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The Shadow of Success: How International Criminal Law Has Come to Shape the Battlefield

Gabriella Blum

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I. INTRODUCTION

The rise of international criminal law (ICL) and its expansion in the past few decades has been celebrated as one of the greatest achievements of modern international law, advancing justice and the rule of law, deterring atrocities, and protecting victims worldwide. Judges and lawyers fill the halls of courts adjudicating international crimes, activists promote prosecutions, diplomats threaten transgressors with criminal punishment, professors teach international criminal law as a triumphant proof of international law's existence and practical relevance, and eager graduates are flocking to the growing number of jobs that the field now has to offer.

As the project of ICL celebrates its successes, it has also been met with vociferous criticism. As always, these occupy both sides of debates, with some arguing that the field has gone too far¹ and others that it has not gone far enough.² On a more fundamental level, scholars have raised questions with regard to the morality and justness of the entire ICL project, including concerns about the effects of post-war trials on peacemaking³ and the possible misattribution of responsibility to a few individuals for crimes that are collective in nature. More broadly still, others have challenged the wisdom of investing so much in the project of criminal accountability at the expense of other worthy goals—be they post-conflict reconstruction,⁴ social justice

1. These critics have raised concerns about politically-motivated prosecutions; prosecutors and courts that are too remote from the site of alleged crimes to be able to adjudicate them accurately; criminal trials that are too divorced from the broader political and social context to adjudicate fairly; substantive and procedural doctrines that are illiberal at heart; and the illegitimate assertion of jurisdiction over individuals from States who have not signed on to the project of transnational criminal institutions.

2. These critics have raised concerns about gaps in the law that leave accountability deficits; regional biases in case selection (especially at the International Criminal Court); the effective immunity of officials of the most powerful States; and a very slow and ultimately unsatisfying process that results in too few prosecutions of too few perpetrators who are met with too-lenient sentences.

3. See, e.g., Kerstin Bree Carlson, *International Criminal Law and Its Paradoxes: Implications for Institutions and Practice*, 5 JOURNAL OF LAW AND COURTS 33 (2017).

4. See, e.g., Makau Mutua, *The Transformation of Africa: A Critique of Rights in Transitional Justice*, in LAW IN TRANSITION: HUMAN RIGHTS, DEVELOPMENT AND TRANSITIONAL JUSTICE 91 (R. Buchanan & P. Zumbansen eds., 2014) (relating to the International Criminal Tribunal for Rwanda).

more generally,⁵ or the use of military power to prevent or respond to the misconduct of wars.⁶

In this article, I shift the focus to another line of critique, one that has found less expression in existing scholarship and commentary. It concerns the ICL branch of war crimes and its uneasy relationship with the more general body of international law that governs warfare, namely international humanitarian law (IHL). In a nutshell, I wish to draw more attention to the possibility that the war crimes regime may have not only strengthened in some aspects, but also undermined in some other aspects, the regulation of warfare by IHL and, consequently, the very humanitarian goals it was designed to serve.

I am not the first to raise concerns about the effects of ICL on IHL. The relationship between the two fields has garnered attention generally⁷ and in connection with specific doctrines or crimes adjudicated by particular tribunals.⁸ My aim is to build on this prior scholarship and sketch in greater detail how the two fields interact and, especially, how this interaction may be detrimental to humanitarian welfare.

5. See KAREN ENGLE, *THE GRIP OF SEXUAL VIOLENCE IN CONFLICT* (2020).

6. See Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 2 EUROPEAN JOURNAL OF INTERNATIONAL LAW 331 (2009); see also Marco Sassóli, *Humanitarian Law and International Criminal Law*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 111 (Antonio Cassese ed., 2009) (warning against “the increasing effectiveness of international criminal justice” obscuring “the need for prevention through other means, such as education, analysis and reduction of the root causes of violations and reparations to victims independently of any criminal trial”).

7. See, e.g., Sassóli, *supra* note 6; Anderson, *supra* note 6; SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* (2012); ROBERT CRYER, *THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW BY THE INTERNATIONAL CRIMINAL TRIBUNAL* (2013).

8. See, e.g., Rogier Bartels & Katharine Fortin, *Law, Justice and a Potential Security Gap: The “Organization” Requirement in International Humanitarian Law and International Criminal Law*, 21 JOURNAL OF CONFLICT AND SECURITY LAW 29 (2016); SIVAKUMARAN, *supra* note 7; Nicole Urban, *Direct and Active Participation in Hostilities: The Unintended Consequences of the ICC’s decision in Lubanga*, EJIL:TALK! (Apr. 11, 2012), <https://www.ejiltalk.org/direct-and-active-participation-in-hostilities-the-unintended-consequences-of-the-iccs-decision-in-lubanga/>; DEMETRA LOIZOU, *THE IMPACT OF THE INTERNATIONAL CRIMINAL COURT’S ESTABLISHMENT ON THE FURTHER AND FUTURE DEVELOPMENT OF THE CRIMES WITHIN ITS JURISDICTION* (2016); Geoffrey S. Corn, *Regulating Hostilities in Non-International Armed Conflicts: Thoughts on Bridging the Divide Between the Tadić Aspiration and Conflict Realities*, 91 INTERNATIONAL LAW STUDIES 281 (2015); Carolin Wuerzner, *Mission Impossible? Bringing Charges for the Crime of Attacking Civilians or Civilian Objects Before International Criminal Tribunals*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 907 (2008).

