

quaderni di  
SIDIBlog

9/2022

# SIDIBlog<sup>quaderni di</sup>

il blog della Società italiana di Diritto internazionale  
e di Diritto dell'Unione europea

Volume 9 • 2022

ISSN 2465-0927

Il conflitto russo-ucraino •  
Rapporti tra ordinamento internazionale e dell'Unione europea  
e ordinamento interno • Verso un definitivo superamento  
dell'arbitrato intra-UE in materia di investimenti? •  
Temi di diritto internazionale e di diritto dell'Unione europea

**editoriale scientifica**

E  
S

## **DIRETTORE RESPONSABILE**

PASQUALE DE SENA (UNIVERSITÀ DI PALERMO)

## **CONSIGLIO SCIENTIFICO**

GIOVANNA ADINOLFI (UNIVERSITÀ DI MILANO)  
MAURIZIO ARCARI (UNIVERSITÀ DI MILANO - BICOCCA)  
MARIANO AZNAR GÓMEZ (UNIVERSITAT JAUME I, CASTELLÓN)  
FRANCESCO BESTAGNO (UNIVERSITÀ CATTOLICA DEL SACRO CUORE)  
MARINA CASTELLANETA (UNIVERSITÀ DI BARI “ALDO MORO”)  
EMANUEL CASTELLARIN (UNIVERSITÀ DI STRASBURGO)  
GIUSEPPE CATALDI (UNIVERSITÀ DI NAPOLI “L’ORIENTALE”)  
ANGELA DI STASI (UNIVERSITÀ DI SALERNO)  
SERENA FORLATI (UNIVERSITÀ DI FERRARA)  
MARCO GESTRI (UNIVERSITÀ DI MODENA E REGGIO EMILIA)  
LORENZO GRADONI (MAX PLANCK INSTITUT LUXEMBOURG)  
ALESSANDRA GIANELLI (UNIVERSITÀ DI TERAMO)  
EDOARDO GREPPI (UNIVERSITÀ DI TORINO)  
PETER HILPOLD (UNIVERSITÀ DI INNSBRUCK)  
IVAN INGRAVALLO (UNIVERSITÀ DI BARI “ALDO MORO”)  
FRANCESCO MUNARI (UNIVERSITÀ DI GENOVA)  
GIUSEPPE NESI (UNIVERSITÀ DI TRENTO)  
PAOLO PALCHETTI (UNIVERSITÀ PARIS I)  
GIUSEPPE PALMISANO (UNIVERSITÀ DI ROMA TRE)  
MARCO PEDRAZZI (UNIVERSITÀ DI MILANO)  
LAURA PINESCHI (UNIVERSITÀ DI PARMA)  
RICCARDO PISILLO MAZZESCHI (UNIVERSITÀ DI SIENA)  
PIETRO PUSTORINO (LUISS)  
ILARIA QUEIROLO (UNIVERSITÀ DI GENOVA)  
MARCO ROSCINI (UNIVERSITÀ DI WESTMINSTER, REGNO UNITO)  
LUCIA SERENA ROSSI (UNIVERSITÀ DI BOLOGNA)  
GIULIA ROSSOLILLO (UNIVERSITÀ DI PAVIA)  
CARLO SANTULLI (UNIVERSITÀ PARIS II)  
ROSARIO SAPIENZA (UNIVERSITÀ DI CATANIA)  
MASSIMO STARITA (UNIVERSITÀ DI PALERMO)  
ANTONELLO TANCREDI (UNIVERSITÀ DI MILANO - BICOCCA)  
ATTILA TANZI (UNIVERSITÀ DI BOLOGNA)  
SELINE TREVISANUT (UNIVERSITÀ DI UTRECHT)  
INGO VENTZKE (AMSTERDAM CENTER FOR INTERNATIONAL LAW)  
ILARIA VIARENGO (UNIVERSITÀ DI MILANO)

FRANCESCA CLARA VILLATA (UNIVERSITÀ DI MILANO)  
SALVO ZAPPALÀ (UNIVERSITÀ DI CATANIA)

