Tear Gas, Expanding Bullets and Plain-Clothed Personnel: The Interface between Human Rights and Humanitarian Law in Modern Military Operations

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Dieser Artikel untersucht das Verhältnis zwischen den Menschenrechten und dem Humanitären Völkerrecht in Bezug auf Reizstoffe (wie z. B. Tränengas), Dum-Dum-Geschosse und nicht-uniformierte Einheiten. Während diese Waffen und Methoden durch das Humanitäre Völkerrecht verboten sind, werden sie oft in Friedenszeiten durch Polizeikräfte genutzt. Überraschenderweise haben die rechtlichen Herausforderungen, die sich aus ihrem möglichen Einsatz in Militäroperationen ergeben könnten, bisher nur wenig Aufmerksamkeit erhalten. Dieser Artikel versucht, diese Lücke zu schließen und einen Beitrag zum grundsätzlichen Wirkungsverhältnis zwischen beiden Rechtsbereichen zu leisten.
Unter Berücksichtigung der entsprechenden Vorarbeiten (travaux préparatoires) und der nachfolgenden Staatenpraxis sowie neuerer Rechtsprechung zeigt dieser Artikel, dass die einschlägigen Verbotsnormen des Humanitären Völkerrechts eine Ausnahme für jene Situationen zulassen, in denen Angehörige der Streitkräfte polizeiliche Funktionen wahrnehmen (d. h. law-enforcement exception). Das bedeutet, dass Tränengas, Dum-Dum-Geschosse und nicht-uniformierte Einheiten auch während eines bewaffneten Konflikts eingesetzt werden dürfen, solange dies außerhalb von Gefechtssituationen geschieht.

This article examines the interplay between Human Rights Law and Humanitarian Law in relation to riot control agents (such as tear gas), expanding bullets and plain-clothed forces. While outlawed under humanitarian law, they are widely used by police in peace time and not subject to similar bans under human rights law. Surprisingly, the legal challenges arising from their potential use in modern military operations have so far received only limited scholarly attention. This article tries to fill that gap and endeavours to contribute to the broader debate on the interplay between human rights and humanitarian law in (international) military operations. Drawing on the relevant preparatory works as well as subsequent practice and recent jurisprudence, this article shows that the humanitarian law rules on the use of riot control agents, expanding bullets and plain-clothed personnel provide for a sufficiently broad law-enforcement exception. Hence, they can be used in times of armed conflict outside of combat operations.

1. Introduction

The repeated use of chemical weapons in the Syrian Civil War has pushed the topic of prohibited weapons back into the headlines.[1] Even though chemical attacks have only been responsible for a fraction of the conflict's overall casualty figures, the use of these weapons is considered particularly reprehensible.[2] Yet, this is not necessarily the case for all means and methods of warfare prohibited under humanitarian law. Indeed, while there is a ban on the use of riot control agents, expanding bullets and plain-clothed personnel in warfare, they are widely used by police in peace time. Yet, these weapons and tactics may also have a role to play in modern military operations, in view of their complex mandates and the full spectrum of possible mission scenarios. Besides active combat, military operations often involve a broad range of tasks such as maintaining law and order in volatile security situations and taking forcible measures against members of organised armed groups, criminal gangs or pirates.
Therefore, it is the aim of this article to examine whether and under which conditions riot control agents, expanding bullets and plain-clothed personnel can be used by armed forces involved in an armed conflict. For that purpose, Chapter 2 analyses the scope of the specific rules of humanitarian law prohibiting their use in warfare and contrasts them with the lack of similar regulation in the field of human rights law. Today, most armed confrontations involve members of non-state armed groups on the opposing side rather than other state armed forces, which means that non-international armed conflicts have become the most prevalent situation for humanitarian law to apply. Therefore, Chapter 2 considers in particular the relevance of the said prohibitions in conflicts of a non-international character. Special attention is given to the *Customary IHL Study* (2005) by the International Committee of the Red Cross (ICRC), which identified 161 customary rules of humanitarian law and found that the vast majority of these rules apply also in non-international armed conflicts.[3] A more cautious account of the relevant custom-

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1 Arms Control Association, Timeline of Syrian Chemical Weapons Activity, 2012-2017, June 2017, www.armscontrol.org/factsheets/Timeline-of-Syrian-Chemical-Weapons-Activity (all accessed on 07 September 2017).

2 President Obama once called the use of chemical weapons a "game changer" and "red line" for possible US military actions. Eventually, in response to the renewed use of chemical weapons by Assad forces in April 2017, the US carried out a series of missile strikes against a Syrian air base: BBC, Syria war: US launches missile strikes in response to 'chemical attack', 7 April 2017, www.bbc.com/news/world-us-canada-39523654.

3 In fact, 147 rules apply both in international and non-international armed conflicts. Three other rules were considered analogous, although the content showed minor differences: Rules 124, 128-29. Moreover, there are two rules that apply solely in non-international conflicts, namely Rule 148 (prohibition of belligerent reprisals) and Rule 159 (amnesty clause).

ary rules is provided by the *Sanremo Manual of the Law of Non-International Armed Conflict* (2006), which also confirms the trend that most rules of the law of international armed conflict apply equally in non-international armed conflicts.[4] Likewise, the *Bulletin on the Observance by United Nations Forces of International Humanitarian Law*, issued by the United Nations (UN) Secretary-General in 1999,[5] reflects the customary status of many humanitarian law rules regardless of the nature of the conflict and in the absence of treaty law binding on international organisations such as the United Nations.

Chapter 3 examines the differences in regulating the use of riot control agents, expanding bullets and plain-clothed personnel in view of the broader debate on the interplay between human rights and humanitarian law in military operations. On the basis of a distinction between two paradigms (hostilities and law-enforcement), Chapter 3 explores the availability of a law-enforcement exception for the use of these weapons and tactics in times of armed conflict.

2. Prohibitions of Specific Weapons and Methods

2.1. Background

Despite its permissive targeting rules, Humanitarian law restricts the choice of means and methods that the belligerents can employ.[6] It bans explicitly the use of weapons and methods that are of a nature to "cause superfluous injury or unnecessary suffering".[7] In addition to this general rule, Humanitarian law contains a number of prohibitions and restrictions on the use of specific methods and weapons.[8]

There have been attempts in the field of Human Rights Law to apply the same standards also to peacetime situations. The *Turku Declaration of Minimum Humanitarian Standards* (1990) states that:

"Weapons or other material or methods prohibited in international armed conflicts must not be employed *in any circumstances*."[9]

Yet, there is little proof that such specific bans could add to human rights law, considering that it already contains far stricter rules on the use of (lethal) force.[10] Quite the opposite – as will be shown in the following sections – adopting the same prohibitions and limitations may even prove counterproductive in peacetime situations.

