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## **HUMANITY IN MODERN WARFARE, EMPATHY AND *JUS IN BELLO***

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### **ABSTRACT**

Based on the work of S. Baron-Cohen, the text considers the relationship of empathy disorders with the perception of humanity in the context of the conduct of hostilities. Making use of philosophical and legal assumptions, it examines the understanding of the principles of humanity and dictates of public conscience, namely the Martens Clause, providing for the moral compass of international humanitarian law. Controversially it argues that the widely proclaimed postulate of warfare humanisation is a kind of paradox. On the one hand, we assume that man is inherently good and, therefore, the conduct of war should be more humane; on the other hand, we perform it by withdrawing man from the battlefield and by replacing him with autonomous systems. Will the replacement of human weaknesses kind by artificial intelligence lead to a revolutionary solution and reduction of suffering or will it only speed up movement of humanity on the slippery slope? In this text, the author will try to draw the reader's attention to the often overlooked ethical dilemmas and issues of fundamental nature which are often lacking in the security studies.

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### **INTRODUCTION**

The law of war and the law of the sea are some of the oldest branches of international law, and there is nothing surprising in this since, as it is clear from the history of mankind, war and trade accompanied Homo sapiens for a long time often fueling each other. Generations and the crystallisation of customary international law norms relied on consensus concerning shared values and interests that the international community, whatever its definition may be<sup>1</sup>, recognised as decisive enough to commit to comply with. As a result, over the centuries, we moved from the total arbitrariness of war, which was the basic prerogative of the absolute sovereign, to the limited right to use force according to the Charter of the United

Nations and collective security system.<sup>2</sup> Whereas the law of sea, while remaining largely conditioned by the economic interests of the countries, will not be subject to further discussion aimed at the mapping of the issues of morality of war in the context of the norms of international humanitarian law (IHL).

At the very beginning it is worth noting that the evolution of the perception of the doctrine and the law of war is expressed, *inter alia*, in their nomenclature. And so the first work of Hugo Grotius, the father of international law, dealt with *the law of war and peace*,<sup>3</sup> the name which only at the end the twentieth century was replaced by *the law*

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<sup>1</sup> R. Kwiecień, *Teoria i filozofia prawa międzynarodowego. Problemy wybrane*, Diffin 2011, pp.30-35.

<sup>2</sup> Art.2 par. 4 and Chapter VII, United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>3</sup> H. Groot, *De jure belli ac pacis*, 1625 [in:] L. Friedman, *The Law of War. A Documentary History*, Volume 1, Random House, New York, 1972.

of armed conflicts to finally take the form of *international humanitarian law*.<sup>4</sup> Application of linguistic analysis is suggestive of the shift that we have experienced: we have to deal with the transfer of emphasis from the *rationae materiae* aspect emphasising the state of war by distinguishing it from the state of peace, to the *rationae personae* focus, namely humanitarian nature. This clearly legible paradox results from the compilation of such a concept as humanity with the state of war and is closely linked to the claim of war being "humanised". This will provide the backbone of the following essay and will be discussed in the context of the principles of humanity under IHL and empathy as a psychological mechanism, based on the research of S. Baron-Cohen.<sup>5</sup>

It should also be anticipated that this essay does not intend to address the traditional understanding of IHL and will be limited to the domain of *jus in bello*, namely the conduct of warfare whose legality and legitimacy is assessed separately from the merits of its commencement which is regulated under *jus ad bellum*. What is more, the reader interested in exploring the detailed rules of the conduct of hostilities and the verification of its legality may feel disappointed because the author focuses on the subjective side, i.e. the question of the morality of soldiers and exciting new developments of military techniques aimed at the withdrawal of men from the battlefield. The author attempts to combine scientific considerations concerning the sources of cruelty and empathy with the legal standards governing warfare, expressed in the basic norm of humanitarian law – the principle of humanity.

## FEELINGS PROVOKED BY THE WAR

War has been and still is sadly one of the main ways of solving international disputes, and in-

creasingly of internal conflicts between the government and insurgents, or between armed groups of regional warlords. The bloodshed experience of the early twentieth century contributed to the acceleration of international works related to the reduction of suffering caused by war. On the one hand the will to protect civilians and "humanise war" were declared,<sup>6</sup> but on the other hand it was decided to limit resort to this method as a means of dispute resolution and to promote other peaceful solutions.<sup>7</sup> This is the most common argument put forward when it comes to the incentives to limit hostilities. Cynically, one may ask if indeed the suffering of millions of people along with the destructions caused by war which affect the economy and infrastructure of numerous countries are the main driving forces behind such peace talks and whether they form the building block of the international system of collective security. Are the subjects of international law, mainly States with a slowly increasing role of global intergovernmental organisations, still driven by values such as compassion and the common good, intrinsically relating to human dignity and the fundamental duty of the State to protect it? It is at least debatable to analyse conscience and consciousness of a State but if we were to accept that ultimately there is an individual human being performing the functions of State bodies reflection on his or her motivation and the sphere of subjective evaluation becomes possible. Another issue is the existence of the "conscience of nations" as referred to by States while adopting the *Martens Clause*.<sup>8</sup>