My main concern is that by labeling certain violations of the laws of war as “criminal” and setting up dedicated mechanisms for prosecuting and punishing those alleged to have committed these offenses, the content, practice, and logic of ICL are displacing those of IHL. Though the two bodies of law were meant, from the beginning, to occupy distinct though complementary spaces, there is a growing risk that the war crimes arm of ICL—with its own specific doctrines, dedicated institutions, and a seemingly irresistible claim of priority—threatens to overshadow the more diffuse, less institutionalized, and more difficult to enforce domain of international humanitarian law. If so, the risk is not merely conflation or absorption, but an overall weakening of IHL as a distinct legal regime that aims to regulate a broader range of conduct than what counts as “criminal” under international law.⁹

In contrast to the oft-vague prescriptions of IHL, addressed to States and lacking any mens rea definitions, ICL offenses, for good reason, are defined specifically and narrowly to cover only particular (and particularly heinous) forms of wrongdoing by individuals. Yet, precisely because of these features ICL offenses and individual criminal liability have become focal points for normative judgments about behavior in military conflicts that divert attention from alternative IHL standards. Quietly, lawyers, courts, and commentators sometimes seem to accept, if only tacitly, that criminal wrongdoing dominates the field, that it is not only supreme but effectively exhausts the category of impermissible conduct in war. Likewise, efforts to generate public outcry over wartime misconduct rarely focus on IHL violations other than those that also constitute war crimes. Both critics and defenders of any wartime act also are more likely to deploy arguments about the criminality of the act than about its general compliance with IHL.

If at first blush the idea that lesser violations warrant lesser attention seems obvious, one that perhaps resembles our everyday attitudes towards, say, misdemeanors and felonies, or torts that have no corresponding criminal expressions, consider this: in some types of wars, including most of those fought by western democracies, the majority of deaths and injuries do not result from acts that would be classified as war crimes, but from the more

9. Robert Cryer reminded us that “prosecutions for war crimes can never be considered a means of ensuring compliance with all of international humanitarian law for the simple reason that such prosecutions cannot be for the full panoply of international humanitarian law rights and responsibilities.” Robert Cryer, *The Role of International Criminal Prosecutions in Increasing Compliance with International Humanitarian Law in Contemporary African Conflicts*, in *INCLUDING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW: LESSONS FROM THE AFRICAN GREAT LAKES REGION* 188, 189 (Heike Krieger ed., 2015).

“mundane” choices of means and methods of warfare. Across the battlefields of Iraq, Afghanistan, Gaza, Lebanon, Libya, and Mali, the primary causes of harm to people and objects at the hands of standing armies have not been the execution of civilians or prisoners of war, the commission of sexual war crimes, looting, or even torture, even though such crimes have certainly figured in these conflicts. Instead, the lion’s share of the human casualties and the property destruction of protected people and objects on these battlefields can be traced to everyday combat missions carried out with no criminal intent, under resource constraints, conditions of uncertainty, and a general preference for the defense of one’s own forces and civilians. Such missions are subject to various IHL rules but few, if any, of these are the sorts that, when violated, establish individual criminal liability under ICL. In fact, because IHL rules often leave much room for interpretation, it would not at all be clear that a violation did occur. If so, and on the assumption that States do care, at least to some degree, about compliance with international law, the questions of what IHL actually requires of combatants and the implications of violations for both individuals and States become crucial.

If ICL becomes the dominant lens through which battlefield activity is measured and international lawyers—and those they advise—are losing their sense of the idea—and the importance—of “violations” that are not “crimes,” IHL is now being effectively folded into ICL. The threatened collapse of IHL into ICL—through interpretation or application—is not merely intellectually unsatisfying; it poses a serious risk to the attainment of the very same humanitarian values that ICL seeks to protect.

To be sure, IHL has long recognized a normative hierarchy of wrongdoing. The field of ICL emerged from within IHL precisely to ensure accountability for those violations that were deemed to be the worst transgressions, under the label of “grave breaches” (under the 1949 Geneva Conventions) or “serious violations” (under the 1977 Additional Protocols). In some sense, the “grave breaches” regime already began subsuming the general IHL prescriptions, for example, in criminalizing some forms of disproportionate targeting and leaving the consequences of other types of targeting that resulted in civilian casualties unclear. But whereas this regime was originally understood to address a particular subset of IHL violations, the modern ICL regime, with its much more elaborate rules, procedures, and institutions, is now threatening to obscure much more.

