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Edited by Kjetil Mujezinović Larsen, Camilla Guldaahl Cooper and Gro Nystuen

Excerpt

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## 1

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## Introduction by the editors: is there a 'principle of humanity' in international humanitarian law?

KJETIL MUJEZINOVIĆ LARSEN,  
CAMILLA GULDAHL COOPER AND GRO NYSTUEN

### 1. Object and purpose of this book

In international humanitarian law (IHL), references are frequently made to a 'principle of humanity' or to 'principles of humanity'. Such terms appear not only in scholarly contributions, but also in legal texts, military manuals and other official documents. But despite the frequent use of these terms, the concept of a 'principle of humanity' is vague in several respects. The primary purpose of the present book is to explore important issues that may contribute to greater clarity concerning the possible emergence, existence, function and significance of the 'principle of humanity' in contemporary IHL. The concept gives rise to a wide range of questions, and at the moment it suffices to introduce three challenges.

First, is it a 'principle' in the same sense as other general principles in IHL? When references are made to general principles, such as the principle of distinction, the principle of proportionality or the principle of unnecessary suffering, the use of the term 'principle' implies a particular legal impact of the concepts.<sup>1</sup> Does the 'principle of humanity' have a similar legal impact? If so, what is this impact? Or is this 'principle' more a form of consideration, as opposed to a legal principle, the violation of which would result in some form of reaction?

Secondly, what is 'humanity'? This is not an easily defined term, and it may be given different meanings and carry different connotations depending both on the user of the term and on the situation in which the term is used. To hint at the possible significance of this question, it should be noted that the 'principle of humanity' in this regard clearly is different from the general principles mentioned above, as 'distinction',

'proportionality' and 'unnecessary suffering' carry a particular, and well-defined, meaning in IHL.<sup>2</sup>

Thirdly, what is the scope of application of such a 'principle'? Is it, for example, relevant when assessing means and methods of combat, or does it apply to the treatment of protected persons under the four Geneva Conventions?

A further introduction to the 'principle of humanity' will be provided in section 2 below, where the focus is to describe the legal basis for the possible principle and to introduce its possible legal impact.

As a consequence of the current lack of clarity with regard to a 'principle of humanity', however, this book also addresses two related issues that bring useful perspectives to the discussion. When combined, these two issues may provide arguments that either support or deny the existence of a 'principle of humanity' in contemporary IHL. Furthermore, if one were to conclude that a 'principle of humanity' does not as such exist in IHL, these issues would also allow for an inquiry to be made as to whether such a principle is, at least, *emerging* in IHL.

The first of these issues is whether there has taken, or is taking, place a shift in the fundamental relationship between humanitarian considerations and considerations of military necessity in IHL. Any textbook on IHL will describe how the IHL legal regime incorporates a delicate balance between these two sets of considerations, but this book inquires as to whether recent developments may arguably have resulted in a generally increased impact of humanitarian considerations in IHL at the cost of considerations of military necessity. This inquiry is addressed further in section 3 below.

The second issue is whether regional or national differences are emerging with regard to the importance and emphasis placed on humanitarian considerations in IHL. The underlying, fundamental hypothesis to be tested is whether states which are not directly affected by armed conflicts attach greater weight to humanitarian considerations when interpreting and applying IHL than those states that are more directly involved in armed conflicts. It follows from this hypothesis that the latter group of states thus places greater emphasis on considerations of military necessity. For practical reasons, the hypothesis will be tested only in a limited manner in this book, through an inquiry as to whether a particular 'Nordic perspective' can be identified under IHL. The Nordic states (Denmark, Finland, Iceland, Norway and Sweden) are typical examples of states which have not been affected by armed conflicts on their own soil since the Second World War, and these states therefore provide useful

illustrations in this context. This inquiry is addressed further in section 4 below.

## 2. Legal basis and the arguable legal impact of a 'principle of humanity'

It is well documented that humanitarian considerations have influenced the law of war in various cultures since ancient times, with the result that some restraints should be observed during armed conflict.<sup>3</sup> Famous examples can be found in the Old Testament, where the prophet Elisha told the king of Israel that he should not slay his prisoners;<sup>4</sup> in the old Indian epic *Mahabharata* and the Code of Manu, which prohibited the killing of those who were incapable of fighting, and further prohibited the use of certain weapons;<sup>5</sup> or in ancient Greece, where the use of poison on weapons or the poisoning of wells were prohibited.<sup>6</sup> Principles of a humanitarian character could also be found, e.g., in the Code of Hammurabi King of Babylon, the teachings of Sun Tzu, the practices of the Roman Empire, or in Islamic tradition, to name but a few sources. In the Middle Ages, concepts of chivalry emerged, and the conduct of hostilities was governed by strict principles.<sup>7</sup> While the end of the Middle Ages saw a decline in the impact of considerations of chivalry and humanity on the conduct of hostilities, the Age of Enlightenment brought with it a reinvigoration of these concepts. It had become generally acknowledged that it was prohibited to kill civilians or persons who had laid down their arms, and such thoughts gradually began to be included in international treaties.<sup>8</sup>