S. Baron-Cohen believes that the most valuable source of norms of human behavior is

<sup>4</sup> The term "international humanitarian law" is a concept developed by the International Committee of the Red Cross and can be used interchangeably with "humanitarian law", ICRC, *Commentary on the Additional Protocols of 8 June 1977, Geneva, 1987*, p. XXVII. In contrast, the concept of "international law of armed conflict" or "law of war" appear in military jargon and should be used as synonyms. It is significant that the legal doctrine and the international community prefer the term „humane" and soldiers directly involved in the conduct of hostilities prefer a more forceful term.

<sup>5</sup> S. Baron – Cohen, *The Science of Evil. On Empathy and the Origins of Cruelty*, 2011.

<sup>6</sup> Saint Petersburg Declaration of 1868, Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight ; Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925, the Hague Conventions of 1907 and the Geneva Conventions of 1949.

<sup>7</sup> Woodrow Wilson Fourteen Points proposal for ending the war in a speech on January 8, 1918, the Treaty of Versailles of June 28, 1919 ; the Kellogg–Briand Pact (or Pact of Paris, officially General Treaty for Renunciation of War as an Instrument of National Policy) of 1928 and the Charter of United Nations.

<sup>8</sup> Placed in the preamble to the Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907.

not law, religion or society, but empathy. Presenting an approach that combines the knowledge that comes from biology and psychology, he relies on empathy as a free way to resolve disputes. In contrast to the religious, legal and armaments systems, empathy is a sustainable source of reconciliation between individuals and cannot coerce anyone. At the same time he observes that the era of globalisation and acceleration has contributed to the erosion of empathy on the level of small groups (family) and large (society), as disclosed in our consumerist approach to others and their treatment in an objective way. S. Baron-Cohen refers as well to examples from history, focusing primarily on specific social groups suffering under the rule of Nazi Germany. He explains that the lack of empathy partly contributed to the commission of the most serious human rights violations which later gained the title of war crimes and crimes against humanity.

Moreover, according to the author, a new field of international law, international criminal law, should take a full empathy approach into account. This postulate is not new since also domestic systems provide for basic guarantees of the defendant such as the presumption of innocence or the extraordinary mitigation of punishment due to repentance or other extenuating circumstances as well as to the guarantee for a sentenced person not to be treated in an inhuman and degrading manner. The existence of the aforementioned absolute norms in domestic and international legal systems identifies certain rules to be followed regardless of the horror and disgust the committed acts and the villain might induce.

This approach points to overcoming the desire for revenge and making redress without resorting to methods and measures that we reject and condemn. Behind this lies the moral norm that tells us that treating the villain in the way he treated the victim, thus duplicating deprecated behavior, turns ourselves into abusers. Consequently, procedural guarantees and rules arising from substantive law, which sometimes may seem unfair, especially for the victim and his loved ones also concentrate on the positive sides of the accused or convicted person. This is a clear manifestation of empathy legislator deriving its legitimacy from the public. A good reflection of this

desire is a popular movement for the abolition of the death penalty which is still in place in many countries.<sup>9</sup> Criminal law is a special case because it takes the person's intention, and not just an external expression of the will in the form of accomplished act, into account.<sup>10</sup>

Finally, S. Baron-Cohen exposes the need to include empathy in post-conflict processes, carried out among conflicted communities, for whom often clarification of the circumstances and factual findings together with moral satisfaction or personal reconciliation are more valuable than the judgment of an international tribunal or compensation in cash. This thriving branch of international law – *jus post bellum*<sup>11</sup> – provides the best example of the appreciation of this postulate.

While analysing the history of armed conflicts in the twentieth century it seems that emotions and issues that belong to the psychological and personal sphere play a comparable role to the motivation coming from the hard premises of *Realpolitik* associated with the material side of the conflict. The need to take moral reasons into account exists at every stage of the war: its commencement, conduct, and the whole process that takes place at the end of the conflict. The eternal dispute about the duality of duties, provoking the discussion on the relation of law to morality materialises in IHL in the principle of humanity and military necessity. Their crucial role is to guaran-

<sup>9</sup> The death penalty is still foreseen in the legislation of, inter alia, Afghanistan, Saudi Arabia, China, Egypt, India, Iraq, Iran, Japan, Lebanon, North Korea and some states in the US. In contrast, its has not been used in the last 10 years or a moratorium on it was established in, inter alia, South Korea, Cuba and Russia. More: Amnesty International, *Death sentences and executions in 2013 Report*, March 2014.

<sup>10</sup> Tadic, Judgement, ICTY Appeals Chamber {Case No.IT-94-1-A}, 15 July 1999, § 84–104, 123, 137, 145–147, 162.