2.2. Riot Control Agents and Chemical Weapons

Tear gas and other chemical substances used as riot control agents provide an illustrative example. Human rights law strongly recommends their use alongside other less-lethal equipment for crowd control and gradual force application.[11] By contrast, the use of riot-control agents as a method of warfare is explicitly prohibited, alongside other substances falling under the *Chemical Weapons Convention* (1993).[12] These prohibitions are widely regarded as rules of customary law applicable both in international and non-international armed conflicts.[13] Also, the above-mentioned *Secretary-General's Bulletin* contains an explicit ban on the use of asphyxiating, poisonous or other gases.[14]

There are a number of reasons why the ban on chemical weapons has been extended to cover riot control agents and other less-toxic substances. As a general rule, many chemical agents can prove lethal or lead to grave injuries, depending on the quantity and concentration, the location and duration of exposure as well as the age and health condition of the person affected. Moreover, riot control agents were notoriously used as the first chemical weapons in modern warfare and carry the danger of escalation, including the use of more dangerous substances.[15]

Furthermore, the effects of chemical agents cannot be easily limited to a specific area and may thus strike combatants and civilians without distinction. The ban on the use of such substances as a method of warfare is therefore a concretisation of the general prohibition on indiscriminate weapons.[16] Likewise, other forms of non-lethal weapons may pose a problem under Humanitarian Law – even if they are not explicitly prohibited – to the extent that they have indiscriminate

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4 IIHL, The Manual on the Law of Non-International Armed Conflict. With Commentary, drafted by Michael M. Schmitt, Charles C. Garraway and Yoram Y. Dinstein, Sanremo, 2006, hereinafter: Sanremo NIAC Manual.

5 United Nations Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13, 6 August 1999, hereinafter: SG Bulletin.

6 Art. 35 (1) AP I. See also: Sect. 6.1, SG Bulletin.

7 Rule 70, CIHL Study; Sect. 2.2.1.3 (Unnecessary Suffering), Sanremo NIAC Manual; Sect. 6.3, SG Bulletin.

8 Rules 46-69 (on methods) and 71-86 (on weapons), CIHL Study. See also, Sects. 2.2.2.-2.2.3 (on weapons) and Sect. 2.3 (on methods), Sanremo NIAC Manual; Sects. 6.1-6.9, SG Bulletin.

9 Art. 5 (3), Declaration of Minimum Humanitarian Standards (Declaration of Turku), Turku/Abo, 2 December 1990, UN Doc. E/CN.4/1995/116, p. 4.

10 See, for instance, ECtHR, McCann v. UK, *infra* note 45, para. 32.165-214; Basic Principles on the Use of Force, *infra* note 44.

11 ECtHR, Erdogan v. Turkey, Judgement, 25 April 2006, Application no. 19807/92, para. 79 (criticising the failure to use tear gas rather than life ammunition); ECtHR, Güleç v. Turkey, Judgement, 27 July 1998, Application no. 21593/93, para. 71-72 (requiring states to equip security forces with "truncheons, riot shields, water cannon, rubber bullets or tear gas" in riot control situations).

12 Chemical Weapons Convention, 13 January 1993, hereinafter: CWC. See, in particular, Art. I (5) CWC ("Each State Party undertakes not to use riot control agents as a method of warfare") and Arts. I (b) and II (1) CWC (on the general ban of chemical weapons and their definition).

13 Rules 74-75, CIHL Study; Sect. 2.2.2 (c), Sanremo NIAC Manual. See also: S. Hains, Weapons, Means and Methods of Warfare, in: E. Wilmshurst and S. Breau (eds.), Perspectives on the ICRC Study on Customary International Humanitarian Law, Cambridge 2007, 258-81, pp. 269-70; B. Boothby, Weapons and the Law of Armed Conflict, Oxford 2009, p. 135.

14 Sect. 6.2, SG Bulletin ("The United Nations force shall respect the rules prohibiting or restricting the use of certain weapons and methods of combat under the relevant instruments of international humanitarian law. These include, in particular, the prohibition on the use of asphyxiating, poisonous or other gases and biological methods of warfare", emphasis added).

15 They were used in the trenches of World War I and made affected soldiers an easy target for enemy firearms, regardless of their being hors de combat. See also Rule 75, CIHL Study, commentary, p. 265.

16 Rule 71, CIHL Study; Sect. 2.2.1.1 (Indiscriminate Weapons), Sanremo NIAC Manual.

effects, for instance: acoustic weapons, heat rays, sticky or slippery foam and malodorants.[17]

2.3. Expanding Bullets and Similar Projectiles

Bullets that "expand or flatten easily in the human body" are another example of weapons subject to different rules in peace and wartime. Their use in international armed conflicts has been explicitly outlawed since 1899.[18] What makes them especially reprehensible is their high degree of lethality: Unlike regular ammunition, these projectiles – also known as hollow-point, soft-nose or dum-dum bullets – mushroom upon entering the target's body and thus cause much more excessive tissue damage.[19] However, despite this age-old ban in warfare, expanding bullets are commonly used by national police forces in many different countries. They are an effective tool in confrontations with armed, recalcitrant hostage-takers and suicide bombers, as these projectiles are more likely to kill the targeted person instantly, without the risk of over-penetration, thus avoiding the dangerous ricochet effect that ordinary bullets may have for bystanders.[20] From a human rights perspective, the use of expanding bullets is justified for being often the only viable way to protect the lives of innocent people in such situations.[21]

The *Customary IHL Study* claims that the ban on expanding bullets also extends to non-international armed conflicts.[22] This view is supported by the *Secretary-General's Bulletin*, which explicitly mentions expanding bullets in a list of prohibited weapons.[23] By contrast, the drafters of the *Sanremo NIAC Manual* considered it doubtful whether the prohibition equally applies to non-international armed conflicts, considering the above-mentioned common use of expanding bullets in domestic law-enforcement.[24] The authors of the *Customary IHL Study* tried to distinguish these projectiles from the banned military version, by arguing that the former are commonly fired from pistols rather than rifles and thus deposit much less energy, which may result in less severe injuries.[25] Practice shows, however, that expanding bullets used by police are often fired from rifles to ensure better long-distance targeting.[26]

At the Kampala Review Conference in 2010, the state parties to the International Criminal Court (ICC) Statute adopted an amendment to Article 8 of the Statute, which makes it a war crime to employ certain weapons in non-international armed conflicts.[27] Besides poison and gases, the list includes also expanding bullets,[28] the use of which had previously only been a crime in international armed conflicts.[29] This development ultimately confirms the customary law prohibition of these projectiles in any type of armed conflict, regardless of whether they are shot from rifles or pistols.

