the principle of military necessity, the principle of distinction, the principle of proportionality and the principle of humanity. The principle of military necessity entitles states to use military force against other states so as to weaken the military forces of the enemy, which qualifies as the only legitimate object of states during

necessary means and resources. Moreover, the Council is not a forum for decision-making with universal representation. Its discussions are not aimed at putting together a broadly accepted programme, nor can they take the place of the UNFCCC negotiations among the 193 United Nations Member States.' According to Russia, the involvement of the Security Council would have no added value, but 'would merely lead to a further politicization of the issue and increased disagreements among countries'. S/PV.6587, Meeting of the Security Council of 20 July 2011, pp. 9, 13.

24 See, for example, the statement made by Germany in 2007 on behalf of the European Union and the statement of the Netherlands. S/PV.5663, Meeting of the Security Council of 17 April 2007, pp. 19, 21.

25 For a discussion of the *jus ad bellum* and the use of force by states in relation to climate change, including a brief discussion of the relationship between the responsibility to protect, human security and climate change, see Gray, *supra* note 9, pp. 236–240.

26 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, signed on 11 December 1868, entered into force on 11 December 1868, AJIL, Vol. 1, No. 2, Supplement: Official Documents, 1907, p. 95, preambular paras 1–2.

armed conflict.[27] As such, states must distinguish between military objects and combatants on the one hand and civilian objects and civilians on the other (the principle of distinction) and avoid excessive collateral damage to civilian objects and civilians (the principle of proportionality). Finally, the entitlement to use military force within these boundaries is limited by the principle of humanity, which provides for an absolute limitation to any use of military force.[28]

The inherent limitation to the entitlement to use military force by the principles of military necessity, distinction and proportionality, and the absolute limitation provided by the principle of humanity, indicate that the law of armed conflict is primarily focused on the protection of the victims of armed conflict, including civilians. It is for that reason that this area of public international law is also generally known as international humanitarian law (IHL).[29]

The rules of IHL were generally developed in customary international law in the course of the 19th and 20th centuries and have been codified in a number of general conventions since 1864. The most comprehensive of these general conventions is Additional Protocol I to the Geneva Conventions, which was concluded in 1977 after four years of negotiation in order to reaffirm and develop IHL.[30] In 2005 the

27 *Ibid.*, p. 95, preambular para. 3. This object and purpose is repeated in Article 3 of the 1880 Oxford Manual on the Law of War on Land, adopted by the Institut de Droit International (which was established in 1873). Through <www.icrc.org>. Compare also the descriptions of military necessity in the 1863 Lieber Code, in which military necessity was understood as consisting of measures 'which are indispensable for securing the ends of the war' (Article 14), admitting 'all direct destruction of life or limb or armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war' (Article 15). Through <www.icrc.org>.

28 St. Petersburg Declaration, *supra* note 26, preambular paras 1, 5–6. This author has argued that the entitlement to use military force within these boundaries is further limited by the laws protecting the natural environment, as reflected in the principle of ambituity (after the Latin word '*ambitus*', which means environment). See E.V. Koppe, The Principle of Ambituity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict, 82 Nordic Journal of International Law (2013).

29 More precisely, IHL refers to that branch of the law of armed conflict which is known as 'Geneva law'. The law of Geneva (named after the place where the majority of these rules were codified, starting in 1864) intends to protect 'the victims of war and [aims] to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities'. Nuclear Weapons Opinion, para. 75. Geneva law must be distinguished from the law of The Hague, which with 'the rights and duties of belligerents in their conduct of operations [limits] the choice of methods and means of injuring the enemy in an international armed conflict'. Since 1968 the law of The Hague and the law of Geneva have been complemented by a third branch of the law of armed conflict, namely the law of New York. The law of New York was instigated by the General Assembly of the United Nations and focuses on the protection of human rights during armed conflict. F. Kalshoven and Zegveld, Constraints on the Waging of War: An Introduction to International Humanitarian Law, 4th edition, ICRC 8, 22 (Cambridge: Cambridge University Press, 2011).