<sup>11</sup> T. Lachowski, *Transitional justice as substantive component of the responsibility to rebuild within the RtoP framework*, [in:] *Responsibility to Protect in Theory and Practice* [eds. V Sancin, M. Kovic Dine], GV Založba 2013, pp.629 – 652 ; M. Saul, *Local Ownership of Post-Conflict Reconstruction in International Law: The Initiation of International Involvement*, „Journal of Conflict & Security Law”, Oxford University Press 2011, pp. 169-177 ; I. Osterdahl, E. van Zadel, *What Will Jus Post Bellum Mean? Of New Wine and Old Bottles*, „Journal of Conflict & Security Law”, Oxford University Press 2009.

tee a proper balance between the competing interests of civilians and military.

### **EMPATHY: DOES IT MEAN SUFFERING FOR TWO?**

Before examining the norms expressing moral obligations in IHL, S. Baron-Cohen's empathy argument shall be briefly presented and mapped in the context of its disorders classification as well as its causes.

Empathy is a peculiar antithesis of self-admiration. We can talk about it when we suspend our one-sided perception of reality and thus of feelings and needs of the people around us. Instead, we focus on the others and the message being communicated with their behavior – verbally as well as non-verbally. Empathy determines our ability to identify the way of thinking and feeling towards others and to use appropriate methods of response.

Empathy is a trait that scientists explore using quantitative analysis based on two elements: "recognition" and "response" expressed by the „seven-step mechanism" and "empathy quotient".<sup>12</sup> In addition to the above methods to identify the level of empathy of the person, the researchers are able to distinguish areas of the brain responsible for this state.

S. Baron-Cohen describes two types of empathy erosion depending on their reversibility. Cases in which our empathy is to "recover" occur due to "corrosive emotions". Everyone happens to have moments of weakness when the level of compassion for the people accompanying us suddenly drops. This is typically caused by emotions such as jealousy, frustration, revenge, blind jealousy, hatred or the desire to self-defense. In such cases we become more selfish and closed to the feelings of others. It is worth noting that most of these features are in some way inseparable from the battlefield where stressful situations can easily and quickly take possession over thinking and acting in an inadequately trained or emotionally unstable soldier. This type of empathy erosion is temporary. However, the mere fact that these conditions are typically ephemeral does not mean that they could not have a big impact. It is easy to

imagine a soldier in berserk committing the most heinous crimes.

The second case, a much more serious one, is the long-term mental condition that is irreversible and provokes serious disorder of one's empathy levels. People affected by this condition are involuntary prisoners of their "self-focus" and are not able to release themselves from their perception of the world. In addition, while permanent changes that have taken place in the brain prevent self-renewal of the empathy level, the disorder of "empathy circuit" does not allow one to return to a normal condition.

S. Baron - Cohen indicates a complex source of disorders which includes, *inter alia*, changes in the brain (especially in the amygdala), stress in the early stages of life and genetic or environmental factors. At the same time he stresses that in spite of the reflection that comes from the title of the book we shall not speak about evil people but about people with zero or low levels of empathy. Consequently, he presents a typology of zero levels, concluding, with a degree of optimism that, firstly, empathy alone, devoid of logic, is not sufficient for the proper functioning of society. Secondly, a person with zero empathy (especially the so-called "zero-positive") has an opportunity to pursue a different way of moral development through individually developed solutions. It is worth noting that the author argues that zero-level empathy cannot be automatically linked to immoral behavior since the complexity of the human psyche reveals many "shades of gray" of a lack of empathy. Even though it must be assumed that empathy does not necessarily follow a specific code of ethics, it is nevertheless difficult to deny the claim of its usefulness in social relations.

Zero-level empathy should be divided into states in which there are positive characteristics that support the functioning of society, which is a *zero-positive*, and *zero-negative* states which do not have such features and therefore are a source of serious adaptation problems. *Zero-negative* are subdivided into 3 types: Type B (Borderline), Type P (Psychopath) and Type N (Narcissus), while the *zero-positives* encompass people with autism, including a special type of people with Asperger's syndrome.

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<sup>12</sup> More: S. Baron-Cohen, *op.cit.*, Chapter II.

### THE ZERO-NEGATIVES

Type B is characterised by falling into two extreme conditions which may vary in small time intervals: absolute happiness or total breakdown. It determines automatic idealisation or automatic devaluation of external factors. In relation to interpersonal relations this means feeling emotionally insecure. Consequently, Type B feels an intense need for affection, while feeling a deep fear of abandonment. Being emotionally unbalanced, Type B becomes an unpredictable person whose rational decisions are strongly influenced by his or her current emotional state. The perception of reality in two colours is not conducive to the understanding of the complexity of the processes and phenomena and therefore reduces the chances of compliance with social norms and moral values.