The overshadowing of IHL by ICL is not merely a matter of doctrinal constriction, although that in itself is a serious concern. It has also served to substitute for a more elaborate and collaborative discussion, especially at the

inter-State level, over the desirable interpretation and application of IHL in military engagement, as well as of the consequences of violations. The absence of this discussion has allowed States a broader latitude to interpret the rules applicable to their fighting forces and, no less importantly, to continue to avoid their responsibility for making reparations for noncriminal IHL violations—a duty under the law that is almost never fulfilled in practice—and instead channel all remedies to the rare and sporadic criminal prosecution of a few individuals.¹⁰

None of this is to deny that ICL has made valuable contributions to the regulation of war and the achievement of humanitarian aims. It probably has deterred some grave forms of misconduct and strengthened important norms. The jurisprudence of international criminal courts has, at times, expanded the interpretation and application of certain IHL proscriptions and thus strengthened both fields. Moreover, it is not only possible but highly likely that, in some instances, concerns about potential prosecutions have induced militaries to adopt more stringent rules and procedures to ensure compliance with IHL—if only to avoid the threat of criminal prosecution.

My argument, therefore, should not be read as an indictment of ICL. And indeed, I return to discuss the ways in which ICL has worked to strengthen IHL later in the article. Still, the bulk of this article is devoted to the “risks” or “costs” side: the doctrinal and institutional forces that push general IHL to be shaped by ICL and effectively subordinate the former to the latter. Ultimately, I hope this study revives a primary interest in IHL and a reconsideration of the different actors and methods by which it is interpreted, applied, and enforced.

I examine the overshadowing effects of ICL on IHL in both analytical and practical terms. I suggest several interrelated factors that have contributed to the crowding-out effect, including the malleability of IHL rules as compared to war crimes definitions, the existence of dedicated institutions and more elaborate institutional frameworks for enforcement of the latter,

10. To stress, my argument here is not about the opportunity costs of the investment in criminal accountability for war crimes at the expense of other worthy goals. That investment may or may not have proven more cost-effective than other possible opportunities along various dimensions of social utility or even justice per se. I focus here only on the relationship between ICL and IHL, which is a much closer one; whatever else it was designed to achieve, ICL was designed to ensure that the prescriptions of IHL were followed; to deter violations and improve accountability. If so, the effects of ICL on IHL are not a question of substitutes, but a question of how one field came to shape the other, and in the process possibly undermine its own goals.

and the respective political forces that are driving each field and its institutional operation.

To set expectations at the outset, I do not purport to prove my claims with any systematic empirical data, nor do I purport to assess whether, overall, ICL has done more to benefit—or harm—humanitarian welfare. Indeed, many of the claims I raise here would be impossible to put to an empirical test or a systematic evaluation. I do, however, offer some anecdotal evidence for the infusion of IHL with ICL rules and case law and I have greatly benefitted from numerous conversations I have had with lawyers engaged with IHL in militaries, non-governmental organizations (NGOs), and academia.

I begin, in Part II, with a rudimentary overview of the relationship between IHL and the ICL branch of war crimes. The two fields are distinct yet overlapping, with possibly different goals behind them. I note the historical evolution of ICL against the backdrop of IHL and attempt to excavate the intended effects of ICL on compliance with IHL more generally. In the process, I outline the different mechanisms that are in place for ensuring compliance with both fields. In Part III, I detail the concern about ICL’s overshadowing of IHL in practice, offering some concrete examples for the scope of application as well as specific doctrines and prohibitions that play out differently under each branch of international law. In Part IV, I suggest some channels through which overshadowing takes place and discuss some broader institutional considerations of the threat that criminal prosecutions pose to the military practice of applying IHL. In Part V, I offer some counter-evidence to my narrative—factors and forces that have clearly strengthened IHL. Part VI concludes.

II. IHL AND ICL

A. *Historical Evolution*

Legal rules have been a part of warfare throughout recorded human history. Sumerian law prescribed “specific rules” to govern wartime conduct, such as the granting of immunity to enemy negotiators.¹¹ The Babylonians, in their “Code of Hammurabi,” also provided for the protection of the oppressed and for the release of hostages upon payment of ransom.¹² As early as 400

11. Mary Ellen O’Connell, *Historical Development and Legal Basis*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 10, 25 (Dieter Fleck ed., 4th ed. 2021).

12. *Id.*

BC, Indian laws prohibited certain means of warfare, such as poisoned arrows and the killing of a surrendering enemy.¹³ The ancient Greeks and Romans at least purported to respect the life of war victims and prisoners of war, respectively.¹⁴ Rules of warfare continued to evolve through custom, combining conventional practices with a sense of legal obligation. Codification of some of these practices was undertaken by Just War theorists from Thomas Aquinas onwards, and bilateral agreements between would-be warring parties have anchored some of these obligations in mandatory treaty law.