30 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), opened for signature on 12 December 1977, entered into force on 7 December 1978, UNTS, Vol. 1125, No. 17512. Additional Protocol I converges the law of the Hague with the law of Geneva. Additional Protocol II regulates the law applicable in non-international armed conflict.

International Committee of the Red Cross (ICRC) published the results of its Customary International Humanitarian Law Study (CIHL Study).[31] The ICRC identified 161 rules of customary international law in relation to both international and non-international armed conflict.[32] Although the CIHL Study has been criticised in the literature,[33] it has 'achieved remarkable success in the short time following its publication'[34] and appears to be a valuable starting point for a general discussion on the substance and scope of certain norms of international humanitarian law.

In view of the above-mentioned consequences of climate change, a number of rules of international humanitarian law will become particularly relevant when it comes to the protection of the victims of armed conflict, in particular the rules relating to food security, displaced persons and humanitarian relief.[35] First, customary international humanitarian law prohibits the use of starvation of the civilian population as a method of warfare (Rule 53) and, as a matter of principle, the destruction of objects

31 J.-M. Henckaerts and L. Doswald-Beck (eds), Customary International Humanitarian Law; Volume I: Rules, International Committee of the Red Cross (Cambridge: Cambridge University Press, 2005).

32 Some conflicts are difficult to characterise, though, because of a foreign intervention in a non-international armed conflict or because a non-international armed conflict takes place on the territory of several states. See S. Vité, Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations, 91 (873) International Review of the Red Cross 83–93 (2009). The conflicts in the former Yugoslavia, Libya, Afghanistan, Iraq and the conflict between Israel and Lebanon and Hezbollah may qualify as mixed armed conflicts with elements of both international and non-international armed conflict. Although a modern 'law of armed conflict' may be emerging in response to such developments, which would apply to all types of armed conflict, the dichotomy between international and non-international armed conflict cannot be ignored, in particular when it comes to the law relating to occupation, to prisoners of war and to means and methods of warfare. R. Kolb and R. Hyde, An Introduction to the International Law of Armed Conflicts 67–70 (Oxford: Hart Publishing, 2008). See, for the problems following 'requalification' of a conflict, in particular with respect to the treatment of combatants and non-combatants, S. Wills, The Legal Characterization of the Armed Conflicts in Afghanistan and Iraq: Implications for Protection, 58 Netherlands International Law Review 173–208 (2011).

33 See E. Wilmshurst and S. Breau (eds), Perspectives on the ICRC Study on Customary International Humanitarian Law (Cambridge: Cambridge University Press, 2007). See also G.H. Aldrich, Customary International Humanitarian Law – An Interpretation on Behalf of the International Committee of the Red Cross, 76 British Yearbook of International Law (2005); M. Bothe, Customary International Humanitarian Law: Some Reflections on the ICRC Study, Yearbook of International Humanitarian Law (2005). For an official government response, see J.B. Bellinger, III and W.J. Haynes, II, A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law, 89 (866) International Review of the Red Cross (2007).

34 E. Wilmshurst, Conclusions, in: Wilmshurst and Breau, *supra* note 33, p. 409.

35 The consequences of climate change will also increase the unpredictability of conflict for the belligerent parties. As such this will impact the application of the IHL, including rules on targeting, protection of civilians and the environment, and even rules relating to weather manipulation. Hulme, *supra* note 8, pp. 193–214. In particular, the rules relating to the protection of the environment during armed conflict may be significant in view of the increased risk of hostilities in ecologically sensitive regions, such as the Arctic or Antarctica due to the melting of the ice sheets. Warfare in those regions might have disastrous consequences for the fragile ecosystem of the arctic.

indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas, crops, drinking water installations and irrigation infrastructure (Rule 54).[36] Both rules are intended to alleviate the consequences of war for the civilian population and apply during both international and non-international armed conflict.[37] Rule 54, as well as the rules relating to humanitarian relief (Rules 55 and 56), are corollaries of the prohibition on using starvation as a method of warfare, which means that a violation of these Rules may *ipso facto* entail a breach of Rule 53.[38]

Second, customary international humanitarian law requires the parties to a conflict – whether it is international or non-international – to allow and facilitate humanitarian relief for civilians in need (Rule 55). The parties to a conflict must also ensure, subject to temporary restrictions due to military necessity, the freedom of movement of humanitarian relief personnel (Rule 56). Both rules apply during international and non-international armed conflict[39] and are related to the rules governing humanitarian assistance to victims of disasters, which will be discussed below. Although the consent of the parties to the conflict is required in order to provide humanitarian assistance (often by the ICRC), such 'consent must not be refused on arbitrary grounds' and must be accepted when 'a civilian population is threatened with starvation and a humanitarian organization which provides relief on an impartial and non-discriminatory basis is able to remedy the situation'.[40] According to Barber, there is even sufficient evidence to conclude that such obligation to consent to humanitarian assistance must be accepted by states irrespective of the circumstances and is not limited to cases where the population is threatened with starvation.[41]

Third, in relation to displaced persons the ICRC established that customary international humanitarian law entails a number of rights and obligations in relation to displaced persons, including the obligation that '[i]n case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated ' (Rule 131). Rule 131 applies in both international and non-international armed conflict[42] and is additional to the general

36 See Articles 54(2) Additional Protocol I and Article 14 Additional Protocol II.

37 Rules 53 and 54 are reflected in Article 54(1) and 54 (2) Additional Protocol I and Article 14 Additional Protocol II.

38 Henckaerts and Doswald-Beck, *supra* note 31, p. 188.

39 Rules 55 and 56 are partially reflected in Article 70 Additional Protocol I and Article 18 Additional Protocol II.

40 Henckaerts and Doswald-Beck,, *supra* note 31, p. 197. See also ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflict, Report submitted to the 31st International Conference of the Red Cross and Red Crescent (31IC/11/5.1.2), p. 25.

41 R. Barber, Facilitating humanitarian assistance in international humanitarian and human rights law, 91 International Review of the Red Cross 391 (2009).

42 Rule 131 is reflected in Articles 17 and 4(3)(b) Additional Protocol II and Article 49(3) Fourth Geneva Convention (in case of occupation).

protection provided to civilians under customary international humanitarian law. The primary responsibility to provide help to displaced persons lies with the state where the displacement occurs. If that state has no control over that territory, it must allow humanitarian relief workers to pass and provide the help needed in accordance with the above-mentioned Rules 55 and 56.[43]

These rules must therefore be taken into consideration by all states and organised armed groups in case of international or non-international armed conflict. As was mentioned above, these rules may become particularly relevant where armed conflict is exacerbated by the consequences of climate change.

D. CLIMATE CHANGE AND THE PROTECTION OF THE VICTIMS OF ARMED CONFLICT UNDER INTERNATIONAL HUMAN RIGHTS LAW

It is nowadays generally accepted that human rights will remain applicable during armed conflict.[44] Indeed, in 1996 the International Court of Justice (ICJ) observed in its Nuclear Weapons Opinion that 'the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities.'[45] In 2004, the ICJ observed more generally that 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Convention on Civil and Political Rights'.[46]

Although the ICJ appears to confirm the applicability of human rights during armed conflict as a matter of course, the outbreak of armed conflict used to have significant consequences for the application of rules of public international law in the relationship between belligerent states. In the past, the legal relationship between

43 Henckaerts and Doswald-Beck, *supra* note 31, p. 467. Practical guidance for states and international organisations (both government and non-governmental) is provided by the Guiding Principles on Internal Displacement, which were first presented to the Human Rights Commission in 1998 (E/CN.4/1998/53/Add.2).