Type P is distinguished by a lack of confidence in the safety of interpersonal relations and the lack of the ability to distinguish neutral speech from an emotionally charged one. In consequence, in ambiguous situations Type P chooses the interpretation oriented at the hostility to the communicated content. The milder form of Type P disorder is called *Machiavellianism* and is characteristic for those who exploit others for their own self-promotion. Thus, in order to achieve their objectives these persons will not hesitate to use all available means, including notorious lies. Type P is considered a typical example of the amoral personality whose relation of parent-child went wrong and swayed the normal development of a sense of justice (according to the Lawrence Kohlberg test of morality).

The third type is a zero-negative narcissistic personality, in which the key issue is the "entitlement". Type N leads monologues instead of dialogues using people to achieve his/her own goal to then get rid of them. Type N acts in selfish and self-centered ways, does not pay attention to whether this could hurt someone, yet at the same time, unlike the Type P, is not necessarily cruel. As the name suggests Narcissus is very focused on his own talents and self-admiration.

### THE ZERO-POSITIVES

Individuals with zero empathy can also be seen positively. S. Baron-Cohen defines them as individuals who transpose complicated complexity of

the world and perceive it through the prism of formulas and algorithms, known only to themselves. The problem with this kind of disorder is the difficulty of communication with the outside world as they may not be able to produce information that then could be properly processed by the zero-positive type. The Autistic Type, highly systematising, may be particularly interesting from the point of view of the new warfare revolution, namely the progressive robotisation of conduct of hostilities. It is also directly connected to the legal science concerning the study of codifying legal texts – hence the subsequent framing of „open” textuality of legal norms in specific algorithms and syllogisms.<sup>13</sup>

Autistic people unconsciously treat others as objects albeit without causing any harm. What is more, people affected by Asperger's syndrome may have a career chance in the fields where analytical skills and accuracy count the most since they perceive the world through patterns, compliance with which confirm the validity of their conclusions. Unfortunately, this condition prevents them from understanding situations in which logic does not play a major role, especially social situations requiring tact and intuition and therefore logic reasoning plays secondary role. The problem is that the truth is neither always the result of a certain equation nor is it reproducible nor verifiable. There are serious reasons for which science continues to be challenged by the problem of „finding the truth” despite centuries of development and numerous breakthroughs. Finally, setting up a rigid system excludes the possibility of taking unexpected modifications into account, and is fueled by the strong need for precision. The assumptions of such reasoning do not correspond to the reality of social processes in which the role and importance of feelings cannot be defined in absolute terms, which in consequence could be substituted in appropriate fields in pattern in order to obtain a correct, accurate and reliable answers. Lack of predictability in social situations and the role of external variables requires a certain degree of flexibility and creativity from individuals. Meanwhile, the zero-positive people deal in a much

<sup>13</sup> W. Cyrul, J. Duda, J. Opita, T. Pelech-Pilichowski, *Informatyzacja tekstu prawa perspektywy zastosowania języków znacznikowych*, Wolters Kluwer SA, 2014.

worse manner with tasks requiring improvisation. Empathy requires quick perception of social group complexity: its multiple objectives, interests, presented points of view, changes in mood and social interactions make it sheer impossible for people with zero or low empathy to work well in interpersonal dialogue. At the same time, it should be noted that S. Baron-Cohen holds that these individuals use developed systems to build the algorithm conditioning ethical behavior and treatment of people in accordance with the accepted morality. As a result, people with Asperger syndrome could be considered good lawyers, if they focus on the documentation analysis and argumentation structure while leaving the contact with clients and negotiations to other associates.

It seems that one of the conclusions that can be drawn from the description above is that in the case of recruiting a person to be entrusted with responsible tasks, especially those concerning the protection of common values and interests of others, the level of empathy should be examined in order to possibly diagnose the type of disorder. It is hard to imagine a soldier who is devoid of empathy to be able to meet the principle of humanity in his conduct. On the other hand, a model training of new recruit presupposes exercises designed to strengthen the psyche of a soldier who cannot afford a moment of weakness in a crisis situation. This does not mean, however, that it should eradicate any glimpses of compassion since soldiers must be guided by principles of caution and distinction. Therefore, it implies saving civilians<sup>14</sup> and in any case restraining from using torture or other degrading treatment of prisoners of war.<sup>15</sup> Nevertheless, a person diagnosed as zero-positive may be good a analyst who can deal with the so-called Big Data<sup>16</sup> thanks to the ability to systemise supplement staff or military operational and intelligence analysts. As far as zero-positive skills allow communication, it can be concluded that thanks to the fact that they are

operating a pattern, they may become a valuable source of knowledge on how to develop appropriate algorithms which could then be used in development of automated systems, especially in ever more autonomous systems. The latter, supported by still developing artificial intelligence incite many debates today on the gradual dehumanisation of war and the general withdrawal of men, not so much from the battlefield ("stand-off" war) as from the mere decision-making process.<sup>17</sup>

### HOW MUCH HUMANITY IN WAR?

Empathy being one of the main inhibitions of aggressive reactions may be one of the most important arguments in the debate on the humanisation of wars, which allegedly are to become less aggressive and non-inflicting suffering. It seems that as a consequence of being an ability of reading others' feelings, including those unpleasant and painful, empathy should be a natural barrier of the brutalisation of war. In the previous sections the author explained why in some cases this does not happen. S. Baron-Cohen cites two main causes for this: the irreversible changes in the brain and transitional strong emotional states which are temporarily blinding us to the compassion of others. It is the second cause that will be further discussed in the context of IHL – the principle of humanity.