Beginning in the mid-nineteenth century, a host of multilateral conventions on the *jus in bello* were adopted. These conventions covered wars at sea and on land as well as international and non-international armed conflicts, addressed means and methods of warfare, provided guidance on the treatment of combatants who are hors de combat (prisoners of war and the wounded, sick, and shipwrecked) and civilians, provided instructions on the administration of occupied territories, prohibited certain weapons, guided the work of humanitarians on the battlefield, and more. Today, *jus in bello* treaty law comprises over a thousand provisions spread over more than a dozen treaties, some overlapping in their material application, some modifying previous instruments. Importantly, the last major IHL treaties—the Additional Protocols of the Geneva Conventions—were adopted in 1977,¹⁵ with few serious attempts—and little political prospect—for updating or expanding them in treaty form.

Alongside this elaborate treaty law, customary provisions fill in gaps—especially with regard to non-international armed conflicts—and also bind those States that have not ratified all the relevant treaties. The vast majority of IHL rules are binding today on all States around the world, as well as—at least in aspiration—on nonstate armed groups. Other “soft law” instruments that have not yet attained the status of customary international law attempt

13. *Id.*

14. *Id.*

15. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter APII].

to address particular issues, such as air warfare¹⁶ or cyber warfare.¹⁷ These instruments do not have binding force but are sometimes considered instructive, especially in the absence of applicable treaty provisions.

Complementing legislative efforts on the global stage are national instructions to military forces. Mostly in the form of military orders and manuals, these instructions cannot allow what international law prohibits, but they can further constrain military action as well as offer interpretations—even if controversial—of internationally prescribed rules.¹⁸ In combined military operations, countries may agree on adopting particular rules of engagement that would govern their respective forces in that context.

ICL is a more modern development, although precursors trace back at least to the 1918 Treaty of Versailles. This is not to say that the idea of accountability for violation of the rules of warfare is a new one. Ancient texts expounding on the rules of war threatened violators with the wrath of God (or Gods), in addition to punishment by the hand of mortals.¹⁹ And even before the modern codification of the laws of war conventions, there was a general acceptance that, to matter, the rules must be enforced in some tangible way. During the Revolutionary War, for instance, George Washington agreed with the British that the conflict should be “carried on agreeable to the rules which humanity formed” and vowed “to prevent or punish every breach of the rules of war within the sphere of [their] respective commands.”²⁰ The Civil War Lieber Code threatened soldiers who committed wanton murder, rape, or pillage with the death penalty,²¹ and some penal

16. See PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2013) [hereinafter HPCR].

17. See TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt gen. ed., 2013); TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt gen. ed., 2017).

18. See, e.g., BRYAN FREDERICK & DAVID JOHNSON, THE CONTINUED EVOLUTION OF U.S. LAW OF ARMED CONFLICT IMPLEMENTATION: IMPLICATIONS FOR THE U.S. MILITARY (2015), https://www.rand.org/pubs/research_reports/RR1122.html; MICHAEL NEWTON, THE UNITED STATES DEPARTMENT OF DEFENSE LAW OF WAR MANUAL: COMMENTARY AND CRITIQUE (2019).

19. Fleck, *supra* note 11, at 25.

20. OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL at ii (rev. ed. Dec. 2016) [hereinafter U.S. LAW OF WAR MANUAL].

21. See U.S. Department of War, Instructions for the Government of Armies in the Field, General Orders No. 100, art. 44, Apr. 24, 1863.

provisions were also introduced to the 1906 Geneva Convention on the Wounded or Sick²² and the 1907 Hague Convention on Land Warfare.²³

These antecedents notwithstanding, the birth of the field of ICL as such is often dated to the post-World War II Nuremberg trials, which introduced, along with long-recognized war crimes, the crime of aggression and crimes against humanity. In the 1949 Geneva Conventions an article in each of the four conventions was dedicated to “grave breaches,”²⁴ namely, those IHL violations that rise to the level of war crimes and that require State parties to either prosecute the offenders themselves or extradite the offenders to face trial in another jurisdiction. Two similar provisions were included in the 1977 Additional Protocols (API, APII) that elaborate on the rules of warfare in both international armed conflicts (IACs) and non-international armed conflicts (NIACs). The official *Commentary* on the Geneva Conventions explained the regime of “grave breaches” as follows:

If repression of grave breaches was to be universal, it was necessary to determine what constituted them. However, there are violations of certain detailed provisions of the Geneva Convention which would constitute minor offences or mere disciplinary faults which as such could not be punished to the same degree.