### **REDAZIONE**

LORENZO ACCONCIAMESSA (UNIVERSITÀ DI PALERMO E PARIS I)  
CATERINA BENINI (UNIVERSITÀ CATTOLICA DEL SACRO CUORE)  
GIACOMO BIAGIONI (UNIVERSITÀ DI CAGLIARI)  
GIUSEPPE BIANCO (BANCA D'ITALIA)  
MARTINA BUSCEMI (UNIVERSITÀ DI MILANO)  
FEDERICO CASOLARI (UNIVERSITÀ DI BOLOGNA)  
FRANCESCO COSTAMAGNA (UNIVERSITÀ DI TORINO)  
FILIPPO CROCI (UNIVERSITÀ DI MILANO)  
ESTER DI NAPOLI (UNIVERSITÀ LUMSA)  
ORNELLA FERACI (UNIVERSITÀ DI SIENA)  
MAURO GATTI (UNIVERSITÀ DI BOLOGNA)  
LORENZO GROSSIO (UNIVERSITÀ DI MILANO - BICOCCA)  
NICOLE LAZZERINI (UNIVERSITÀ DI FIRENZE)  
OLIVIA LOPES PEGNA (UNIVERSITÀ DI FIRENZE)  
DANIELE MANDRIOLI (UNIVERSITÀ DI MILANO)  
DIEGO MAURI (UNIVERSITÀ DI FIRENZE)  
ALICE OLLINO (UNIVERSITÀ DI MILANO - BICOCCA)  
GIUSEPPE PASCALE (UNIVERSITÀ DI TRIESTE)  
LUCA PASQUET (UNIVERSITÀ DI UTRECHT)  
FRANCESCO PESCE (UNIVERSITÀ DI GENOVA)  
CESARE PITEA (UNIVERSITÀ DI MILANO)  
ALICE RICCARDI (UNIVERSITÀ DI ROMA TRE)  
PIERFRANCESCO ROSSI (LUISS)  
ANDREA SPAGNOLO (UNIVERSITÀ DI TORINO)  
FRANCESCA TAMMONE (UNIVERSITÀ DI FIRENZE)  
ENZAMARIA TRAMONTANA (UNIVERSITÀ DI PALERMO)  
SUSANNA VILLANI (UNIVERSITÀ DI BOLOGNA)  
DANIELA VITIELLO (UNIVERSITÀ DELLA TUSCIA)  
GIOVANNI ZARRA (UNIVERSITÀ DI NAPOLI FEDERICO II)  
NICCOLÒ ZUGLIANI (UNIVERSITÀ BOCCONI, MILANO)

### **REFEREES**

DANIELE AMOROSO (UNIVERSITÀ DI CAGLIARI); ALESSANDRA ANNONI  
(UNIVERSITÀ DI FERRARA); ANGELICA BONFANTI (UNIVERSITÀ DI MILANO);  
LEONARDO BORLINI (UNIVERSITÀ BOCCONI, MILANO); ANDREA CALIGIURI