### MARTENS CLAUSE AND THE REQUIREMENTS OF THE PUBLIC CONSCIENCE

Paying attention to the the horrors of war combined with particular work of the International Committee of the Red Cross significantly contributed to the establishment of inter-State dialogue on the protection of victims of war, happening at the first international conferences. The culmination of the first phase (1899-1907) of shaping contemporary humanitarian law was marked with the signing of the 13 Hague Conventions in 1907. As a result, the so-called Hague Law was created defining the rights and duties of belligerents in the conduct of hostilities and limiting the scope of authorised means of injuring the enemy. The sec-

<sup>14</sup> Art. 35 I Additional Protocol, op.cit.

<sup>15</sup> Art. 17 the Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949.

<sup>16</sup> K. Trapp, *Great Resources Mean Great Responsibility: A Framework of Analysis for Assessing Compliance with API Obligations in the Information Age*, [in:] *International Humanitarian Law and the Changing Technology of War* (eds. D. Saxton), Brill | Nijhoff 2013.

<sup>17</sup> J.S. Thurner, *Examining Autonomous Weapon Systems from a Law of Armed Conflict Perspective*, [in:] *New Technologies And The Law Of Armed Conflict* (Hitoshi Nasu & Robert McLaughlin eds.), 2013.

ond stage, closely linked to the experiences of World War II, resulted in the elaboration of the so-called Geneva Law in order to ensure the protection of the military personnel not participating in the hostilities or hors de combat and persons taking no active part in hostilities, especially civilians.<sup>18</sup> These provisions were written in the fourth Geneva Conventions of 1949 which together with the Hague Law have gained the status of customary international law and constitute the canon of classical IHL.

Interestingly, the Martens Clause, which will be the axis of the analysis below, did not first appear in the original version of the proper text of the international agreement<sup>19</sup> but in the preamble to the 1899 Hague Convention (II) on the Laws and Customs of War on Land. It was then repeated in the preamble to the Hague Convention (IV) 1907. The formula proposed by the Russian delegate Fyodor Martens, provides that

*"Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from **the laws of humanity and the requirements of the public conscience.**"*  
 "[Bold. Aut.].

The flexibility of the clause wording as well as the complementarity of application of the principles of humanity and the dictates of the public conscience was and still is a source of much controversy on the legal nature of this clause.

Literature is abundant in discussions of Martens Clause's place in the legal order<sup>20</sup> but taking into account the context of this study the following study is limited to the presentation of possible interpretations of „the laws of humanity and the dictates of the public conscience”.

At first glance, it would seem counterintuitive that that clause separates humanity with the requirements of the public conscience, which in colloquial meaning comes down to the concept of humanity and consciousness. If we assume a positive vision of human nature, this clause will most definitely fulfill its functions, i.e. provide a "last resort" for persons deprived of protection under contractual or customary law. Hence, given the nature of the formula and the idea of its creator, a pessimistic view of human nature does not seem to fit. But the analysis of IHL as a system secondary to human nature does not allow to set a conclusive thesis as to the vision of human nature. On the one hand, it is a law designed to impose rules of conduct condemning the heinous and cruel acts, and providing appropriate consequences for those who commit such violations. As a result, the following presumption arises: War-time experiences and history prove that war and "bestial"<sup>21</sup> acts are an integral part of human nature. On the other hand, the reference to humanity, even and perhaps above all, in situations of immediate danger to health and life, indicates the fact that the international community wants to believe that man is inherently good and humane [sic !].

Invoking the principle of humanity before international bodies – the guardians of peace and justice – resulted in a rich collection of documents making an attempt to approach this concept using

<sup>18</sup> M. Marcinko, *Historia, źródła i podstawowe zasady międzynarodowego prawa humanitarnego*, IHL course, Faculty of Law and Administration, the Jagiellonian University, 2011.

<sup>19</sup> What took place only in 1977 when its modified version was included in article 1 par. 2 of I Protocol Additional and provides as follows: „In cases not covered by this Protocol 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> T. Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, „The American Journal of International Law”, Vol. 94, No. 1 (Jan., 2000), pp. 78-89; M.N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, „Virginia Journal of International Law”, Volume 50, Issue 4, pp. 795 – 839; T. Widiak, *Klauzula Martensa na tle pojęcia „ludzkość” w prawie międzynarodowym*, [in:] „Międzynarodowe Prawo Humanitarne. Zasady podejmowania działań przy użyciu siły”, Volume III, 2012, pp. 173-186.