For the purposes of the present book, this cursory account should suffice to provide a background for the first legal text that deserves closer attention, namely the 1863 Lieber Code.<sup>9</sup> The Lieber Code is commonly recognised as the first attempt to codify the laws and customs of war. It consisted of 157 articles and was promulgated as law with binding effect for conduct in the field of the Union Army of the United States during the American Civil War. The Code was described – perhaps somewhat over-enthusiastically – by Root in 1913 as 'an instinctive selection of the best and most humane practice' during armed conflicts.<sup>10</sup> A more realistic description is offered by Meron, who states that the Code's 'balancing of humanitarian concerns with military necessity did not always further the dictates of humanity'<sup>11</sup> (and that a small number of provisions even appear both 'harsh' and 'barbaric'<sup>12</sup> to the modern reader), but that the Code was founded on 'broad humanitarian principles' and contained an 'overall humanitarian spirit'.<sup>13</sup> Several examples may be given of provisions where

humanitarian considerations restrict the conduct of hostilities, but in the present context the more relevant issue is the reference made in the Code to a more general 'principle of humanity'. This is particularly evident in Article 4 of the Code, which required those who administered martial law to be 'strictly guided by the principles of justice, honor, and humanity'. While neither the interpretation nor the possible legal impact of these 'principles of ... humanity' are clear, the way in which the term is used implies that Lieber *may* have intended this to be a general standard to be respected even in the absence of specific norms.

A few years later, a form of a 'principle of humanity' was invoked for a very specific purpose in the 1868 St. Petersburg Declaration.<sup>14</sup> While the Declaration itself only contains a narrow, specific ban of a particular type of ammunition, it has acquired an importance that significantly exceeds this narrow scope, namely through its codification of the general principle prohibiting the infliction of unnecessary suffering.<sup>15</sup> The relevant parts of the Declaration are found in the Preamble, where it is said that 'the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable' would be 'contrary to the *laws of humanity*' (emphasis added). While the principle of unnecessary suffering is recognised as a fundamental principle of IHL, the related reference to 'the laws of humanity' has not acquired any independent legal impact. This reference to humanity helped only to justify the creation of the specific norm and to support the more specific principle of unnecessary suffering.

The next step in the development came in the Preamble to the 1899 Hague Convention II and the 1907 Hague Convention IV containing the Regulations on the Laws and Customs of War on Land, namely the well-known Martens Clause. The Clause, in its 1907 version in an English translation, reads:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.<sup>16</sup>

The Martens Clause has been interpreted in various ways, and these interpretations will be addressed below. But first it is useful to note (in the words of Cassese) that the Martens Clause 'has been very frequently relied upon in international dealings, restated by states in treaties, cited

by international and national courts, invoked by organizations and individuals', and it 'approached the question of the laws of humanity for the first time not as a *moral* issue but from a *positivist* ... perspective'.<sup>17</sup>

Four important examples of restatements of the Martens Clause in later treaties ought to be mentioned before we turn to its possible legal impact. First, it was recalled in the Preamble to Additional Protocol II to the Geneva Conventions in 1977 that 'in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience'.<sup>18</sup> Secondly, the Preamble to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW) from 1980 contains a similar clause, where the Contracting States confirmed their determination 'that in cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.<sup>19</sup> Thirdly, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, in its Preamble, stresses 'the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines'. Fourthly, it was reaffirmed more recently in the Cluster Munitions Convention in 2008 that 'in cases not covered by this Convention or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law, derived from established custom, from the principles of humanity and from the dictates of public conscience'.<sup>20</sup>

Finally, it should be recalled that even the four Geneva Conventions of 1949 contain a reference to the 'laws of humanity', as it is provided that a denunciation of the Conventions 'shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience'.<sup>21</sup> It is also worth recalling that Common Article 3 sets forth the fundamental rule that persons taking no active part in the hostilities shall in all circumstances be 'treated humanely'.

Legal instruments therefore provide ample references to 'principles of humanity' or to 'laws of humanity'. But what is the content of this concept, and what is its legal impact? These questions will be addressed to a

varying extent by the different contributions in this book, and this chapter thus only aims to provide some general points of departure for the further discussion.