44 See for an analysis of the concurrent application of human rights law and IHL from a victim's perspective: J.-M. Henckaerts, Concurrent Application of International Human Rights Law: Victims in Search of a Forum, 1 Human Rights & International Legal Discourse 95 (2007).

45 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, ICJ Reports 1996, para. 25.

46 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, para. 106.

belligerents would be affected by the outbreak of hostilities, including the termination of all applicable treaties between belligerent states.[47]

Nowadays it appears to be generally accepted that armed conflict does not automatically terminate or suspend treaties, and that suspension or termination depends on the classic but difficult to determine criteria of the intention of the parties as reflected in the text of the treaty, or the object and purpose of the treaty in question.[48] This pragmatic view is reflected in the 2011 Draft Articles of the International Law Commission.[49] Article 3 of the Draft Articles provides: 'The existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties: (a) as between States parties to the conflict; (b) as between a State party to the conflict and a State that is not.' Although the subject matter of a treaty is a factor which may indicate that a treaty is susceptible to termination (Article 6), the Draft Articles provide an 'indicative list of treaties the subject-matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict' (Article 7 and Annex). This indicative list refers to twelve categories of treaty, including '[t]reaties for the international protection of human rights'.[50]

It follows therefore that, as a matter of principle, the legal relationship between belligerent states and non-belligerent states remains unaffected.[51] As such, belligerent states, whether they are involved in an international or a non-international armed conflict, must continue to observe their international obligations under human rights

47 J. Delbrück, War, Effects on Treaties, in: R. Bernhardt (ed.), Encyclopaedia of Public International Law; Volume Four; Quirin, Ex Parte to Zones of Peace 1369 (Amsterdam: Elsevier, 2000). Also McNair, who provides a number of historical examples of the application of this theory. A.D. McNair, The Law of Treaties 698–702 (Oxford: Clarendon Press, 1961); A/CN.4/550, The effect of armed conflict on treaties: an examination of practice and doctrine; Memorandum by the Secretariat, 1 February 2005; International Law Commission, fifty-seventh session, Geneva, 2 May – 3 June 2005 and 4 July – 5 August 2005, pp. 12–13. Brownlie states: 'War is the polar opposite of peace and involves a complete rupture of relations, and a return to anarchy. It follows that all treaties are annulled without exception. The right of abrogation arises from the occurrence of war regardless of the original intention of the parties.' A/CN.4/552, First Report on the Effects of Armed Conflicts on Treaties, by Mr Ian Brownlie, Special Rapporteur, of 21 April 2005; International Law Commission, fifty-seventh session, Geneva, 2 May – 3 June and 4 July – 5 August 2005, p. 4.

48 A/CN.4/550, The effect of armed conflict on treaties: an examination of practice and doctrine; Memorandum by the Secretariat, pp. 1, 9–12, 13–14.

49 A/66/10, para. 100; Draft articles on the effects of armed conflicts on treaties 2011. The Draft Articles were taken note of by the General Assembly in 2011 (A/RES/66/99 of 9 December 2011, para. 3).

50 Special Rapporteur Brownlie found that the identification of categories of treaties not susceptible of termination during armed conflict was so common in the literature that he followed suit. The categories listed in the annex are largely based on the examples given in literature and are included for the sake of discussion by the Commission. A/CN.4/552, First Report on the Effects of Armed Conflicts on Treaties, by Mr Ian Brownlie, Special Rapporteur, Comment to Draft article 7, pp. 20–21.

51 See also McNair, *supra* note 47, p. 728. McNair writes that only under exceptional circumstances may an implied condition be found to exist (…) which excludes or modifies the operation of such a treaty during the war. See also A/CN.4/552, First Report on the Effects of Armed Conflicts on Treaties, by Mr Ian Brownlie, Special Rapporteur, of 21 April 2005; International Law Commission, fifty-seventh session, Geneva, 2 May – 3 June and 4 July – 5 August 2005, Draft article 3, p. 10.

law treaties towards their contracting parties and may only derogate from their obligations if the treaty specifically so provides.