(UNIVERSITÀ DI MACERATA); ELENA CARPANELLI (UNIVERSITÀ DI PARMA); LUIGI DANIELE (UNIVERSITÀ DI NOTTINGHAM); SARA DE VIDO (UNIVERSITÀ CA' FOSCARI, VENEZIA); STEFANO DOMINELLI (UNIVERSITÀ DI GENOVA); LUIGI FUMAGALLI (UNIVERSITÀ DI MILANO); MARIO GERVAZI (UNIVERSITÀ DI BARI "ALDO MORO"); COSTANZA HONORATI (UNIVERSITÀ DI MILANO - BICOCCA); MARIO LAVEZZI (UNIVERSITÀ DI PALERMO); LAURA MAGI (UNIVERSITÀ DI FIRENZE); LORIS MAROTTI (UNIVERSITÀ DI NAPOLI FEDERICO II); LUDOVICA POLI (UNIVERSITÀ DI TORINO); GIUSEPPE PUMA (UNIVERSITÀ LUMSA); JACOPO RE (UNIVERSITÀ DI MILANO); DEBORAH RUSSO (UNIVERSITÀ DI FIRENZE); ANDREA SACCUCCI (UNIVERSITÀ DELLA CAMPANIA "LUIGI VANVITELLI"); STEFANO SALUZZO (UNIVERSITÀ DEL PIEMONTE ORIENTALE); LORENZO SCHIANO DI PEPE (UNIVERSITÀ DI GENOVA), TULLIO SCOVAZZI (UNIVERSITÀ DI MILANO - BICOCCA); SARA TONOLO (UNIVERSITÀ DI PADOVA); ANNAMARIA VITERBO (UNIVERSITÀ DI TORINO), DIEGO ZANNONI (UNIVERSITÀ DI PADOVA); PAOLO ZICCHITTU (UNIVERSITÀ DI MILANO - BICOCCA).

#### **COMITATO EDITORIALE EDIZIONE 2022**

CATERINA BENINI  
FEDERICO CASOLARI  
FILIPPO CROCI  
MAURO GATTI  
LORENZO GROSSIO  
NICOLE LAZZERINI  
DANIELE MANDRIOLI  
DIEGO MAURI  
ALICE OLLINO  
FRANCESCO PESCE  
ALICE RICCARDI  
FRANCESCA TAMMONE  
DANIELA VITIELLO  
NICCOLÒ ZUGLIANI

#### **GRUPPO DI COORDINAMENTO EDIZIONE 2022**

LORENZO GROSSIO  
DIEGO MAURI  
ALICE OLLINO  
FRANCESCO PESCE



## QUADERNI DI SIDIBLOG

<i>Prefazione</i>	9
<i>Introduzione</i>	11
<b>SEZIONE I</b>	
<b>Il conflitto russo-ucraino</b>	
Il conflitto armato in ucraina come catalizzatore di una rinnovata fiducia nei tribunali internazionali? Riflessioni a partire dalle misure provvisorie della Corte internazionale di giustizia	19
LORENZO ACCONCIAMESSA	
Che fine hanno fatto gli Accordi di Minsk?	49
KHRYSTYNA GAVRYSH	
Considerazioni 'a caldo' sull'espulsione della Russia dal Consiglio d'Europa e sulle sue conseguenze sull'applicazione della Convenzione europea dei diritti umani	63
ANDREA SACCUCCI	
Le misure restrittive del commercio adottate nel contesto del conflitto in Ucraina alla prova del diritto OMC	79
DOMENICO PAUCIULO	
Gli effetti economici delle sanzioni imposte alla Russia: una prima valutazione	97
MARCO LOSSANI	
Alcune considerazioni sul ruolo del diritto internazionale in relazione agli attacchi informatici sferrati nel corso del conflitto tra Russia ed Ucraina	121
ALESSANDRO STIANO	
<b>Winter Has Come: Can It Be Used as a «Weapon of War» by Russia?</b>	<b>137</b>
FRANCESCA CAPONE	
Cose dell'altro mondo: la Russia considera obiettivi militari alcune costellazioni commerciali di satelliti	145
DIEGO MAURI	
Riflessioni sul rilievo degli strumenti di diritto internazionale privato nella protezione dei bambini in fuga dall'Ucraina (o ancora ivi residenti)	161
LAURA CARPANETO	

- La compatibilità con il diritto internazionale e la Costituzione italiana dell'invio di aiuti militari all'Ucraina 185  
PIERFRANCESCO ROSSI  
«Il ripudio della guerra preso sul serio». Quattro tesi sull'incostituzionalità dell'invio di armi all'Ucraina 217  
EDAORDO CATERINA, MATTEO GIANNELLI e DOMENICO SICILIANO