<sup>21</sup> More about that war is more "human" than the "bestial" or "animal" D. Livingstone Smith, *The most dangerous animal: Human nature and the origins of war*, Macmillan, 2009.



legal language. Walter Kälin, the UN Special Rapporteur on the situation of human rights in Kuwait, concluded in his final report that the Martens Clause encompasses three main arguments.<sup>22</sup> Firstly, the right of the parties to choose the means and methods of combat is not unlimited. Secondly, parties need to distinguish between those who take part in hostilities and those belonging to the civilian population; the latter should be spared if possible. Thirdly, there shall be no attacks against the civilian population as such.

Moreover, the Martens Clause presented as the foundation of the minimum "requirements of humanity" is applicable in non-international armed conflicts.<sup>23</sup> Therefore, the humanitarianism is meant to primarily distinguish between people involved in the fight and presenting a risk from potentially vulnerable people (civilians) to put limits in the conduct of warfare that cannot cause excessive suffering<sup>24</sup> and which should be carried out with precaution.<sup>25</sup> Moreover, IHL does not presuppose the principle of reciprocity which means that the party to a conflict is obliged to observe the law regardless of the other party insistently breaking it. It may be understood as a desire to ensure a minimum of empathy on the side of legally operating entity. This problem is particularly acute in an era of asymmetric conflicts where one party is at a stronger position and thus the weaker party flees to unethical behavior aimed at the strategic use of the opponent's compliance with humanitarian law. This stands in direct contradiction with the principle of chivalry and recalled "the dictates conscience."<sup>26</sup>

Equally important in this regard is the advisory opinion of the International Court of Justice (ICJ) on the Legality of the Threat or Use of Nuclear Weapons,<sup>27</sup> especially the dissenting opinion of Judge Mohamed Shahabuddeen discussing in detail issues relating to Martens Clause's place in the system of international law, its meaning and method of implementation. Also while analyzing positions of States during the proceedings before the ICJ we shall look closely at the statements of Australia, emphasising the crucial importance of the doctrine of human rights and its impact on "dictates of public conscience".<sup>28</sup>

Consequently, the underlying idea of that concept whose counterpart in domestic legal systems may be found in the rules of social relations<sup>29</sup> shall be presented. Nevertheless, while discussing the public conscience in the national legal system we have a clarity as to what kind of society we refer, whereas in the international community it is characterised by a low degree of organisation and unclear notion of subjectivity it is no longer a case. To whose conscience, and consequently requirements/dictates shall we refer in the realm of international law? The concept of social conscience brings the reference to public opinion to mind, which in the context of armed conflict can be understood as public opinion of parties to the conflict, the United Nations or the world of human community (all people living on the planet). Reference must be made here to the previously made argument. If while speaking of public opinion we mean positive connotations, it is mainly due to the media and non-governmental organisations invariably supporting the development of the common good of all humanity.<sup>30</sup> Un-

<sup>22</sup> Report on the situation of human rights in Kuwait under Iraqi occupation, prepared by Mr. Walter Kälin, Special Rapporteur, E/CN.4/1992/26 of 16 January 1992.

<sup>23</sup> ICJ described the common article 3 to the Geneva Conventions as "elementary considerations of humanity". Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgement of 27 June 1986 I.C.J. Reports 1986, p. 14; General List No. 70, para 218.

<sup>24</sup> Art. 35, I Protocol Additional, *op.cit.*

<sup>25</sup> Chapter IV, *Ibid.*

<sup>26</sup> It is worth noting that S. Baron-Cohen points out that the zero level of empathy is not directly linked to a lack of remorse, and even contrary remorse may be accompanied by actions that we condemn from moral point of view. The problem lies in the fact that the person affected by

a disorder of empathy does not draw conclusions corresponding to the conclusions of compassionate person. Thus, despite being aware of conscience, they do not refrain from actions dictated by their aberrant personality.

<sup>27</sup> ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996.

<sup>28</sup> Requests for Advisory Opinions on the Legality of Nuclear Weapons- Australian Statement, 1996 AUSTL. Y.B. INT'L L. 685, 699

<sup>29</sup> Art. 5 and art. 56 of Polish Civil Code.

<sup>30</sup> In addition, vital role of empathy among volunteers working in the NGO sector shall be noted. Those individuals do not necessarily have to share the tragic experiences of the victims of violence and armed conflict, in order to bring help and mobilize civil society to render selfless help.

fortunately, history teaches us that it is not necessarily what is in accordance with the conscience of one community which can be recognised as such in other factual circumstances or especially by another community.<sup>31</sup> Conflict of political and economic interests has a direct bearing on the moral valuation of the position which in certain cases also relies on the differentiation of religion or origin. That is why the ICRC amounting to more than the traditional individual perception of the national interest of given population or individual adopted impartiality as a principle in helping regardless of nationality, race, religious beliefs, class or political opinions.