It further follows that the relationship between two or more belligerent states also remains unaffected and that human rights law and IHL will be simultaneously applicable in the relationship between belligerents *inter se*. The ICJ recognised in the Wall Opinion that there may be circumstances which are exclusively regulated by IHL or human rights law, but that there may also be circumstances that will be regulated by both IHL and human rights law. In that case, both branches must be taken into consideration, namely 'human rights law and, as *lex specialis*, international humanitarian law'.[52] Indeed, both branches of public international law are triggered by different criteria and have a different scope of application. It will therefore depend on the facts and circumstances of each case whether and to what extent a belligerent state must observe its human rights obligations towards another belligerent state.

So, what would be the consequences of the continuing applicability of human rights law during armed conflict in light of the consequences of climate change? The relationship between climate change and international human rights law has been discussed in detail elsewhere in this issue. It appears that the consequences of climate change will impact primarily on international economic, social and cultural rights,[53] in particular in states which will be most vulnerable to the consequences of climate change (small island states, low-lying states, delta regions, and states with vulnerable agricultural systems). These rights have been primarily laid down in the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR),[54] which includes 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing' (Article 11(1)), the right 'to be free from hunger' (Article 11(2)), and the right to health (Article 12). The ICESCR currently has 161 States Parties and thus appears to qualify as a good starting point for further analysis.

While civil political rights are generally obligations of result and sometimes even non-derogable, the implementation of economic, social and cultural rights generally requires that a state performs to the best of its abilities. Indeed, Article 11 requires States Parties to take 'appropriate steps to ensure the realization of this right'. It is not unlikely that belligerent states will be held to a different standard in determining a state's efforts to implement these rights than states which are not involved in armed conflict. There may even be circumstances in which the wrongfulness of an omission by a state involved in an armed conflict to implement these rights may be precluded due to *force majeure* (Article 23 Draft Articles on State Responsibility). A plea of *force majeure* would require as a minimum that the conflict was unforeseen, that the

52 Wall Opinion, para. 106.

53 S. Humphreys, Climate Change and International Human Rights Law, in: R. Rayfuse and S.V. Scott, International Law, *supra* note 7, p. 35.

54 International Covenant on Economic, Social and Cultural Rights, opened for signature on 19 December 1966, entered into force on 3 January 1976, UNTS, Vol. 993, No. 14531.

conflict made it materially impossible (and not just burdensome) to perform obligations under the ICESCR, and that the state invoking it did not cause or at least contribute to the emergency situation.

Furthermore, the obligation of a belligerent state must be considered in light of its obligations under IHL as *lex specialis*. This means that the obligation to take appropriate measures to provide adequate food, housing and health and the obligation to take measures 'individually and through international cooperation' to ensure food security, housing and health must be interpreted in light of the above-mentioned customary rules of international humanitarian law, as established by the ICRC, which apply during both international and non-international conflict. These rules thus appear to reinforce rather than conflict with the existing human rights obligations of belligerent states. Indeed, the obligation to take appropriate measures to ensure food security and shelter must be interpreted in light of the prohibition of starvation as a weapon of warfare, the prohibition from destroying objects indispensable to the survival of the population and the obligation to protect displaced persons. As such, the simultaneous application of these rules in the relationship between belligerents leads to convergence of IHL obligations and human rights obligations.

What then about the obligations of *non*-belligerent states to take appropriate measures to ensure the protection of the economic, social and cultural rights of those who suffer not only from the consequences of climate change (drought, natural disasters, rising sea level) but also armed conflict? After all, the consequences of climate change concern the entire of community of states and create particular responsibilities for industrialised states, i.e. those states which have contributed the most to the emission of greenhouse gases.