## SEZIONE II

### **Rapporti tra ordinamento internazionale e dell'Unione europea e ordinamento interno**

- La giurisdizione penale extra-territoriale e la Convenzione di Palermo: analisi del nuovo orientamento assunto dalla Corte di cassazione a partire dalla sentenza *Tarek* 237  
DANIELE MANDRIOLI  
L'immunità degli Stati come inammissibile 'zona d'indifferenza' in caso di violazione dei diritti umani. Riflessioni a margine della decisione *Changri-la* della Corte suprema brasiliana 253  
ELEONORA BRANCA  
La sentenza *Dobbs* della Corte suprema statunitense: riflessioni nella prospettiva del diritto internazionale dei diritti umani 267  
SARA DE VIDO  
Reati contro il patrimonio culturale, criminalità transnazionale e ordinamento italiano: l'adeguamento agli standard della Convenzione di Nicosia 287  
ANNA ORIOLO  
Diritto UE, poteri officiosi del giudice nazionale e giudicato interno alla luce della prassi recente 305  
GIAMPAOLO MARIA RUOTOLO

## SEZIONE III

### **Verso un definitivo superamento dell'arbitrato intra-UE in materia di investimenti?**

- L'arbitrato in materia di investimenti intra-UE sulla base del Trattato sulla Carta dell'energia: alcune considerazioni sul lodo *Green Power c. Spagna* 319  
GIULIANA LAMPO  
Il lodo *Green Power and SCE v Spain* dalla prospettiva del diritto dell'Unione europea: una risposta al problema dell'effettività dell'autonomia dell'ordinamento? 339  
NICOLA BERGAMASCHI

Intra-EU Investment Arbitration After <i>PL Holdings</i> : Open Questions and Institutional Approaches	357
CHIARA CELLERINO	

#### SEZIONE IV

##### **Temi di diritto internazionale e di diritto dell'Unione europea**

La nuova "strategia" della Corte europea in ordine ai criteri di trattazione dei ricorsi: un primo bilancio dei cd. " <i>impact</i> " cases nell'ottica di una selezione di "qualità"	373
ANNA IERMANO	
The <i>Milanković</i> Case: Do Convictions Based on Rules of Customary International Law Violate Article 7 of the Convention?	387
NICOLE CITERONI	
Il riconoscimento del rapporto di filiazione costituitosi all'estero: la sentenza <i>Pancharevo</i> della Corte di giustizia UE tra i diritti umani e il diritto internazionale privato	403
FRANCESCA MAOLI	
La crisi del Nicaragua e il ruolo dell'Organizzazione degli Stati Americani: il difficile equilibrio fra politica, democrazia e diritti umani	427
MATTIA COLLI VIGNARELLI	
La controversia italo-tedesca sulle immunità giurisdizionali ancora una volta dinanzi alla CIG	443
GIORGIA BERRINO	
Verso un regime europeo uniforme di responsabilità civile delle imprese per violazioni dei diritti umani: riflessioni sulla proposta di direttiva europea sulla <i>corporate sustainability due diligence</i>	473
MARCO FASCIGLIONE	
La dichiarazione di emergenza sanitaria pubblica di rilevanza internazionale: quale futuro? Alcune considerazioni tra quadro normativo esistente e possibili sviluppi alla luce dell'epidemia di vaiolo delle scimmie	513
ALESSIO AZZARITI	
Il genere nei diritti umani: narrazioni e contronarrazioni	529
GIOVANNA GILLERI	

# Winter Has Come: Can It Be Used as a «Weapon of War» by Russia?

FRANCESCA CAPONE\*

TABLE OF CONTENTS: 1. Introduction. – 2. An overview of the relevant facts. – 3. Dual-use, proportionality and incidental harm. – 4. Does dark and cold equal terror?. – 5. Concluding observations.