It was also thought advisable to draw up as a warning to possible offenders a clear list of crimes whose authors would be sought for in all countries.²⁵

For almost fifty years following the work of the International Military Tribunal and the Nuremberg trials, the only practice of ICL was in various domestic jurisdictions that prosecuted war criminals, mainly those who committed crimes during World War II. After a long lull in international enforcement, ICL was revived in the mid-1990s with United Nations Security Council resolutions that established two dedicated international criminal tribunals: one for the Former Yugoslavia (ICTY) and the other for Rwanda (ICTR).

22. *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, arts. 27–28, July 6, 1906, 35 Stat. 1885, 202 Consol. T.S. 144.

23. *See, e.g.*, Convention No. IV Respecting the Laws and Customs of War on Land, arts. 21–22, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539.

24. *See* Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

25. *See* COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 597 (Jean Pictet ed., 1958) (commentary on art. 147).

Each of these tribunals operated on the basis of its own statute—as laid down by the Security Council—and each would develop a rich ICL jurisprudence.

The project of ICL came of age more fully in 1998 with the adoption of the Statute of the International Criminal Court (ICC), known as the Rome Statute, and the establishment in 2002 of the International Criminal Court in The Hague. As the Preamble to the Rome Statute stressed, the parties affirmed “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”; and committed themselves to put “an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”²⁶

Unlike its precursors, the ICC sought to be universal in its reach rather than limited to a particular conflict, location, or nationality. Political disagreements ultimately forced a more modest compromise by which the ICC can only exercise jurisdiction over individuals from State parties or who have committed crimes in the territories of State parties. The UN Security Council also has the option of granting jurisdiction to the court over particular individuals, even where their own States are not parties to the Rome Statute.

The substantive list of crimes over which the ICC has jurisdiction includes aggression (albeit under a more constrained jurisdictional regime), genocide, crimes against humanity, and war crimes. For present purposes, of particular interest is the list of war crimes detailed in Article 8 of the Rome Statute. Crucially, Article 8 is, in fact, comprised of two lists: a list of offenses that count as war crimes in the context of IACs, and a list of offenses that count as war crimes in the context of NIACs. Of the fifty criminal offenses identified by the Rome statute, about two-thirds apply to IACs, while one-third apply to NIACs. Of the first category, most are crimes that were already defined as grave breaches in the 1949 Geneva Conventions and the 1977 Additional Protocols, though some—such as several of the sexual war crimes—were newly recognized.

Meanwhile, Article 8’s list of criminal offenses that apply to NIACs is based in large part on the jurisprudence of the ICTY and ICTR, as there was no dedicated “grave breaches” regime in IHL for NIACs.²⁷ It is noteworthy

26. Rome Statute of the International Criminal Court, pmbl, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

27. Violations of Common Article 3 of the four Geneva Conventions are not listed in the respective grave breaches articles of these conventions.

that some crimes that were recognized by the ICTY and ICTR were not included in Article 8. For example, targeting operations that cause disproportionate collateral damage are not considered criminal for NIACs in the ICC, even though operations of this nature are criminal for IACs and are widely considered a violation of IHL, even when committed in the course of NIACs.

The ICC never imagined, nor would it have been practical to imagine, that it would adjudicate each and every war crime under its jurisdiction. Instead, it was meant to “have the power to exercise its jurisdiction over persons for the most serious crimes of international concern.”²⁸ No less importantly, unlike its regional predecessors, the ICC did not seek to replace domestic accountability systems but merely to augment them. Under Article 17 of the Rome Statute, the ICC will exercise jurisdiction only if the relevant State is unable or unwilling to do so itself.²⁹ The first chief prosecutor at the ICC, Louis Moreno Ocampo, thus expressed the view that the true success of the court would be when it no longer has cases before it because States themselves would proceed with investigations and prosecutions of the underlying crimes.

Indeed, under the principle of universal jurisdiction—and in line with the grave breaches regime of the Geneva Conventions—some countries were already in the business of adjudicating allegations of war crimes long before the ICC came to life, and many others have incorporated war crimes into their domestic criminal code.

Finally, in parallel to domestic courts and transnational tribunals, a few international-domestic hybrid courts have been established as mechanisms of transitional justice, including Cambodia, Sierra Leon, and Timor-Leste.

B. Legal Incorporation and Enforcement Mechanisms

ICL is the province of courtrooms: war crimes are prosecuted by public or private prosecutors,³⁰ defended by counsel for the alleged perpetrators, and, when prosecutions are successful, result in punishment by incarceration and possibly an order to pay reparations. As noted, IHL conventions demand that parties either try or extradite those suspected of grave breaches, thereby

28. Rome Statute, *supra* note 26, art. 1.

29. *Id.* art. 17.