In the literature, dispute lasts as to whether concepts of "humanitarian principles and requirements of the public conscience" are of normative value or whether they represent only a kind of rhetorical embellishments highlighting the obligations arising from the invoked "(...) *regulations in force (...), the principles of the law of nations (...), customs*".<sup>32</sup> And if they can be assigned the nature of legal norms, what range of standard do they constitute? Basic positions represent them as the norms of customary law, *jus cogens* norms or interpretation norms, not necessarily limited to IHL but representing a principle of international law generally.

Besides the classic problems associated with the cruelty of war, the modern doctrine of humanitarian law must face new challenges, among which, particularly interesting in the context of the humanisation of war, is a growing presence and new fields of application of remotely controlled or autonomous unmanned systems.

### ROBOTISATION OF HUMANITARIAN WAR?

Along with the development of technology, armed forces have been doing everything to ensure that human lives were protected. The development of aviation, automatic weapons and eventually remotely piloted systems perfectly fits into this paradigm. Except that what at first sight seems to be the ideal direction for the modernisation of the armed forces and the way to mitigate human suf-

fering, at least of one party to the conflict, also leaves us with the uncomfortable impression that such works of science fiction like „Ender's Game” and „Robocop” finally begin to materialise in real life.<sup>33</sup>

Since the Martens clause points out humanity as the foundation of international law one should consider how to regulate the operation of robots, especially those that will be able to make their own targeting decisions.<sup>34</sup> In contrast to the classical sniper's task – vaunted by some condemned by others, yet certainly necessary in most relevant operations – in the case of autonomous action (not automatic)<sup>35</sup> of a combat system we will not find a "humanity" factor, i.e. a human being making the decision. We disregard here the participation and responsibility of the creators of hard- or software which, once activated, decides alone when to deprive a person of his/her life and when to save it. Particularly interesting is the previously cited perspective of autistic persons who in their systemising reasoning resemble such systems. According to S. Baron-Cohen despite zero empathy autistic persons are able to follow the moral code albeit the one creating the code remains unknown. Another issue that should be pondered upon is the context of these situation. It seems that S. Baron-Cohen talks about the possibility of ethical behaviour in everyday situations assuming that such persons will not have direct access to coercive measures or to fighting measures in the context of war. So the question arises as to their ability of translating the provisions of IHL into the pattern which would consequently allow them to distinguish combatants from civilians. Or should the subtle differences between military necessity and proportionality be captured which are causing problems to people without any empathy disorders? Provided the answer was

<sup>31</sup> The support of Serbs for the policies of Mr Milosevic against the Kosovars or anti-Semitism before World War II, which went beyond the borders of one country.

<sup>32</sup> T. Widlak, *op.cit.*, pp. 177-178.

<sup>33</sup> More on the website of Campaign to Stop Killer Robots, [www.stopkillerrobots.org/bibliography/](http://www.stopkillerrobots.org/bibliography/) [accessed on 28.10.2014].

<sup>34</sup> At the present state it is still a "song of the future" - systems that can aspire to the title of autonomous, are being used, among others, in Israel (Iron Dome, the Hapry drone) and the United States (the Patriot air and missile defense system).

<sup>35</sup> W. Boothby, *Some legal challenges posed by remote attack*, „International Review of Red Cross”, Volume 94 Number 886 Summer 2012, s. 584.

yes, the problem of robotisation of hostilities would have been resolved. Unfortunately, the present state of knowledge does not allow the development of this type of pattern as it would constitute a basic artificial intelligence algorithm. As long as scientists do not discover how the human brain performs the reasoning, technicians have to rely on simplified models of limited use<sup>36</sup> since the requirements of morality do not allow to expand the areas in which the experiment's price can consist of the deprivation of the life of a person under legal protection.

The public opinion of the international community at large so far toppled institutions such as slavery, apartheid and colonialism. It seems quite surprising that the discussion on transferring the decision-making process „into the hands of” machines is only at the initial stage given the rapid pace of this field development. The international community, being based on the principle of humanity and following the dictates of conscience, which are taking into account the atrocities of the previous century, should clarify its position towards the use of autonomous unmanned combat systems, so-called killer robots, as soon as possible.<sup>37</sup> It is not just about the moral premises but about cogitation of the role of IHL as a system aimed at the protection of individuals and mankind as a whole.

### PLAYSTATION MENTALITY

Milder form of robotisation of warfare is the development of remotely controlled unmanned combat systems<sup>38</sup> where the operator can be away from the battlefield by thousands of kilometers. In the space of just a few years, these systems have entered into the equipment of numerous armed

forces, including the Polish army. The basic argument was the ability to reduce losses among the military and civilian casualties. The practice of their application and especially the controversial policy of "targeted killing" however, have cast doubt on the legality of the use of these new means of warfare under IHL and the current human rights regime.<sup>39</sup> A particularly interesting topic is the effect of operator remoteness on the moral judgment that takes place when reporting the target and then carrying out the attack. There are voices raising that as robots in the future, operators acting from a secure command station are not susceptible to stress and overwhelming emotions interfering with the rational assessment on the battlefield.<sup>40</sup>