At the outset, it can be established that no one questions the impact of humanitarian considerations in the *norm-creation* process in IHL. In the creation of binding, positive norms in IHL, humanitarian considerations are always weighed against demands of military necessity, and one may even say that every single norm in IHL represents a compromise between these considerations.<sup>22</sup> Whether one characterises the influential notion as 'humanitarian considerations', a 'principle of humanity' or 'laws of humanity' is then partly a semantic question, and partly a question of how restrictive one is with regard to the use of the term 'principle'.

A more controversial question is whether a 'principle of humanity' exists with a legal impact as an *independent, binding norm* in IHL. Is the legal impact of such a 'principle' limited only to the norm-creation process, or does it have a legal impact as a norm in its own right? This issue is most frequently discussed in relation to the Martens Clause, which has been subject to various interpretations in both legal doctrine and practice. Cassese has identified three main trends.<sup>23</sup>

First, it is contended that the Martens Clause operates only at the level of interpretation of international principles and rules. There are two varieties of this argument. One understanding is that the Clause excludes the *a contrario* argument that when a matter is not covered by the Hague Regulations (or by later conventions where the Clause is reiterated), belligerents would be free to act in whatever manner they wish. Another understanding is that the Clause serves as a general interpretative guideline, in the sense that whenever there are doubts about the interpretation of norms under IHL, the Clause calls for the demands of humanity and public conscience to be taken into account.

Secondly, it is contended that the Clause has had an impact on the sources of international law, and thereby contributed to an expansion of the sources of IHL. The argument is that the Martens Clause has created two new and independent sources of law, namely the 'laws of humanity' and 'the dictates of public conscience'.

Thirdly, it is contended that the Clause is an expression of notions that have motivated and inspired the development of IHL, i.e., that the Clause has had an impact on the norm-creation process.

Cassese also formulates a fourth option, namely to let the Clause have an impact on the assessment of the international customary law status of

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norms or principles in IHL, in the sense that if a principle or rule reflects the laws of humanity or the dictates of public conscience, the requirements of state practice may be loosened while the requirements of *opinio juris* become more prominent.<sup>24</sup> He formulates this view after having reviewed national and international case law referring to the Martens Clause, from which he draws the conclusion that 'no international or national court has ever found that a principle or rule had emerged in the international community as a result of "the laws of humanity" or the "dictates of public conscience"'.<sup>25</sup> Meron has also expressed the view that the legal significance of the Clause is rather restricted. He also focuses on the impact of the Clause in the formation of customary international law, and states further that the Clause should be taken into consideration in evaluating the legality of weapons and methods of war. Meron is also of the opinion that it provides an argument against a finding of *non liquet*.<sup>26</sup>

In the *Kupreskić* case, the Trial Chamber in the International Criminal Tribunal for the Former Yugoslavia (ICTY) suggested a direct legal impact of the Martens Clause. After expressing that the Clause 'enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates', the Chamber continued:<sup>27</sup>

As an example of the way in which the Martens Clause may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul per se of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.

A possible legal impact of a 'principle of humanity' is also discussed in legal literature and other sources without a reference being made to the Martens Clause. For the purposes of the present section, two paragraphs from the UK *Manual of the Law of Armed Conflict* form an appropriate starting point. This manual states first that humanity

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'forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes', and second:

The principle of humanity is based on the notion that once a military purpose has been achieved, the further infliction of suffering is unnecessary. Thus, if an enemy combatant has been put out of action by being wounded or captured, there is no military purpose to be achieved by continuing to attack him. For the same reason, the principle of humanity confirms the basic immunity of civilian populations and civilian objects from attack because civilians and civilian objects make no contribution to military action.<sup>28</sup>

The wording here suggests that a 'principle of humanity' is understood as having an independent legal impact. On closer examination, however, one may equally well interpret the statement to say either that a 'principle of humanity' is simply the moral justification for the well-established principles of unnecessary suffering and of distinction, or even that these two last principles, when combined, form a wider, overarching principle of humanity.

A more recent reference to a 'principle of humanity' is made in the ICRC's 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law'. Under a heading of 'Restraints on the use of force in direct attack', the Guidance states that 'the kind and degree of force permissible in attacks against legitimate military targets should be determined, first of all, based on the fundamental principles of military necessity and humanity'.<sup>29</sup> Quoting the above-mentioned definition in the UK *Manual of the Law of Armed Conflict*, the Guidance continues to state that the 'principle of humanity' is '[c]omplementing and implicit in the principle of military necessity', and that '[i]n conjunction, the principles of military necessity and of humanity reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances'.<sup>30</sup> Notwithstanding, the Guidance acknowledges that this is a controversial issue,<sup>31</sup> and the participating experts had differing opinions as to the extent to which the principles of military necessity and humanity impose restraints on the kind and degree of force used.<sup>32</sup> This serves to underline the main point to be made at present, namely that references to a 'principle of humanity' inevitably invite questions as to the exact content, meaning and legal impact of the term.