The scope of the obligations of non-belligerents depends first and foremost on the question to what extent states have an obligation to implement economic, social and cultural rights outside their own territories and subsequently to what extent states may implement these duties within the framework of an armed conflict to which they are not party. While the application of a civil and political rights treaty, such as the International Convention on Civil and Political Rights (ICCPR), is limited to individuals within the territories of the States Parties and subject to their jurisdiction, no such clause relating to the scope of application was included in the ICESCR. According to the International Court of Justice, the absence of a provision which regulates the convention's scope of application may be 'explicable by the fact that [the] Covenant guarantees rights which are essentially territorial', but does not exclude that the ICESCR also applies to territories under the sovereignty or jurisdiction of States Parties.[55]

The obligations of States Parties under the ICESCR therefore appear, as a matter of principle, to be limited to individuals within their territories and possibly within their

55 ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004 (Wall Opinion), para. 112. See also M. Ssenyonjo, Economic, Social and Cultural Rights in International Law 42–46 (Oxford: Hart Publishing, 2009).

jurisdiction. However, the ICESCR also obliges States Parties to the Convention to *cooperate* with each other in order to realise the fulfilment of the rights laid down in the convention. Article 2(1) ICESCR provides: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.' States must therefore cooperate to realise their obligations under the ICESCR, as was duly noted by the Committee on Economic, Social and Cultural Rights in its General Comment 3. The Committee noted that States Parties to the ICESCR must use the resources available in the international community and that all States have an obligation to cooperate in order to realise the rights enshrined in the Covenant.[56]

In 2011 a group of experts convened in Maastricht and drafted the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles).[57] According to the drafters, the Maastricht Principles 'constitute an international expert opinion, restating human rights law', and 'clarify extraterritorial obligations of States on the basis of standing international law'.[58] Pursuant to Principles 33 and 35 of the Maastricht Principles, all states have an obligation to provide international assistance, as part of their obligation to cooperate, to contribute to the fulfilment of economic, social and cultural rights in other states and to respond to requests to assist or cooperate.

The obligation to cooperate and provide such assistance may be particularly relevant in respect of food security problems, the displacement of people and the outbreak of disease resulting from disasters, irrespective of the origin of the disaster (nature, man or armed conflict). This obligation appears to be related to the rules concerning humanitarian assistance which have been developed in doctrine[59] and

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56 General Comment No. 3 (1990); The Nature of States' Parties obligations (art. 2 para. 1 of the Covenant), paras 13–14, in: E/1991/23, Committee on Economic Social and Cultural Rights; Report on the Fifth Session, 26 November – 14 December 1990, Annex III.

57 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted on 28 September 2011, through <www.etoconsortium.org>. For a commentary on the principles, see O. De Schutter, A. Eide *et al.*, Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 34 Human Rights Quarterly (2012).

58 Maastricht, Booklet by ETOs for human rights beyond Borders, p. 3, through <www.etoconsortium.org>.

59 See Guiding Principles on the Right to Humanitarian Assistance of the (expert) Council of the San Remo Institute (Guiding Principles), 33 International Review of the Red Cross 519 (1993); Institut de Droit International, Resolution of 2 September 2003 on Humanitarian Assistance, Bruges Session – 2003 (Bruges Resolution). The importance of humanitarian assistance had already been recognised by the General Assembly in 1988 (A/RES/43/131 of 8 December 1988) and 1991 (A/RES/46/182 of 19 December 1991). Preambular para. 8 of A/RES/43/131, which provides: '*Considering* that the

which have been on the agenda of the International Law Commission (ILC) since 2007.[60] These rules, which arguably reflect a progressive development of international law,[61] allegedly include a qualified right of individuals to humanitarian assistance[62] and an alleged duty of states to cooperate with states affected by disasters in organising and distributing humanitarian assistance.[63]

However, any humanitarian assistance provided to the victims of disaster is subject to the consent of the state involved.[64] Indeed, an affected state has the primary responsibility to ensure the protection of persons in its territory[65] by virtue of its sovereignty,[66] but it may not reject a (*bona fide*) offer for humanitarian assistance.[67] Such obligation arguably follows from the responsibility of states to protect their

abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity'.