ABSTRACT: Since 10 October 2022 Russia has carried out an unprecedented number of attacks against Ukraine's energy infrastructures. The attacks have been strongly criticized by several commentators as they appear to be blatant violations of international humanitarian law (IHL). Some comments have focused on the exploitation of the dire winter conditions by the Russian strategy, thus affirming that President Putin has been «using winter as a weapon of war». Others have stressed the fact that such attacks amount to violations on the prohibition of spreading terror against the population, a conduct that is banned under IHL. After sketching a succinct picture of the current situation in Ukraine, the present article will discuss whether we can correctly assume that Russia's actions can be labelled as violations of IHL, especially in light of the peculiar character of energy infrastructures, *and* as acts of terror. The current events, in fact, provide an opportunity to reflect on a number of important issues, including how the «dual-use» of certain military objects is considered in a proportionality assessment and which are the essential elements of the prohibition of acts or threats of violence aimed at terrorizing the civilian population under a IHL perspective.

KEY WORDS: Ukraine – Russia - energy infrastructure - dual-use objects – proportionality – terrorist acts

## 1. Introduction

On 29 November 2022 at a summit in Bucharest, NATO Secretary General Jens Stoltenberg affirmed that Russian President Vladimir Putin is using «winter as a weapon of war» against Ukraine<sup>1</sup>. An article published on the

---

\* Associate Professor of International Law, Sant'Anna School of Advanced Studies, francesca.capone@santannapisa.it.

BBC addresses whether Russia's attacks on Ukraine's energy grids amount to violations of international humanitarian law (IHL). The article concludes that Russia's main motivation, at least in some attacks, is to «terrorize the civilian population»<sup>2</sup>. This statement calls for a much-needed reflection on what kind of acts amount to a violation of Article 51 (2) of Additional Protocol I (API) to the Geneva Conventions (which prohibits «acts or threats of violence the primary purpose of which is to spread terror among the civilian population») and if bringing Ukraine's energy network to its knees can actually be regarded as an illustrative example of unlawfully inflicting terror upon civilians. After sketching a succinct picture of the current situation in Ukraine, this work will discuss whether we can correctly assume that Russia's actions can be labelled as violations of IHL *and* as acts of terror. A preliminary caveat is needed as, from a legal perspective, we can rule out right away that winter can be used as a «weapon of war». As is well known, when we speak of prohibited «weapons» of war we refer to a growing body of international law on arms control that excludes outright the use or possession of certain means of warfare, such as chemical or biological weapons<sup>3</sup>. Therefore, rather than dealing with weapons, i.e. *the instruments* through which force is used in hostilities, this post is concerned with «methods» of warfare, i.e. tactics that, like inflicting terror on a civilian population, are outlawed under treaty law as well as customary international law.

## 2. An overview of the relevant facts

Russia has carried out at least 13 waves of attacks against energy-related infrastructure between 10 October 2022 and 1 February 2023 using hundreds of long-range missiles and drones equipped with explosives<sup>4</sup>. As a result of the attacks, millions of people were without power, and electricity usage was restricted in over a dozen regions. Reports from Kyiv paint a painfully detailed picture of what is currently happening, explaining that Russia has deployed its strategic bombers and warships to unleash aerial devastation on Ukraine's

<sup>1</sup> J. LUKIV, *Ukraine war: NATO pledges to provide more weapons and fix power grid*, in *BBC News*, 29 November 2022.

<sup>2</sup> B. TOBIAS, *Is attacking Ukraine's power grid a war crime?*, in *BBC News*, 1 December 2022.

<sup>3</sup> D. MAURI, *The Use of CBRN Weapons in Armed Conflict*, in A. DE GUTTRY, M. FRULLI, F. CASOLARI and L. POLI (eds), *International Law and Chemical, Biological, Radio-Nuclear (CBRN) Events Towards an All-Hazards Approach*, Leiden, 2022, p. 358 ss.

<sup>4</sup> Human Rights Council, *Report of the Independent International Commission of Inquiry on Ukraine*, UN Doc. A/HRC/52/62, 15 March 2023, para. 40.

critical infrastructure<sup>5</sup>. The attacks have been taking place every few days, with Ukrainian people reacting how they can, e.g. cooking on camping stoves in candlelit kitchens, without being able to predict when the power will be restored and for how many hours.