2.4. Perfidy and Plain-Clothed Personnel

Another area where Human Rights Law and Humanitarian Law come to different solutions involves the use of deceptive methods by operating forces. Ruses are commonly used in wartime to gain a tactical advantage by confusing or surprising the enemy, for instance, by using decoy weapons or by launching mock attacks or ambushes.[30] As a general rule, parties to the conflict are free to use ruses and deceptive tactics as long as they are not specifically prohibited.[31] Examples of such bans include: the improper use of the Red Cross emblem or other protected signs,[32] the misuse of the white flag[33] and the use of flags, insignia and uniforms of neutrals

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17 D. Koplow, Non-Lethal Weapons, Cambridge 2006, 46-47; S. Casey-Maslen, Non-Kinetic-Energy Weapons Termed "Non-Lethal", Geneva Academy of International Humanitarian Law and Human Rights, October 2010, pp. 69-73. See also: NATO Research and Technology Organisation, Non-Lethal Weapons and Future Peace Enforcement Operations, RTO-TR-SAS-040, December 2004, Annex; N. Davidson, New Weapons: Legal and Policy Issues Associated with Weapons Described as 'Non-lethal', in: D. Saxon (ed.), International Humanitarian Law and the Changing Technology of War, Leiden 2012, 281-313; D. Fidler, The Path to Less Lethal and Destructive War? Technological and Doctrinal Developments and International Humanitarian Law after Iraq and Afghanistan, in: D. Saxon (ed.), International Humanitarian Law and the Changing Technology of War, Leiden 2012, 315-49.

18 Declaration Concerning Expanding Bullets, The Hague, 29 July 1899. Note that the United States was the only major power that did not ratify the treaty.

19 R. Coupland and D. Loye, The 1899 Hague Declaration Concerning Expanding Bullets, A Treaty Effective for more than 100 Years Faces Complex Contemporary Issues, in: 85 IRRC (2003), 136-42. See also: B. Kneubuehl, Wound Ballistics Basics and Applications, Berlin 2011 and www.weaponslaw.org/weapons/expanding-bullets.

20 Channel 4, Hollow point bullets to be standard issue for Met Police, 11 May 2011, https://www.channel4.com/news/hollow-point-bullets-to-be-standard-issue-for-met-police (on the plans of introducing hollow-point bullets as standard ammunition for police in the United Kingdom, similar to France and the US, where hollow-point bullets are widely used by police).

21 So far, there has been no case where a human rights court had to consider the legality of the use of hollow-point bullets by police forces. A prominent case in which this question could have been relevant is Armani da Silva v. UK, involving the death of Jean Charles de Menezes, who was shot dead by police officers on 22 July 2005 in the mistaken belief that he was a suicide bomber linked to the 7 July London bombings. The complaint only concerned the procedural limb of Art. 2 ECHR. The substantive aspect of Art. 2 – under which the use of hollow-point bullets by the police could have been addressed – had been previously settled between the parties. ECtHR, Armani da Silva v. UK, Judgement, 30 March 2016, Application no. 5878/08.

22 Rule 77, CIHL Study.

23 Sect. 6.2, SG Bulletin.

24 Sect. 2.2.2, Sanremo NIAC Manual, para. 12, p. 35. See also: S. Hains, *supra* note 13, p. 272 (criticising the ICRC's CIHL Study for its unqualified ban on expanding bullets in NIAC).

25 Rule 77, CIHL Study, p. 270, referring to: R. Coupland and D. Loye, *supra* note 19, pp. 140-41.

26 See, for instance, the very elaborate outline of recent practice highlighting the police use of rifles: A. Vanheusden, H. Parks and W. Boothby, The Use of Expanding Bullets in Military Operations: Examining the Kampala Consensus, in: 50 Military Law and the Law of War Review (2011), 535-56, pp. 541-42, text of footnote 17. By reverse logic, it is highly unlikely that the ICRC would accept the unlimited use of expanding bullets fired from handguns against enemy forces during international armed conflicts.

27 Amendments to Article 8 of the Rome Statute, RC/Res.5, adopted at the 12th plenary meeting, 10 June 2010, www.icc-cpi.int/icedocs/aspdocs/Resolutions/RC-Res.5-ENG.pdf.

28 Art. 8 (2) (e) (xv) ICC Statute.

29 Art. 8 (2) (b) (xix) ICC Statute.

30 E. Crawford and A. Pert, International Humanitarian Law, Cambridge 2015, pp. 213-14.

31 Rule 57, CIHL Study ("Ruses of war are not prohibited as long as they do not infringe a rule of international humanitarian law").

32 Rules 59-61, CIHL Study (including the UN emblems and uniforms); Sect. 2.3.4, Sanremo NIAC Manual.

33 Rule 58, CIHL Study.

and other states not party to the conflict.[34] These cases are closely connected to perfidy, which involves:

"Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence […] The following acts are examples of perfidy:

a. the feigning of an intent to negotiate under a flag of truce or of a surrender;
b. the feigning of an incapacitation by wounds or sickness;
c. the feigning of civilian, non-combatant status; and
d. the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict."[35]

The essence of perfidy is thus the abuse of good faith among the parties to the conflict. Suicide bombings against international forces in Afghanistan, Mali and Somalia by fighters dressed as civilians are a more recent form of perfidious attacks,[36] which may seriously undermine the respect for the protection of civilians and other protected persons and objects. Article 37 of Additional Protocol I explicitly bans the resort to perfidy to "kill, injure or capture the adversary".[37] The *Customary IHL Study* uses the same wording in its rule on perfidy, applicable in both types of armed conflict.[38]

State practice is, however, not fully consistent as to the inclusion of *capture* by resort to perfidy in addition to the acts of killing and injuring.[39] For instance, under the original ban contained in the *Hague Regulations* (1907) it is only prohibited "to kill or wound treacherously".[40] This is why the *Sanremo NIAC Manual* uses a more narrow definition limited to only these two acts and questions whether customary law covers also *capture*.[41] It appears, however, more reasonable to include capture, as any attempt to seize a person usually involves "a threat to kill or injure" and may even result in the death or injury of the person in question.[42] For this reason, military planners should be particularly careful when using special forces commandos in plain clothes or non-conventional uniforms during armed conflict situations.[43]

As for human rights law, no such restrictions exist in peacetime. While law-enforcement agents are usually required to identify themselves as such, especially before using firearms, this does not prevent them from using plain clothes to gain a tactical advantage.[44] Indeed, the use of undercover commandos may often be the best way to confront and arrest dangerous suspects. Using plain-clothed agents for such specific tasks is therefore fully consistent with human rights law, especially where other alternatives carry a greater risk to the lives of those involved (i.e. suspects, police and bystanders).[45]

3. Regime Interplay in Relation to Specific Weapons and Methods

3.1. Background

In view of the differences in regulating the use of these specific weapons and methods, there is a tension between Human Rights Law and Humanitarian Law. Charles Garraway once poignantly likened both regimes to two tectonic plates and cautioned that:

"If the pressure is not released in some way and the plates are allowed to continue to push up against each other, there will sooner or later be the equivalent of an earthquake […] The cost would inevitably be paid by the victims of conflict and violence, the very people that both systems seek to protect."[46]

This reflects the demise of the traditional distinction between the laws of peace and the laws of war. Much has been written in recent years on the relationship between Humanitarian Law and Human Rights law.[47] While the exact mode of interaction remains contested, there is overwhelming support in international jurisprudence, practice and doctrine that human

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34 Rule 63, CIHL Study; Sect. 2.3.4, Sanremo NIAC Manual. Moreover, it is also prohibited to use the flags or emblems, insignia or uniforms of the adversary in combat: Rule 62, CIHL Study; Sect. 2.3.5, Sanremo NIAC Manual.