60 The Drafting Committee of the ILC is currently in the process of drafting articles relating to the issue of 'Protection of Persons in the Event of Disasters'. See the reports of the Drafting Committee of the ILC with the provisionally adopted Articles 1–5 (A/CN.4/L.758 (2009), 6–9 (A/CN.4/L.776 (2010), 10–11 (A/CN.4/L.794 (2011), 5*bis*, 12–15 (A/CN.4/L.812 (2012), and 5*ter*, 16 (A/CN.4/L.815 (2013).

61 According to Special Rapporteur Valencia-Ospina, the topic is in principle subject to the progressive development of international law. A/CN.4/598, Preliminary report on the protection of persons in the event of disasters, by Mr Eduardo Valencia-Ospina, Special Rapporteur, 5 May 2008, para. 42.

62 B. Vukas, Humanitarian Assistance in Cases of Emergency, Max Planck Encyclopedia of Public International Law (www.mpepil.com), para. 18. See also Guiding Principle 1 and implicitly Section I, II and V Bruges Resolution. According to Spieker, however, there is no general and comprehensive treaty law relating to humanitarian assistance in non-conflict situations and 'customary law has not developed in order to fill-in this lacuna'. H. Spieker, The Right to Give and Receive Humanitarian Assistance, in: H.-J. Heintze and A. Zwitter (eds.), International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism 28–29 (Heidelberg: Springer, 2011).

63 See Section V IDI Bruges Resolution and provisional ILC Article 5 on Protection Persons in the Event of Disaster. An offer to provide humanitarian assistance shall not be considered an unfriendly act or unlawful interference in the internal affairs of the affected states. See Guiding Principle 5, Section IV IDI Bruges Resolution, and provisional ILC Article 12 on Protection Persons in the Event of Disaster.

64 See Guiding Principles 5 and 6, Section IV(2) and V(3) IDI Bruges Resolution, and provisional ILC Article 13 on Protection Persons in the Event of Disaster.

65 See Guiding Principles 4 and 6, Section III IDI Bruges Resolution, and provisional ILC Article 9 on Protection Persons in the Event of Disaster. See also A/RES/43/131, para. 2 and A/RES/46/182, Guiding Principle 4. For the modalities of such cooperation, see the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (the IDRL Guidelines), which were adopted in 2007 at the 30th International Conference of the States Parties to the Geneva Conventions and the International Red Cross and Red Crescent Movement, through <www.ifrc.org>.

66 This was specifically recognized in Provisional ILC Article 9 on the Protection of Persons in the Event of Disaster. The reference to the sovereignty of the affected state was included to underline the fact that sovereignty does not only establish rights but also implies obligations. The Committee wished 'to avoid any perceived connection with the concept of "responsibility to protect"', however. Statement of the Chairman of the Drafting Committee of 20 July 2010, pp. 10–11, related to A/CN.4/L.776 of 14 July 2010, Protection of persons in the event of disasters; Texts and titles of Draft Articles 6, 7, 8 and 9 provisionally adopted by the Drafting Committee on 6, 7 and 8 July 2010. Through <legal.un.org/ilc>.

67 Barber, *supra* note 41, p. 397.

citizens and the obligations of states which derive from customary international humanitarian law (as were discussed above) and human rights law, in particular the obligations under the ICESCR.[68] An offer for humanitarian assistance may in any case not be refused when it is likely that such refusal may endanger the fundamental human rights of the victims or would amount to a violation of the ban on starvation of civilians as a method of warfare.[69]

If an affected state refuses to accept offers for assistance, the states offering assistance may call upon the competent United Nations organs, including the Security Council, among others, to take the necessary measures to persuade or even coerce an affected state to accept humanitarian assistance.[70] Although some argue that states offering assistance and international organisations 'should be permitted to resort to various measures to induce the affected State to discontinue unjust refusal of humanitarian assistance',[71] such measures would, although perhaps to some extent legitimate, be contrary to the existing rules of public international law if they involved the use of force without the authorisation of the Security Council.