A recent statement by Dr Hans Henri P. Kluge, WHO Regional Director for Europe, adds further details on the matter, explaining that cold weather can kill as temperatures are predicted to plummet as low as -20°C in parts of the country. As he puts it, «desperate families try to stay warm, many will be forced to turn to alternative heating methods (...) these bring health risks, including exposure to toxic substances that are harmful for children, older people and those with respiratory and cardiovascular conditions, as well as accidental burns and injuries»<sup>6</sup>. The other, unfortunately neglected, issue that he points out is that «all of this is taking its toll on the mental health of Ukrainians. This week, the war enters its 9th month, and already some 10 million people are at risk of mental disorders such as acute stress, anxiety, depression, substance use and post-traumatic stress disorder, or PTSD». This account, besides being heart wrenching, calls for a closer look at the current legal framework, to better reflect on the implications of Russia's strategy.

### 3. Dual-use, proportionality and incidental harm

A preliminary consideration concerns whether power infrastructures represent a legitimate military target under IHL or not. The question has been addressed also elsewhere in relation to the war in Ukraine and beyond<sup>7</sup>. The answer is not straightforward as energy grids serve both military and civilian purposes. What are civilian objects? Article 52(1) of API clarifies that «[c]ivilian objects are all objects which are not military objective », whereas Article 52(2) of API describes the latter as «limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage».

<sup>5</sup> R. CHALLANDS, *Winter starts, Ukraine goes dark: Fear and resolve in blackouts*, in *Al Jazeera*, 30 November 2022.

<sup>6</sup> WHO, *Statement by Dr Hans Henri P. Kluge, WHO Regional Director for Europe*, 21 November 2022, [www.who.int](http://www.who.int).

<sup>7</sup> M. N. SCHMITT, *Ukraine Symposium – Attacking Power Infrastructure under International Humanitarian Law*, in *Lieber Institute West Point-Articles of war*, 20 October 2022.

Although the distinction between military objectives and civilian objects is binary<sup>8</sup>, in the sense that an object(ive) is either civilian or military, as explained by Emanuela-Chiara Gillard there may be circumstances in which an object, in addition to being used for military purposes, continues to carry out a civilian function. She provides exactly the example of an electrical power station, which may supply both a military compound and a hospital<sup>9</sup>.

In these circumstances, the object is sometimes colloquially referred to as a «dual-use object». The term shall not be misread, a dual-use object is a military objective as long as it fulfills the two-pronged test in Article 52(2) API (the first prong is that by its nature, location, purpose or use, the object must make an effective contribution to military action; the second prong is that its destruction must give a definite military advantage in the circumstances ruling at the time), and thus damage caused to the object itself does not constitute damage to a civilian object. Accordingly, any reliance by Ukrainian forces on energy infrastructure for military purposes renders it a lawful military objective subject to Russian attack. Nonetheless, Gillard concludes that States' armed forces may be required, as a matter of policy, to take the civilian function of military objectives into account in the targeting decision-making process and that the civilian deaths and injury (potentially including also mental harm) which can reasonably be foreseen to result from its destruction «must be considered in proportionality assessments»<sup>10</sup>.

The rule of proportionality prohibits attacks expected to cause incidental harm, encompassing both direct and indirect effects as long as the latter are foreseeable, that would be «excessive» in relation to the anticipated concrete and direct military advantage<sup>11</sup>. Neither Additional Protocol I nor military manuals provide guidance on how to interpret the notion of what is «excessive». Yet, in certain situations it is evident that the expected incidental harm will be *excessive in relation to the military advantage*. The concept of «military advantage» is part of both the principle of proportionality and the definition of a military objective. As such, the military advantage that may justify civilian loss, injury and damages for purposes of the principle of proportionality must be (1) concrete (it has to be a real, tangible or measurable effect)

<sup>8</sup> O. POMSON, *Proportionality and Civilian Use of a Military Objective*, in *Opinio Juris*, 24 June 2021.