35 Art. 37 (1) AP I, emphasis added. This definition is also used by the commentary to Rule 65, CIHL Study, p. 223.

36 M. Munir, Suicide Attacks: Martyrdom Operations or Acts of Perfidy?, in: M.-L. Frick and A. Müller (eds.), Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives, Leiden 2013, 99-123.

37 Art. 37 (1) AP I.

38 Rule 65, CIHL Study. See also: R. Jackson, Perfidy in Non-International Armed Conflicts, in: 88 International Law Studies (2012), 237-259, pp. 246-47; J. Dehn, Permissible Perfidy?, in: 6 (4) Journal of International Criminal Justice (2008), 627-53.

39 Rule 65, CIHL Study, commentary, p. 225.

40 Article 23 (b), Hague Regulations (1907).

41 Sect. 2.3.6, Sanremo NIAC Manual ("if the intent in doing so is to kill or wound an adversary"). See also the relevant commentary, p. 43, para. 2. See also: Rule 111, HPCR Manual on International Law Applicable to Air and Missile Warfare, With Commentary, March 2010, pp. 244-45, paras. 5-6 (divided on the question whether capture is covered as a matter of customary IHL, with only the minority of experts in favour of its inclusion).

42 Rule 65, CIHL Study, commentary, p. 225. The Secretary-General's Bulletin does not specifically mention perfidy or other forms of unlawful deceptions, but these acts are arguably covered by the general obligation to respect the rules "prohibiting or restricting the use of certain weapons and methods of combat", Sect. 6.2, SG Bulletin.

43 B. Cathcart, Legal Dimensions of Special Forces and Information Operations, in: T. Gill and D. Fleck (eds.), The Handbook of the International Law of Military Operations, Oxford 2010, 395-414, p. 401; H. Parks, Special Forces' Wear of Non-Standard Uniforms, 4 (2) Chicago Journal of International Law (2003), 493-560.

44 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana (Cuba), 27 August to 7 September 1990, hereinafter: Use of Force and Firearms Principles (1990), para. 10.

45 ECtHR, McCann v. UK, Judgement, 5 September 1995, Application no. 18984/91, para. 32. The case involved the fatal shooting of three suspected members of the Irish Republic Army (IRA) by British special forces in Gibraltar. The Court did not criticise the fact that the soldiers had worn plain clothes, but rather the mistakes made at senior command level in the planning and executing the operation.

46 C. Garraway, "To Kill or Not To Kill?" Dilemmas on the Use of Force, in: 14 JCSL (2009), 499-510, p. 510.

47 See, for instance: R. Kolb and G. Gaggioli (eds.), Handbook of Human Rights and Humanitarian Law, Cheltenham 2013; O. Ben-Naftali (ed.), International Humanitarian Law and International Human Rights Law: Pas de Deux, Oxford 2011; R. Arnold and N. Quénivet (eds.), International Humanitarian Law and Human Rights Law. Towards a New Merger in International Law, Leiden 2008.

rights law continues to apply in times of armed conflict.[48] What makes this topic increasingly relevant for international military operations is the expanding geographic scope of human rights law. Previously, its extra-territorial application was only recognised in exceptional cases, usually involving territorial control. Recent jurisprudence and scholarly writing show, however, that human rights law applies to a broad range of actions in military operations abroad, potentially covering even targeting situations.[49]

At the same time, the reach of Humanitarian Law is not confined to areas of active fighting alone but extends to all actions of the belligerents with a nexus to the armed conflict.[50] As a result, Human Rights and Humanitarian Law often apply to the same situation – both in time and space. This leads to a potential conflict between the different rules on the use of force: While human rights law only allows for killings in response to threats to life and limb, Humanitarian Law provides for lethal targeting based on status and conduct (even absent such threats).[51]

Rather than relying on a traditional *lex specialis* approach – whereby rules of Humanitarian Law take precedence over conflicting human rights norms –, international jurisprudence, practice and doctrine[52] increasingly suggest the coexistence of two distinct and mutually exclusive paradigms in times of armed conflict:

A. Hostilities paradigm, which is characterised by active combat and governed by Humanitarian Law,
B. Law-enforcement paradigm, which covers all remaining situations and is based on the ordinary human rights standards.

Under which paradigm a particular use of force falls is largely a question of facts. The defining factor is the degree of control over the area in question: if it is not in the middle of the battlefield but rather under the control of the operating forces (or their allies), the case comes very close to a domestic police operation in peacetime.[53] As a result, the use of force under these circumstances falls within the law-enforcement paradigm and is thus subject to the stricter human rights rules, despite the general application of Humanitarian Law.[54] Relevant scenarios include riots, even when individual fighters are intermingled, as was the case with the violent protests throughout Afghanistan in April 2011 against alleged burnings of the Koran.[55] A similar case exists where civilian demonstrators actively block roads and other means of transport to obstruct the movement of foreign troops with the aim of shielding enemy forces in neighbouring areas. Hence, in both scenarios graduated force must be used in line with Human Rights Law, even though Humanitarian Law would allow for lethal targeting.[56] The same conclusion applies to hostage-takings and the handling of road checkpoints. The case changes, of course, where a failed suicide car attack against a frontline checkpoint is followed by a full-blown assault by enemy forces – a situation clearly falling within the hostilities paradigm, just like any other battlefield situation, including air operations.

If a situation falls within the law-enforcement paradigm, what set of weapons and techniques would be permissible? This question has received surprisingly little scholarly attention, despite the fact that it is of paramount importance

48 ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, ICJ Reports 1996, pp. 226-67, para. 25; HRC, Fourth Periodic Report, USA, 30 December 2011, CCPR/C/USA/4, para. 507 ("human rights law and the law of armed conflict are in many respects complementary and mutually reinforcing").

49 ECtHR, Jaloud v. Netherlands, Judgement, 20 November 2014, Application no. 47708/08, para. 152 (involving the shooting of a civilian at a checkpoint manned by Dutch forces in Iraq); ECtHR, Pisari v. Moldova and Russia, Judgement, 21 April 2015, Application no. 42139/12, para. 33 (involving a similar shooting incident at one of the many Russian-manned checkpoints along the cease-fire line between Moldova and Transnistria). IACmHR, Armando Alejandre et al. v. Cuba, Decision, 29 September 1999, Case 11.589, Report No. 86/99, para. 25 (involving two civilian aircraft shot down by a Cuban military jet in international airspace). M. Milanovic, Extraterritorial Application of Human Rights Treaties, Oxford 2011.