### 3. Increased impact of humanitarian considerations *vis-à-vis* other considerations under IHL

As already indicated, this book also inquires as to whether humanitarian considerations are gaining in importance *vis-à-vis* other considerations under IHL, in particular considerations of military necessity. While this is an interesting inquiry in its own right, it should be recalled that the main purpose of including the inquiry in the present book is to provide additional perspectives that may allow for conclusions to be drawn as to the possible existence or emergence of a 'principle of humanity'. The reader should thus not expect to find a complete presentation of this inquiry here.

In the same manner as the inquiry in the previous section, the question of whether humanitarian considerations are gaining in importance must be divided into two parts: first, whether such a shift is taking place in the norm-creation process, and secondly, whether such a shift is taking place in the interpretation and application of specific norms.

With regard to the first issue, it should be recalled that every single norm in IHL represents a balance between humanitarian considerations and considerations of military necessity. This is no less true for norms that have been adopted recently. The inquiry is not, therefore, whether humanitarian considerations now *exclude* considerations of military necessity from having an impact on the norm-creation process, but only whether humanitarian considerations have acquired a relatively stronger impact. The background for raising this issue can be found in the recent adoption of two international conventions: the Mine Ban Convention in 1997,<sup>33</sup> and the Cluster Munitions Convention in 2008.<sup>34</sup> It has been suggested that the Mine Ban Convention was the first time where humanitarian considerations were predominant in the negotiation of treaties prohibiting the use of certain weapons, whereas strategic considerations had played the primary role in previous negotiations.<sup>35</sup> Nevertheless, this observation may be questioned. Already the St Petersburg Declaration of 1868 on exploding ammunition was based primarily on humanitarian and not strategic considerations. The same would appear to apply to a number of treaties dealing with means of warfare, including the Convention on Certain Conventional Weapons of 1980 with its protocols on inhumane weapons such as undetectable fragments and blinding lasers. The significance of the Mine Ban Convention and the Cluster Munitions Conventions was that they went far beyond a prohibition of use of these weapons; they also created a framework for stockpile destruction, clearing of contaminated areas and victim assistance.

At the time when the Mine Ban Convention was being negotiated, it was thought by many experts that the use of anti-personnel mines could create significant military advantages, and that considerations of military necessity supported the use of these weapons,<sup>36</sup> but their use was nevertheless prohibited with no exceptions. Today, it is more commonly recognised that anti-personnel mines are not important as a means of warfare. The same observation also appears to be valid for cluster munitions. They are imprecise and their military utility is in many cases questionable, although many still find that considerations of military necessity indicate that use of the weapons should be permitted.<sup>37</sup> Both anti-personnel mines and cluster munitions represent grave danger to the civilian population, and this danger often remains long after the end of hostilities.<sup>38</sup> Critics of these weapons therefore argue that their use is incompatible with humanitarian considerations, and this view prevailed in the negotiations. In both cases, the outcome can be explained partly by the immense pressure from civil society and the strong public opinion that were displayed.

These factors lead us to the second issue, namely whether humanitarian considerations are also increasingly influential in the interpretation and application of already existing norms. IHL contains a wide range of norms that leave the involved actors with considerable discretion. What is 'excessive' damage to civilian lives or objects? What is 'unnecessary' suffering? What does it mean that a person not taking active part in hostilities is to be treated 'humanely'? And so on. In all assessments of this character, the actor needs to balance humanitarian considerations against other considerations. This is particularly evident with regard to so-called collateral damage, where Article 51.5(b) of the first Additional Protocol<sup>39</sup> explicitly calls for a comparison to be made between the expected incidental damage to civilian lives and objects, and the direct military advantage anticipated.

It is methodically difficult to assess this issue, since it calls for a comparison on two levels of immeasurable values. Not only must humanitarian considerations be balanced against other considerations in a specific case, but one must compare the outcome of this assessment, which is of course based on the facts as the actor saw them at the time, with similar assessments of cases in the past, where the concrete facts and the surrounding circumstances necessarily were different. The best one can do, at least within the boundaries of this book, is to raise the questions and attempt to suggest some trends. One possible trend is that military operations in multilateral enforcement operations are subjected to stronger demands to