<sup>9</sup> E.C. GILLARD, *Proportionality in the Conduct of Hostilities, the Incidental Harm Side of the Assessment*, Research Paper, Chatham House, December 2018, p. 35.

<sup>10</sup> *Ibid.*

<sup>11</sup> L. GISEL, *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law*, ICRC International Expert Meeting 22–23 June 2016, [www.icrc.org](http://www.icrc.org).

(2) direct (which refers to the short chain of causation) and (3) military (political, economic or other non-military benefits are not relevant, nor, in the case at stake, is any decline in the morale of the Ukrainian civilian population).

The decision as to whether the incidental harm would be *excessive* is probably the most challenging aspect of the application of the rule of proportionality in practice, especially since a set of attacks against different targets, according to the interpretation of several states, may also constitute an attack «as a whole» and not from part thereof<sup>12</sup>, if the military advantage anticipated from engaging one target is dependent – in part or in full – on engaging other targets. As noted by Gillard, the assessment cannot result from the application of a mechanical formula, but it remains a value judgment to be made by the commander, in good faith and in a reasonable manner<sup>13</sup>, as showed by the very few proceedings, before national and international courts that have addressed the matter so far<sup>14</sup>. Moreover, although the determination of excessiveness from the perspective of a reasonable military commander necessarily leaves commanders with a certain margin of discretion, the International Law Association (ILA) Study Group on the Conduct of Hostilities in the 21st Century agrees that the standard is still an objective one<sup>15</sup>. Based on the information available, it seems quite obvious that Russia is not considering at all whether the attacks on the Ukrainian power grids, assuming that they all qualify as military objectives, are causing excessive civilian casualties and damages in relation to the anticipated concrete and direct military advantage. Also, Russian commanders are not concerned (nor aware?) that attacks that violate the rule of proportionality amount to grave breaches of IHL as stated in Article 85(3) of AP I and are criminalized under Article 8(2)(b)(iv) of the Rome Statute<sup>16</sup>.

#### 4. Does dark and cold equal terror?

Going beyond the infliction of excessive incidental harm that result from at-

---

<sup>12</sup> *Ibid.*

<sup>13</sup> E.C. GILLARD, *Proportionality in the Conduct of Hostilities*, cit., p. 22.

<sup>14</sup> ICTY, Judgment (Trial Chamber) of 15 April 2011, *Prosecutor v Ante Gotovina et al.*, para. 1910.

<sup>15</sup> ILA Study Group, *The Conduct of Hostilities and International Humanitarian Law Challenges of 21st Century Warfare*, Final report, 2017, p. 34.

<sup>16</sup> UN Doc. A/HRC/52/62, cit.

tacks against «dual-use objects», many have stressed that, in general, Russia's actions are directly geared towards inflicting suffering on Ukrainians, but, in the specific case under scrutiny, can this strategy amount also to a violation of the prohibition to spread terror amongst the civilian population?

Judicial consideration of the methods of warfare, including inflicting terror on a civilian population, has been piecemeal and at times partial, at least until the advent of international courts and tribunals, which have devoted some attention to the law governing the conduct of hostilities. In particular, the International Criminal Tribunal for the former Yugoslavia (ICTY) has handled a series of cases that focused on attacks against civilians and civilian objects, and the novel war crime of inflicting terror on a civilian population<sup>17</sup>.

In the *Prosecutor v. Galić case*, which dealt with protracted campaign of shelling and sniping upon civilian areas in Sarajevo, the ICTY famously put together the essential elements of a still oblivious international crime<sup>18</sup>. As far as the *actus reus* of the crime is concerned, the Appeals Chamber found that the sniping and shelling in question undoubtedly fall within the scope of «acts of violence» contemplated under the definition of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population. Elaborating on the content of the rule against terror as a method of warfare, the Appeals Chamber concluded that the acts or threats of violence constitutive of the crime of terror are not limited to direct attacks against civilians or threats thereof *but may include indiscriminate or disproportionate attacks (or threats thereof)*. Moreover, the nature of the acts or threats «may vary if they are committed with the specific intent to spread terror among the civilian population»<sup>19</sup>. Notably, the Appeals Chamber also stated that other purposes might have «coexisted simultaneously» with that of spreading terror, which shall be the primary, but not necessarily the only purpose.