50 M. Schmitt, Charting the Legal Geography of Non-International Armed Conflict, in: 90 International Law Studies (2014), 1-19; N. Lubell and N. Derejko, A Global Battlefield?: Drones and the Geographical Scope of Armed Conflict, in: 11 (1) Journal of International Criminal Justice (2013), 65-88. For a more limited geographic scope of application (i.e. based on territory), see ICTY, Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1-AR72, para. 70 ("in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there").

51 ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, prepared and edited by N. Melzer, May 2009, hereinafter: ICRC, Interpretive Guidance (2009), pp. 31-35.

52 D. Murray et al., Practitioners' Guide to Human Rights Law in Armed Conflict, Oxford 2016, pp. 79-80 (using the terms "active hostilities" and "security operations"); M. Sassòli and 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, in: 90 IRRC (2008), 599-627; L. Doswald-Beck, The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?, in: 88 IRRC (2006), 881-904, p. 893; C. Droege, The Interplay between International Humanitarian law and International Human Rights Law in Situations of Armed Conflict, in: 40 (2) Israel Law Review (2007), 310-55, p. 347; K. Watkin, Contro-lling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict, in: 98 (1) AJIL (2004), 1-34, pp. 30-34; ICRC, Expert Meeting on the Use of Force in Armed Conflicts – Interplay between the Conduct of Hostilities and Law Enforcement Paradigms, prepared and edited by G. Gaggioli, November 2013. For a slightly different use of this terminology: N. Melzer, Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities, in: T. Gill and D. Fleck (eds.), The Handbook of the International Law of Military Operations, Oxford 2010, 33-49, pp. 43-45 (for whom both regimes are not mutually exclusive, i.e. they may actually overlap).

53 While this view is widely shared among the commentators cited above (*ibid*), the degree of control played a surprisingly limited role during the most recent expert discussion: ICRC, Expert Meeting on the Use of Force in Armed Conflicts (2013), *Id*., pp. 19-42 (while discussing a number of pertinent scenarios, including sleeping fighters, riots, common crime, escape of captured fighters and checkpoints).

54 There is even strong textual support for this conclusion: the requirement of necessity and proportionality under human rights law – as reflected in the arbitrariness test of most right-to-life provisions as well as Arts. 2 and 15 of the ECHR – may be seen as a limiting factor against the potential over-application of IHL.

55 LA Times, Taliban Exploits Afghan Riots over Koran Burning, 4 April 2011, http://articles.latimes.com/2011/apr/04/world/la-fg-afghan-koran-riots-20110404 ("Officials say insurgents have used the riots as cover for attacks against Western and government targets").

56 See, in particular, ICRC, Interpretive Guidance (2009), *supra* note 51, pp. 31-35 and 63. Accordingly, fighters remain liable to direct attack under IHL for as long as they assume a continuous combat function. Likewise, civilian demonstrators lose their protection from direct attack, when they act as voluntary human shields.

where there exists an armed conflict, to which Humanitarian Law is applicable.[57] As shown above, both legal regimes set very different standards on the use of weapons and methods. While Human Rights Law is silent on the matter, Humanitarian Law bans the use of tear gas and similar non-lethal chemical agents, as well as expanding bullets and offensive operations with plain-clothed forces (qualifying as acts of perfidy).

It would appear artificial to give precedence to the more restrictive provisions under Humanitarian Law simply because they are more specific or more protective than under human rights law. To do so would lead to the absurd situation where forces were to act within the constraints of law-enforcement, while being deprived of some essential law-enforcement tools. But it seems equally wrong to disregard entirely – simply as a *matter of convenience* – the specific set of Humanitarian Law rules. Rather, one should consider possible avenues for a harmonious interpretation of the legal framework to overcome potential norm conflicts between both regimes.

3.2. Riot Control Agents and Chemical Weapons

The most obvious case is the use of riot control agents and similar non-lethal or less-than-lethal chemical agents, which are an effective tool for domestic law-enforcement and have reportedly also been used by international forces in non-combat peace operations.[58]

The European Court of Human Rights has taken a liberal approach on the use of chemical agents against direct military targets. The case of *Kaplan v. Turkey* (2005) involved a police raid against suspected members of the Kurdistan Workers' Party (PKK), who were meeting in an apartment, which led to a heavy exchange of gunfire resulting in the killing of a policeman, the believed fighters and two children.[59] Even though the Court was convinced by the facts that the suspects were indeed PKK fighters, it criticised the police's handling of the raid for unduly putting the lives of the militants at risk, especially by relying exclusively on the use of firearms rather than 'tear gas or stun grenades'.[604] To be precise, the Court applied the ordinary human rights test to the use of force against fighters and even went as far as suggesting the use of tear gas against them, despite the ban on using riot control agents as a method of warfare.

Another case where Humanitarian Law had a role to play is *Finogenov v. Russia* (2011),[61] involving a major hostage crisis. In October 2002, a group of forty to fifty Chechen rebel fighters (armed with assault rifles and explosive vests) seized a Moscow musical theatre, taking 850 hostages and demanding the immediate withdrawal of Russian forces from Chechnya. In order to render the hostage-takers unconscious, Russian special forces pumped an unknown chemical agent (probably fentanyl) into the building's ventilation system. While all militants were killed by gunshots during the subsequent raid, about 130 hostages died due to adverse reactions to the gas. In response to a complaint lodged by the victims' relatives, the European Court found only a violation of the right to life due to the poor planning and implementation of the rescue and evacuation operations after the raid by Russian forces.[62] The Court did discuss extensively the use of the chemical agent as such,[63] and eventually concluded that:

"[T]he gas used by the Russian security forces, while dangerous, was not supposed to kill, in contrast, for example, to bombs or air missiles. The general principle stated in the Isayeva case, condemning the indiscriminate use of heavy weapons in anti-terrorist operations, can be reaffirmed, but it was formulated in a different factual context, where the Russian authorities used airborne bombs to destroy a rebel group which was hiding in a village full of civilians. Although the gas in the present case was used against a group consisting of hostages and hostage-takers, and although the gas was dangerous and even potentially lethal, it was not used "indiscriminately" as it left the hostages a high chance of survival, which depended on the efficiency of the authorities' rescue effort."[64]

Nowhere in the judgment did the Court discuss the legality of using such chemical agents under Humanitarian Law when confronting fighters belonging to an armed group. It is unclear whether the judges considered human rights law to take precedence due to the law-enforcement nature of the situation or whether they deemed Humanitarian Law to be entirely inapplicable, despite the obvious nexus to the ongoing war in Chechnya.[65]

As outlined above, the *Chemical Weapons Convention* (1993) contains a general ban on the use of chemical weapons, covering any toxic chemicals and their precursors,[66] unless they are intended for permitted purposes such as "law enforcement including domestic riot control purposes".[67] In addition, the Convention contains an explicit

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57 For two very helpful analyses: K. Watkin, Chemical Agents and Expanding Bullets: Limited Law Enforcement Exceptions or Unwarranted Handcuffs, 36 IYHR (2006), 43-69; N. Melzer, *supra* note 52, pp. 44-49. See also: D. Fleck, *supra* note 52, pp. 394 (simply outlining the differences between both regimes, without, however, providing any solution for the potential norm conflict in law-enforcement situations during armed conflicts).