30. The latter is accepted by some national systems for universal jurisdiction over foreign suspected war criminals.

effectively requiring parties to legislate these grave breaches into their domestic criminal law. Indeed, many countries have dedicated war crimes laws, though others rely on their general criminal code to cover battlefield-related crimes.³¹

The legislation and enforcement of war crimes are widely considered a crucial pillar in the mitigation of the harms of war: “Without the promise of accountability, deterrence and prevention are reduced, resulting in lower protection of civilians and potential victims of war crimes.”³²

The trials of suspected war criminals, whether domestic or transnational, tend to attract significant media and public attention. As the stakes rise, so does the public interest and political fallout. Invariably, such trials spark heated emotional debates over shame and blame, heroism and savagery, competing historical narratives, and fundamental questions of collective responsibility and national or group identity. For all their notability, however, war crime trials are few and far between.³³ For a variety of institutional and political reasons, only a handful of perpetrators ever stand trial for their crimes in any forum. Their true power, therefore, lies not in retribution or even prevention, but more in their symbolic articulation and affirmation of norms and the expressive power of their operation.³⁴ And as I noted in the introduction, though it would be impossible to measure the true deterrent effects of the *possibility* of war crimes prosecutions—especially by foreign tribunals—on the conduct of hostilities, there is anecdotal evidence to suggest there are some. In Israel, for instance, there has been much public discussion of universal jurisdiction-based prosecutions of Israeli officials in Belgium and Spain (all ultimately dismissed), as well as wide coverage of the pending investigation of Israeli wartime and occupation conduct at the ICC. My own personal experience as a former IDF lawyer, as well as conversations with

31. Ward Ferdinandusse, *The Prosecution of Grave Breaches in National Courts*, 7 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 4 (2009).

32. Christof Heyns, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report to the Human Rights Council*, U.N. Doc. A/HRC/23/47 (Apr. 9, 2013).

33. In 2021 there were only fifteen convictions worldwide for international crimes under universal jurisdiction. See TRIAL INTERNATIONAL, UNIVERSAL JURISDICTION ANNUAL REVIEW 2022: UNIVERSAL JURISDICTION, AN OVERLOOKED TOOL TO FIGHT CONFLICT-RELATED SEXUAL VIOLENCE (2022), https://trialinternational.org/wp-content/uploads/2022/03/TRIAL_International_UJAR-2022.pdf.

34. Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 11 (2002).

contemporary military lawyers, suggests that the threat of foreign prosecutions has been a motivating factor in inviting more lawyers into more military decision-making throughout the chain of command.

IHL, especially beyond the “grave breaches,” is primarily a law for States, not individuals. While it is true that IHL contains rules or norms of individual conduct, responsibility for violations of IHL “passes through” the individual to the State. If a particular military official violates a rule of IHL, it is the State that international law deems responsible for the violation. Being a matter of State responsibility, there is no requirement to demonstrate any particular kind of fault or intention on the part of the breaching individual or State; instead, the primary legal obligation at stake—in our context, the IHL obligations—determines what the obligation entails and when a violation occurs. In addition, as with every other international legal obligation, whether enshrined in treaties or customary international law, a breach gives rise to the responsibility of the breaching State and carries with it the obligation to make reparations. The duty to make reparations is a general international law principle and does not require any specific legal prescription to that effect.³⁵ Still, both the Hague Convention of 1907 and API included specific obligations on States to make reparations to other States for violations of the laws of war.

Yet, whereas dedicated international tribunals, most notably the ICC, are authorized to adjudicate certain claimed violations of ICL, there are no such tribunals for the enforcement of IHL. Decisions from international courts interpreting IHL are sporadic and, as explained below, often involve a simultaneous exposition of ICL and IHL. And IHL is typically not enforced in domestic courts, at least not directly. Thus, in practice, States very rarely are found to have violated IHL or required to make reparations,³⁶ even though they, on occasion, extend voluntary *ex gratia* or *solatia* payments for victims of such operations without admitting fault. Various soft law instruments have been advanced in recent decades to create a legal obligation for States to make reparations to the *individuals* they have harmed (as opposed to other

35. *Factory at Chorzów (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 (Sep. 13).

36. The exceptions are where States have been ordered to make reparations by the United Nations Security Council (in the case of Iraq) or under the terms of a peace treaty (Ethiopia-Eritrea).

States), but those have focused exclusively on the category of war crimes, excluding all other violations.³⁷

It is true that States do bear an obligation under IHL to take steps to ensure that the individuals operating on their behalf comply with the law. Moreover, when an individual is suspected of having committed a “grave breach,” the State has a specific obligation to hold that individual criminally accountable. If the State fails to do so, again, it incurs an international responsibility. But when the commission of a war crime is not at stake, compliance with IHL is ordinarily considered a disciplinary matter, subject to disciplinary review and sanctions.

As a matter of practice, even when a State’s military does hold trials for IHL noncompliance outside the internal military disciplinary action, these trials tend to implicate military justice offenses (such as insubordination or conduct unbecoming an officer) rather than general criminal law. And if criminal charges are pursued, an indictment would often list crimes that would not be considered war crimes under ICL, such as negligent homicide or reckless endangerment.