Despite the fact that under the law an operator situated in an office or in a container in the middle of the desert is a legal target of attack the practical aspects of carrying out such a counterattack, turn it into a counterproductive operation. Therefore, it is argued that by eliminating a sense of immediate danger unmanned combat systems may prove to be more "human" than humans, because their operators will not lust for blood and revenge nor will they carry out massacres of civilians (at most, it will be caused by a critical coding error or displayed misinformation).<sup>41</sup> On the other hand, the development of the so-called „playstation mentality”, defined as the impression of unreality of tasks that the operator performs by using the screen and joystick, is often regarded as the moral risks connected with operations carried out remotely. This tends to reflect the

<sup>36</sup> Recognized expert Ronald Arkin believes that his software developed under the name of the Ethical Governor is able to act as a "muzzle" incorporating ethical evaluation to combat unmanned systems. More: R. C. Arkin, P. Ulam, and B. Duncan, *An Ethical Governor for Constraining Lethal Action in an Autonomous System*, Technical Report GIT-GVU-09-02.

<sup>37</sup> Works on this topic progress on the forum of the United Nations Convention on Certain Conventional Weapons (CCW), whose deliberations on 13-16 May 2014 in Geneva, were devoted to consideration of the proposal of VI Additional Protocol governing the use of autonomous weapons.

<sup>38</sup> Commonly, but incorrectly, called drones.

<sup>39</sup> N. Melzer, „Targeted Killing in Contemporary Legal Doctrine”, [in:] N. Melzer, *Targeted Killing in International Law*, Oxford Scholarship 2009 ; T. Żuradzki, *Polityka namierzania i zabijania: aspekty etyczne i prawne*, academia.eu

<sup>40</sup> A contrario : J. Mullen, Report: Former drone operator shares his inner torment, CNN, 25.10.2013, [www.edition.cnn.com/2013/10/23/us/drone-operator-interview/](http://www.edition.cnn.com/2013/10/23/us/drone-operator-interview/) [accessed on 13.10.2014].

<sup>41</sup> Compare with Isaac Asimov's "Three Laws of Robotics" of 1942:

1. A robot may not injure a human being or, through inaction, allow a human being to come to harm.
2. A robot must obey the orders given to it by human beings, except where such orders would conflict with the First Law.
3. A robot must protect its own existence as long as such protection does not conflict with the First or Second Laws.

dual nature of warfare robotisation: a tactical side, taking into account the extent to which the machine is able to replace the pilot intelligence, and an ethical side emphasising the dehumanisation war causes. How ought one refer to the death of a civilian who was killed by „robot hands”? Which values need to be addressed then? What if the robot, which by default will be replacing a man while claiming to be a more effective and efficient agent, will think automatically instead of thinking autonomously?

It should also be remembered that not all atrocities occur out of impulse, stress or confusion - some of them are well planned actions, carried out with „cold blood”, following a thoughtful order. At least questionable is the assertion that, in such situations we can assign empathy the crucial importance. Because of the right to refuse to obey the order, which is a clear and flagrant violation of the fundamental principles of humanitarian law – the so-called „Nuremberg defense”, priority shall be given to the basic understanding of these principles and focus on the protection of the values regardless of whether the person awakens in us fear, disgust or hatred.

In conclusion, the international community's efforts to incorporate the language of morality to international law, including regulation of warfare, should be emphasised. Under the slogan of humanisation of warfare we can read both the desire to minimise the atrocities of war and paradoxical in this combination as well as the desire to withdraw humans from the battlefield. Unmanned combat systems represent both opportunities and threats to humanity depending on whether the development of technology will allow to program morality or will be accompanied by reflection on the possible ethical implications. Therefore, a key issue is to equip such systems with a safety valve allowing to take over control by the man in every critical case.

The ability to empathize is undeniably connected to qualitative analysis while robots are dealing so far only with quantitative analysis. The latter is very helpful in the era of mass access to information although it should be borne in mind that it is not sufficient because the Big Data problem consists not only of the enormity of information but also of its quality assessment.

S. Baron-Cohen's reflections focused on the presentation of people with mental problems preventing them from the correct detection and response to the complexity, also emotional, of the real world created by social interactions. It is doubtful that the code functioning according to the zero-one method (just like individuals with Borderline disorder) will be able to satisfy the requirements of morality, formulated on the basis of international law, and the Martens Clause.

In the end, it seems that „humanity” has become a fundamental value of the international law system in which legal discourse has been recently dominated by the development of human rights doctrine, modeling concepts like sovereignty. From a moral point of view, it seems perfectly reasonable – if the determinant of this revaluation is to protect the weaker party – regardless of the fact whether his/her behavior or views are consistent with ours or whether we are able to identify and understand them. The law applies in spite of empathy not because of it. People affected by disorders of reality perception should follow certain norms due to the fact that they have an impact on another human being and their source is inalienable and unassailable dignity.

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