58 J. Fry, Gas Smells Awful. U.N. Forces, Riot Control Agents and the Chemical Weapons Convention, in: 31 Michigan Journal of International Law (2010), 475-558, pp. 485-97 (providing an account of situations in which riot control agents have been used by personnel involved in UN-led and UN-authorised peace operations).

59 ECtHR, Hamiyet Kaplan v. Turkey, Judgement, 13 September 2005, Application no. 36749/97.

60 *Id*., para. 51 ('En effet, lors de l'opération en question, les policiers ont exclusivement utilisé des armes à feu. Ils n'ont pas fait usage de gaz lacrymogène ou de grenades paralysantes', emphasis added).

61 ECtHR, Finogenov v. Russia, Judgement, 20 December 2011, Applications nos. 18299/03 and 27311/03.

62 *Id*., paras. 237-263.

63 *Id*., paras. 227-236

64 *Id*., para. 232, emphasis added.

65 Note, however, that incapacitating chemical agents, such as the one used during the Moscow hostage crisis, remain highly controversial (even from a human rights perspective) and need to be distinguished from riot control agents, e.g. tear gas, ICRC, Report of an Expert Meeting. "Incapacitating Chemical Agents": Law enforcement, human rights law and policy perspectives, held in Montreux (Switzerland) on 24-26 April 2012, published January 2013.

66 Arts. I (b) and 2 (1), Chemical Weapons Convention (CWC).

67 Art. II (9) CWC, ("Purposes Not Prohibited Under this Convention" means: … (d) Law enforcement including domestic riot control purposes").

prohibition on the use of "riot control agents as a method of warfare".[68] Regrettably, the Convention fails to provide a clear definition of the terms "method of warfare" and "law enforcement", but their use and position in the Convention implies that both terms must be seen as mutually exclusive. The new commentary to the Convention tries to fill that gap by defining the terminology used.[69] According to the authors, the term "as a method of warfare" is simply a synonym for "use in armed conflict",[70] which leads them to the flawed conclusion that any use of riot control agents:

"[I]n war or other armed conflict does, of course, constitute a method of warfare, which is prohibited […] Such action cannot be misconstrued as law enforcement."[71]

Moreover, the authors of the commentary even question the availability of the law-enforcement exception in most extra-territorial settings, especially in the course of international military operations.[72] This is, however, a serious misreading of both terms. As outlined above, the meaning of law-enforcement is sufficiently broad to cover the actions of international forces abroad. Moreover, law-enforcement even extends to times of armed conflict provided that the situation does not involve active combat, which falls within the hostilities paradigm and would exclude the use of riot control agents and similar chemical substances.[73]

This is precisely why the inclusion of chemical weapons in the list of war crimes of the ICC Statute proved so problematic: it was argued that it would be absurd if peacekeepers handling riots during armed conflict situations were allowed to use live bullets but not tear gas or other riot control agents.[74] These considerations had an impact on the formulation of the elements of the crime of employing asphyxiating, poisonous or other gases in international armed conflicts, which among others require that:

"The gas, substance or device was such that it *causes death or serious damage* to health in the *ordinary course of events*, through its asphyxiating or toxic properties."[75]

This effect-based definition sets a particularly high threshold, which riot control agents and other non-lethal substances are unlikely to reach. Their use would therefore appear to fall outside the scope of the crime.[76] By focusing on the effects rather than on the context of the use, the drafters of the elements of the crimes avoided the arduous task of defining the terms "law-enforcement" and "method of warfare".

The Amendment to Article 8, adopted at the Kampala Review Conference in 2010, makes it also a war crime in non-international armed conflicts to employ asphyxiating, poisonous or other gases as well as poison, poisoned weapons and prohibited bullets. However, Resolution 5 – through which the amendment to Article 8 and the relevant elements of the crimes were adopted – makes clear that law-enforcement situations are excluded from the Court's jurisdiction.[77] This reflects the distinction between both legal paradigms (hostilities and law-enforcement) in relation to the use of prohibited weapons.

Hence, Humanitarian Law clearly provides for a built-in law-enforcement exception in relation to the use of tear gas and similar substances.[78] Armed forces that have become a party to an armed conflict can still make active use of these weapons outside of hostilities.[78] Only where riots and similar disturbances descend into full-blown combat against enemy fighters would they have to abstain from using such weapons.[80]

3.3. Expanding Bullets and Similar Projectiles

The case of expanding bullets is more challenging, because the prohibition on their use appears to be termed in a more absolute language.[81] Resolution 5, adopted at the Kampala Review Conference in 2010, brought some interesting developments.[82] In addition to the law-enforcement reference mentioned above, the preamble also explicitly refers to expanding bullets and stresses that the respective war crime:

"is committed only if the perpetrator employs the bullets to *uselessly* aggravate suffering or the wounding effect upon the target of such bullets, as *reflected* in customary international law".[83]

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68 Art. 1 (5) CWC.

69 W. Krutzsch, E. Myjer and R. Trapp, The Chemical Weapons Convention. A Commentary, Oxford 2014, p. 94.

70 *Id*., pp. 70 and 95.

71 *Id*., p. 101.

72 *Id*., pp. 101-102. In this regard, they adopt the rather extreme position of D. Fry (2010), *supra* note 58, p. 525 (admitting only a case of law-enforcement when the UN is acting "specifically as a domestic police force (and when authorized to act as such), and possibly within areas of their direct and complete control, such as at the U.N. Headquarters in New York").

73 Similarly: D. Fidler, The Meaning of Moscow: "Non-lethal" Weapons and International Law in the Early 21st Century, 87 IRRC (2005), 525-52, pp. 540-47.

74 M. Cottier, War Crimes, Article 8, para 2 a-f, in: O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, 2nd edn, Baden-Baden 2008, p. 180.

75 ICC, Elements of Crimes, 30 June 2000, UN Doc. PCNICC/2000/1/Add.2, Article 8 (2) (b) (xviii) of the ICC Statute, emphasis added.

76 See also: K. Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court, Cambridge 2003, pp. 285-87. Nevertheless, an accompanying footnote clarifies that the narrow definition of the crime by this element does in no way affect the rules of international law with regard to chemical weapons.