Indeed, the rules of IHL, as such, are rarely found in States’ primary laws. Some domestic laws, especially those on military justice, incorporate the Geneva Conventions, its protocols, and other IHL rules by reference.³⁸ For instance, under Ireland’s Geneva Conventions Act (1962), as amended in 1998, any “minor breach” of the protocols is a punishable offense.³⁹ Still, for the most part, rules on the conduct of hostilities are specified in military orders, manuals, and rules of engagement. Many of these are publicized, but some are classified.⁴⁰ Per the obligation under the Geneva Convention to disseminate its rules within the armed forces, most advanced militaries provide some training on the laws of armed conflict (though with varying degrees of detail and rigor), with many repeating instructions at various points in a soldier’s career.

37. *See, e.g.*, G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005); INTERNATIONAL LAW ASSOCIATION, DRAFT DECLARATION OF INTERNATIONAL LAW PRINCIPLES ON REPARATION FOR VICTIMS OF ARMED CONFLICT (2010).

38. *See, e.g.*, Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2018).

39. Geneva Conventions Act 1962, § 4 (Act No. 11/1962) (Ir.), <https://www.irishstatutebook.ie/eli/1962/act/11/enacted/en/html>.

40. For instance, the military manual of Pakistan is entirely classified.

Beyond the internal military and civilian review mechanisms,⁴¹ a host of international and domestic organizations (e.g., the International Committee of the Red Cross (ICRC) and its national societies, Human Rights Watch, and Amnesty International) dedicate themselves to monitoring compliance and alerting authorities to possible IHL violations, although there is a great pull towards focusing—both substantively and rhetorically—on the commission of crimes.

Last, but not least, in recent decades there has been a proliferation of lawyers up and down the chain of command of western militaries, and lawyers are now heavily involved in all battlefield decision making, from detention to targeting.⁴² They weigh-in on target selection, munitions, time and place of attack, and on the precautions necessary to minimize collateral harm. This development preceded—but was undoubtedly accelerated by—the advent of modern ICL.

C. *Conceptual Differences and Doctrinal Gaps*

Though the substantive content of the list of recognized war crimes has drawn heavily on the prescriptions of IHL, the two bodies of law clearly operate in different dimensions. As explained, IHL is essentially a law of State responsibility (which also applies to some organized nonstate actors), whereas ICL applies to individuals.⁴³ States must comply with the rules of IHL and if they do not, they incur, in principle, international responsibility for their violations, including the general duty to make reparations. The commission of a war crime by an individual, conversely, gives rise to possible prosecution, conviction, and punishment, in addition to a possible duty to make individual reparations. Moreover, the rules of IHL are prospective in nature, intended to guide the planning and execution of military operations on the battlefield, including the dissemination of the rules within the armed

41. For details on several review structures in a number of militaries, see 2 JACOB TURKEL ET AL., PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010, ISRAEL'S MECHANISMS FOR EXAMINING AND INVESTIGATING COMPLAINTS AND CLAIMS OF VIOLATIONS OF THE LAWS OF ARMED CONFLICT ACCORDING TO INTERNATIONAL LAW 43, 152–264 (2013), https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_b1-474.pdf.

42. CRAIG JONES, THE WAR LAWYERS (2021).

43. I bracket here the question of whether, how, and should ICL recognize joint criminal enterprise as a basis for criminal liability. On that question, see Jens D. Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 69 (2007).

forces. International criminal law is more retrospective in nature, even if, like domestic criminal law, it also offers guidance on which behavior to avoid and uses the power of deterrence, among others, to minimize the incidence of crime. From this description, it becomes apparent that efforts to transpose the logic of ICL onto IHL are bound to encounter serious difficulties.

ICL includes detailed guidance on the requirements of holding individuals accountable. The Rome Statute is accompanied by an additional document—the *Elements of Crimes*—that specifies what precisely the prosecution must prove in order to establish criminal liability.⁴⁴ These elaborate on the actus reus and mens rea necessary for criminal liability and sometimes also on the circumstances in which the act in question must have taken place to trigger criminality.

Because of its “pass through” nature, State responsibility for IHL violations is an exercise in anthropomorphism. States do not launch attacks, individuals do. Yet IHL prescriptions, like most other general treaties, rarely offer guidance on the actus reus or mens rea conditions for a violation. As noted, it is frequently an open question whether there are any requirements of mens rea for IHL obligations or whether liability is negligence-based or even strict. This omission becomes even more crucial, even if understandable, given that many IHL obligations—many more than in war crimes—are articulated as standards that leave a wide margin of interpretation and application.

Substantively, there are crucial doctrinal differences between the two fields. IHL rules govern a much wider range of conduct than do ICL rules. The guidance provided by ICL is narrower in focus and is limited to those acts that are especially heinous and hence relatively uncontroversial (at least in the abstract). A wide array of IHL requirements and prohibitions have never been recognized as war crimes and have no expression in the ICL world. Among them are rules on the treatment of prisoners of war (POWs), the notice required before attacks on some types of especially protected targets, and the protections guaranteed to the inhabitants of occupied territories. Much like in the domestic context, not every violation of every regulation gives rise to criminal liability.