On the basis of the foregoing it appears that the relationship between belligerents and non-belligerents will continue to be governed by their respective obligations under human rights law, which may include obligations under the ICESCR. This means that as a matter of principle belligerents must observe their obligations under the Covenant and take measures to provide food and water security, housing and shelter and health care to the people within their territory or jurisdiction as appropriate under the circumstances. Further, non-belligerents arguably have an obligation to cooperate with belligerent states in order to assist in the implementation of the latter states' obligations. Both obligations are complemented by the alleged duties to cooperate relating to humanitarian assistance in disaster situations, which include disasters caused by armed conflict.

As such, these obligations under human rights law and the alleged obligations relating to humanitarian assistance appear to converge with the obligations of belligerent states under IHL relating to humanitarian relief. The convergence of the obligations of the various actors involved with respect to humanitarian assistance should help them, in particular humanitarian agencies, in their implementation of their humanitarian work, to the benefit of the victims involved.

68 *Ibid.*, pp. 391–397.

69 Section VIII(1) IDI Bruges Resolution. See also in relation to the obligation to accept humanitarian assistance in such situations during armed conflict (as mentioned above): Henckaerts and Doswald-Beck, *supra* note 31, p. 197.

70 Guiding Principles 7 and 8 and Section VIII(2) and (3) IDI Bruges Resolution.

71 Vukas, *supra* note 62, para. 25.

E. CONCLUSION

Working Group I of the IPCC recently concluded that there is a clear human influence on the climate system and that climate change has resulted, among other things, in the melting of the Arctic and Antarctic ice sheets and a rising sea level and will cause changes in the global weather cycle. These events pose threats not only to human security but also to international peace and security. According to the Secretary-General of the United Nations climate change is a threat multiplier, which may exacerbate existing sources of conflict and insecurity.

Although the threats of the consequences of climate change were duly recognised by the states which participated in the Security Council debates in 2007 and 2011, the Council itself was not willing to assume any direct responsibilities. Instead, it recognised the responsibility of other organs and entities, including the General Assembly and the Economic and Social Council, with respect to sustainable development issues, including climate change.

While the consequences of climate change will likely impact on human security, that impact will be even more significant if those consequences contribute to the outbreak of armed conflict. It is therefore pertinent that all actors involved are aware of the relevant rules which are intended to protect the victims of armed conflict under IHL, as well as the relevant rules of international human rights law, which remain applicable in times of armed conflict. In particular, all actors involved should take full note of the customary rules of IHL and human rights law which are intended to provide food security, humanitarian relief and help to displaced persons, and acknowledge the convergence between the various norms, especially when it comes to providing humanitarian relief or assistance.

These rules not only attribute rights to victims of disasters, including armed conflict, and to humanitarian agencies, but also entail obligations for belligerent and non-belligerent states. In view of the consequences of climate change, it is advisable that states and humanitarian agencies cooperate in making contingency plans in relation to these obligations and implement them in domestic legislation, military manuals and humanitarian guidelines.[72] Indeed, if armed conflict will be a result of climate change exacerbating existing sources of conflict and insecurity, the environment in which states and humanitarian agencies will have to operate when that happens will likely be chaotic. Proper contingency planning will ensure that everyone is on the same page in an attempt to help those who need it the most. Such recognition and planning may contribute to maintaining and if necessary restoring a sustainable society and long-term peace, as envisaged by the 2013 Utrecht Principles.

72 Hulme, *supra* note 8, pp. 217–218.