77 Resolution RC/Res.5, Amendments to Article 8 of the Rome Statute, adopted on 10 June 2010 by consensus, unnumbered preambular para. 7 (referring to the requirement "that the conduct took place in the context of and was associated with an armed conflict, which consequently confirm the exclusion from the Court's jurisdiction of law enforcement situations"). This formulation is, however, too sweeping, because many war crimes listed under Article 8 can indeed be committed in law-enforcement situations, e.g. torture and other grave breaches involving a quasi-custodial situation.

78 In support of this: K. Watkin, *supra* note 57, pp. 67-69; S. Hains, *supra* note 13, p. 270;

79 Quite logically, the same solution should be available to other non-lethal or less-than-lethal weapons that may be seen as inconsistent with IHL because of their indiscriminate effects. See more generally: C. Mayer, Non-Lethal Weapons and Non-Combatant Immunity: Is It Permissible to Target Noncombatants, in: 6 (3) Journal of Military Ethics (2007), 221-31.

80 Similarly: N. Melzer, *supra* note 52, p. 45; D. Murray et al., *supra* note 52, p. 169.

81 See, for instance: Rule 77, CIHL Study ("The use of bullets which expand or flatten easily in the human body is prohibited").

82 A. Vanheusden, H. Parks and B. Boothby, *supra* note 26.

83 RC/Res.5, *supra* note 77, unnumbered preambular para. 9.

Amnesty International pointed out that this resolution should have no bearing on the elements of the crime or on the "absolute character" of the ban on expanding bullets under Humanitarian Law.[84] That seems, however, to disregard the special context in which the resolution was adopted. The Review Conference was attended by 116 state delegations – including states not party to the Rome Statute (e.g. China, India, Israel, Iran, Russia and the United States) – as well as different UN bodies and regional organisations.[85] During the working group sessions, the delegates stressed that there was "no absolute prohibition" on the use of expanding bullets, which was not challenged by any of the delegations present.[86] This is also reflected by the fact that Resolution 5 was adopted by consensus. Hence, there is strong evidence of subsequent practice among states for a narrower scope of the prohibition on expanding bullets, restricted only to cases of *useless* and thus *unnecessary* suffering. Indeed, the ban was an early concretisation of the general prohibition of means and methods of warfare that cause superfluous injuries and cause unnecessary suffering.[87]

According to Christopher Greenwood, suffering caused by a certain weapon cannot be considered "unnecessary if it is inflicted for the purpose of protecting the civilian population",[88] which may be relevant when individual enemy forces use civilians as hostages or human shields or engage in suicide attacks. This leads to the conclusion that the ban on the use of expanding bullets under Humanitarian Law is subject to a built-in necessity test and thus much narrower than under the *Customary IHL Study* and the *Secretary-General's Bulletin*.[89] In other words, armed forces are allowed to use expanding bullets and similar projectiles in exceptional law-enforcement situations – whenever Human Rights Law would permit or even require the direct use of lethal force – including hostage-taking crises involving armed rebel fighters.[90]

3.4. Perfidy and Plain-Clothed Personnel

The use of undercover or plain-clothed operations presents yet another challenge. As outlined above, they run the risk of qualifying as unlawful perfidy, even if the primary aim is to effect an arrest of suspected militants rather than to injure or kill them. To be precise, while relying on such tactics for the purpose of inoffensive intelligence gathering qualifies as a ruse of war, engaging enemy forces in such ways will usually be unlawful as it involves feigning civilian status with the intent of betraying that confidence.

A major challenge presents itself in the personal scope of those that the perfidy ban is meant to protect. While article 37 of *Additional Protocol I* only mentions the "adversary", the original ban contained in the *Hague Regulations* (1907) refers to "individuals *belonging to the hostile nation* or army".[91] This specific formulation was also included in the crime of treachery of the Rome Statute,[92] at least in relation to international armed conflicts.[93] According to the ICRC, the reference to the "individuals belonging to the hostile nation" clearly covers civilians alongside combatants as possible victims of unlawful acts of perfidy.[94] In view of this, Nils Melzer cautions that any undercover arrest conducted in times of armed conflict may run the risk of amounting to perfidy.[95] This overlooks, however, the object and purpose of the relevant provisions. There is simply no reason why ordinary civilians should fall under the protection of the perfidy ban. As a matter of fact, they are *already* protected against direct attack for being civilians. Unlike in the case of regular combatants or civilians taking a direct part in hostilities, perfidious acts by enemy forces should have no bearing on the confidence and behaviour of ordinary civilians.[96]

The exclusion of ordinary civilians is also supported by the drafting history of the prohibition of treachery, which goes back to the *Brussels Declaration* (1874).[97] The initial draft

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84 Amnesty International, Public Statement, Comments regarding the language included in the resolution amending Article 8 of the Rome Statute, 11 June 2010, www.iccnow.org/documents/AI_Public_Statement_on_Weapons_Amendment_20100611_SJ.pdf. For a similar view: R. Geiß, Poison, Gas and Expanding Bullets: The Extension of the List of Prohibited Weapons at the Review Conference of the International Criminal Court in Kampala, in: 13 YIHL (2010), 337-52, p. 347 ("However, there is a risk that parties to an armed conflict could use the wording in Resolution 5 in order to qualify other operations, i.e., operations that typically have a belligerent nexus, such as for example the house-searches carried out in Afghanistan, per se as law enforcement operations in order to circumvent the jurisdiction of the ICC")

85 See the list of delegations, re-issued 26 August 2010, RC/INF.1 (listing the delegates of 84 state parties, and 32 states not party to the ICC Statute as attending the Review Conference, as well as regional organisations, including the EU, the AU and the Arab League).

86 Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May – 11 June 2010, Report of the Working Group on Other Amendments, 10 June 2010, RC/6/Rev.1, para. 5 ("There was *no absolute* prohibition on the weapons referred to in preambular paragraph 9, i.e. bullets which expand or flatten easily in the human body … It was also stressed that *law enforcement situations are excluded* from the Court's jurisdiction", emphasis added).

87 See, for instance, the wording suggested by the US delegate, with which all other delegates at the Hague Peace Conference in 1899 generally agreed: "The use of bullets inflicting wounds of useless cruelty, such as explosive bullets, and in general, every kind of bullets which exceeds the limit necessary for placing a man hors de combat", emphasis added. Carnegie Endowment for International Peace, The Proceedings of the Hague Peace Conferences. The Conference of 1899, Oxford 1920, p. 80. For the full discussion on the ban of expanding bullets: *Id*., pp. 79-88 and 276-357.

88 C. Greenwood, Keynote Speech Delivered on the Occasion of the Third International Workshop on Wound Ballistics, held in Thun, Switzerland, on 28 and 29 March 2001, cited by: A. Vanheusden, H. Parks and B. Boothby, *supra* note 26, pp. 541-42. Supported also by C. De Cock, CounterInsurgency Operations in Afghanistan. What about the 'Jus ad Bellum' and the 'Jus in Bello': Is the Law Still Accurate?, in: 13 YIHL (2010), 97132, pp. 125-26.