The *mens rea* of the crime is composed of the specific intent to spread terror among the civilian population. Obviously, there are significant challenges in defining the *mens rea* of a crime that is so evidently hinging on the state of mind of both the accused and the impacted civilians<sup>20</sup>. Regarding the intent of the perpetrators, the ICTY affirmed that it could be determined

---

<sup>17</sup> S. DARCY, *Judges, Law and War. The Judicial Development of International Humanitarian Law*, Cambridge, 2014.

<sup>18</sup> ICTY, Judgment (Appeals Chamber) of 30 November 2006, *Prosecutor v. Galić*, para. 102.

<sup>19</sup> *Ibid.*

<sup>20</sup> S. DARCY, *Judges, Law and War*, cit., p. 214.

from the «nature, manner, timing and duration of the acts or threats»<sup>21</sup>. In relation to the impacted civilians, the Appeals Chamber in the *Galić* case clarified that the offense specifically concerns cases of «extensive trauma and psychological damage» as resulting from attacks «designed to keep the inhabitants in a constant state of terror»<sup>22</sup>. Providing further (and most welcome) insight, the ICTY in the *Dragomir Milošević* case explained that causing death or serious injury to body or health represents only one of the possible modes of commission of the crime of terror, and thus is not an element of the offence per se<sup>23</sup>. What is required is that the victims suffered grave consequences resulting from the acts or threats of violence; such grave consequences include, but are not limited to, death or serious injury to body or health<sup>24</sup>. Finally, according to the ICTY, the «actual terrorisation of the civilian population is not an element of the crime», although «evidence of actual terrorisation may contribute to establishing other elements of the crime of terror»<sup>25</sup>.

Disproportionate attacks on power systems during armed conflict might fall within the scope of «acts of violence» contemplated under the definition of the crime of terror against the civilian population. However, as noted also by Michael Schmitt, for now there is no conclusive open-source evidence that the primary purpose of the Russia' strikes against the electrical grids is to terrorize the civilian population<sup>26</sup>. The information available so far shows that bombing the power installations is a strategy designed to break the will of a nation that has humbled Russian forces over the past nine months. The intensity of Moscow's deliberate and unpredictable, yet inescapable, targeting of essential infrastructures also denotes the intention to instill a state of extreme fear in the civilian population, who, for over a month now, could not be sure of when the strikes will start, when they will end and if the power will be restored. The message that in Ukraine «no [...] civilian is safe anywhere, at any time of day or night»<sup>27</sup> has been delivered, loud and clear.

---

<sup>21</sup> ICTY, *Galić*, cit., para. 104.

<sup>22</sup> *Ibid.*

<sup>23</sup> ICTY, Judgment (Appeals Chamber) of 12 November 2009, *Prosecutor v. Milošević*, para. 33.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, para. 35.

<sup>26</sup> M. N. SCHMITT, *Ukraine Symposium – Attacking Power Infrastructure under International Humanitarian Law*, cit.

<sup>27</sup> ICTY, *Galić*, cit., para. 106.

## 5. Concluding observations

There isn't a day that goes by without invoking, through different channels and means, Russia's responsibility for the atrocities committed in Ukraine. We read about claims of genocide, sexual and gender based crimes as well as a wide array of war crimes, committed on the Ukrainian territory since the beginning of the conflict<sup>28</sup>. The goal of this brief post was to clarify whether we can reasonably expect to add one more to the already long list. The answer to the original question is potentially a yes, but the true question should be where, and when, there will be accountability, and hopefully justice for the victims.

---

<sup>28</sup> UN Doc. A/HRC/52/62, cit.