89 Rule 77, CIHL Study; Sect. 6.2, SG Bulletin.

90 D. Murray et al., *supra* note 52, p. 169.

91 Art. 23 (b) of the Hague Regulations (1907), emphasis added.

92 Art. 8 (2) (b) (xi) ICC Statute.

93 Indeed, Art. 8 (2) (e) (ix) ICC Statute, applicable to NIACs, mentions only "combatant adversary". For further guidance see: K. Dörmann, *supra* note 76, p. 478 ("This might lead to the conclusion that killing or wounding a civilian adversary (not taking an active/direct part in hostilities) by means of perfidy is not a war crime under Art. 8 (2) (e) (ix)").

94 Rule 65, CIHL Study, Commentary, p. 226.

95 N. Melzer, *supra* note 52, pp. 47-48.

96 Indeed, ordinary civilians have no reason to believe that they are "entitled to, or obliged to accord, protection" vis-à-vis undercover forces, as required by Art. 37 (1) AP I.

97 Art. 13 (b) prohibiting: "Murder by treachery of individuals belonging to the hostile nation or army". Project of an International Declaration Concerning the Laws and Customs of War, Brussels, 27 August 1874, hereinafter: Brussels Declaration. The Brussels Declaration was initially unsuccessful but served as a blueprint for most rules contained in the subsequent Hague Regulations of 1899 and 1907.

of the provision only protected members of the "hostile army".[98] The "hostile nation" phraseology was only added during the negotiations, but the records are unclear as to the reason for this amendment.[99] It seems, however, most plausible that the term "hostile nation" was meant to refer only to the participants of a '*leveé en masse'* – a concept internationally recognised for the first time by the Brussels Declaration – in addition to the *regular* army.[100] As a consequence, acts of perfidy can only be committed against combatants and civilians taking a direct part in hostilities.

In addition, the official *ICRC Commentary* makes clear that the prohibition of perfidy contained in Article 37 only covers "acts that take place in combat",[101] which is supported by the fact that it is part of Section I "Methods and Means of Warfare" of *Protocol I*. The same conclusion can be drawn from the systematic position of equivalent perfidy provisions in the text of other instruments.[102] In other words, the drafters of these instruments never intended to ban the use of covert operations outside active combat, including such by police and other security forces.[103] This allows for a sufficiently broad law-enforcement exception for the use of undercover and plain-clothed personnel.[104] This includes not only attempts to arrest civilians but also applies to commando raids to capture individual enemy forces or suspected militants who find themselves in the territory under the firm control of one's own or associated forces.[105]

4. Concluding Remarks

This article has shown that the specific humanitarian rules on certain weapons and methods – namely on tear gas and similar chemical agents, expanding bullets and the offensive use of plain-clothed personnel – provide for a sufficiently broad law-enforcement exception. This means that they can also be used in times of armed conflict, even against legitimate targets, provided that the situation falls under the law-enforcement paradigm. As shown above, the use of force in such situations would be subject to the stricter rules under human rights law, which requires a graduated use of force and allows killings only in order to save life.

By reverse logic, situations of active and intensive combat fall under the hostilities paradigm and are primarily governed by Humanitarian Law, including its detailed rules on certain weapons and methods of warfare. Hence, armed forces have to abstain from using tear gas and similar chemical agents, expanding bullets and plain-clothed personnel during combat operations. This makes it even more necessary for commanders to provide careful planning and real-time instructions in order to fully operationalise the suggested distinction between the two paradigms.

Some of the positions taken here should be seen in the broader context of technological development. There is indeed a strong potential for more effective non-lethal or less-lethal weapons that could possibly make the reliance on live ammunition as well as riot control agents and expanding bullets less pressing. A similar effect can be expected from the increasing role of robotics in defence technologies. Nevertheless, while drones, robots and similar devices may help to observe Human Rights and Humanitarian Law obligations more effectively in future military operations, they raise many complex legal and moral questions on their own, which are beyond the scope of this study.[106] ■

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98 Ministère des Affaires Étrangères, Actes de la Conférence de Bruxelles de 1874 sur le Projet d'une Convention Internationale Concernant la Guerre : Protocoles des Séances Plénières, Protocoles de la Commission Déléguée par la Conférence, Annexes, Brussels 1874, p. 5 ("Le meurtre par trahison des individus appartenant à l'armée ennemie").

99 *Id*., p. 41 ("Au litt. B, M. le général de Voigts-Rhetz propose de dire: « appartenant à la nation ou à l'armée ennemie ». L'assemblée admet cette addition").

100 Art. 10, Brussels Declaration ("The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops …"). For the nearly *Id*entical provision eventually adopted, see Art. 2, Hague Regulations.

101 Sandoz et al., Commentary to the Additional Protocols, Geneva 1987, Article 37, para. 1484, p. 430. See also para. 1494, p. 433 ('Article 37 is devoted essentially to combat ... it is aimed at regulating one of the problems of combat") and para. 1524, p. 444 ("The rule prohibits acts performed in combat: killing, injuring and capturing by resort to perfidy").

102 See in particular: Art. 23 (b) Hague Regulations (1907), part of 'Section II – On Hostilities'; Rule 65, CIHL Study (part of 'Specific Methods of Warfare'); Sect. 2.3.6 Perfidy, Sanremo NIAC Manual, p. 43-44 (placed under the heading 'Methods of Combat', as part of the broader chapter 'Conduct of Military Operations').

103 Similarly: N. Melzer, *supra* note 52, p. 48.

104 It is unlikely that the ICC or other tribunals with jurisdiction over the war crime of treacherous killing or injury (contained in the ICC Statute) will ever have to deal with relevant cases due to the limited scope of the crime. But in view of Resolution 5, adopted at the Kampala Review Conference, we can expect that they would confirm the law-enforcement exception suggested here.

105 Similarly: N. Melzer, *supra* note 52, p. 48. This includes calm areas under military occupation: R. Giladi, Out of Context: 'Undercover' Operations and IHL Advocacy in the Occupied Palestinian Territories, in: 14 (3) Journal of Conflict and Security Law (2009), 393-439, pp. 428-31

106 See, for instance: N. Bhuta et al. (eds.), Autonomous Weapons Systems: Law, Ethics, Policy, Cambridge 2015; M. Sassòli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to Be Clarified', in: 90 International Law Studies (2014), 308-40; K. Anderson et al., Adapting the Law of Armed Conflict to Autonomous Weapon Systems, in: 90 International Law Studies (2014), 386-411; H. Nasu and R. McLaughlin (eds.), New Technologies and the Law of Armed Conflict, Leiden 2014.