Even where the same prohibitions are recognized under both IHL and ICL, important discrepancies arise. IHL rules that, when violated, give rise to “grave breaches” (and which are the doctrinal and historical basis for the

44. INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES (2013), <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

recognized war crimes) tend to be more general in their articulation and focus on acts that must be taken (e.g., precautions in attacks) or to be avoided (e.g., directing attacks against civilians). When incorporated as war crimes into the Rome Statute, at least some of them have been defined in ways that are arguably more demanding (in terms of what the prosecutor would be required to prove) than their IHL counterparts. Consequently, a number of important IHL provisions are open to being interpreted and applied in different ways.

As I shall argue below, the mere hierarchical difference, coupled with the dedicated institutional framework for ICL but not IHL, threatens to weaken the general IHL rules just as it seeks to reinforce the gravest of breaches.

III. DISCREPANCIES AND OVERSHADOWING: SOME CONCRETE EXAMPLES

In 2009, Marco Sassóli, one of the first scholars to raise concerns about the possible relationship between IHL and ICL, noted the basic concerns I am addressing here, but ultimately dismissed them: “Due to the close relationship between violations of IHL and war crimes, strict interpretations of war crimes could have spilled over into limiting the understanding of the corresponding substantive provisions of IHL. As shown above, however, this fear did not materialize.”⁴⁵

Now, more than a decade later, I think there are good reasons to question Sassóli’s conclusions. The conceptual problems remain as they were and the continued practice of ICL adjudication—and the parallel realm of IHL application—may have done more to undermine IHL than he could have appreciated at the time. In this Part, I offer examples to support and explain my skepticism.

A. Material and Temporal Scope of Application

Out of concern for institutional capacity, the Rome Statute limits the jurisdiction of the court to those war crimes that are “part of a plan or policy or as part of large-scale commission of such crimes.”⁴⁶ IHL, by contrast, applies to any violation, and the grave breaches (or serious breaches) regime requires

45. Sassóli, *supra* note 6.

46. Rome Statute, *supra* note 26, art. 8(1).

the prosecution of every instance of such a breach.⁴⁷ This difference is understandable, given the different roles imagined for IHL (regulating all armed conflicts) and the ICC (ensuring accountability for the most egregious war crimes).

More problematic, however, is ICL case law that has sought to set the material and temporal scopes of armed conflicts, both IACs and NIACs, and thus of IHL. The ICTY, in the *Tadić* case, famously ruled on the identification and classification of armed conflicts in terms that give IHL a very broad reach:

We find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. *International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.* Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.⁴⁸

While perhaps meant to ensure that IHL serves as a minimal guarantee even when there is some doubt whether an armed conflict continues to exist as a matter of law (for instance, if there is a lull in the hostilities), there is a serious concern that the *Tadić* decision also expanded the application of IHL—as opposed to the more restrictive peacetime legal regimes—beyond the scope that IHL experts would have attributed to it prior to the tribunal’s ruling.⁴⁹ However well-intentioned, the decision may enable a State to justify an otherwise unlawful use of military force by arguing that an armed conflict within the State exists even in the absence of active hostilities, instead of relying on ordinary policing under the stricter constraints of domestic law

47. *See, e.g.*, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

48. Prosecutor v. *Tadić*, Case No. IT-94-1-AR-72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (emphasis added).

49. DUSTIN A. LEWIS, GABRIELLA BLUM & NAZ K. MODIRZADEH, *INDEFINITE WAR: UNSETTLED INTERNATIONAL LAW ON THE END OF ARMED CONFLICT* (2017). While one could argue that the *Tadić* tribunal was merely interpreting IHL, as opposed to ICL, the fact that it was an ICL-dedicated tribunal has given the decision greater bite for States to rely on.

enforcement and international human rights. This is particularly the case with regard to NIACs, for which the *Tadić* tribunal required “a peaceful settlement” to end the armed conflict—an outcome that few NIACs lend themselves to.

B. NIACs Crimes and IHL

As noted in the brief historical survey of the two fields, the Rome Statute has codified a list of crimes for NIACs that have not found expression in IHL treaties. In general, IHL treaties say far too little about NIACs, with the bulk of their provisions dedicated to IACs (or a very limited subset of NIACs). The “grave breaches” regime, under IHL treaties, is applicable only in IACs, with no corresponding provisions for NIACs. Nonetheless, clearly bolstered by the jurisprudence of the ICTY and ICTR, the customary international law of NIACs has significantly expanded in recent decades, with both IHL advocates and militaries recognizing the near-identical application of numerous provisions of IHL. This mirroring application is evident in the ICRC’s summary of customary rules that apply in both IACs and NIACs.⁵⁰

The Rome Statute incorporation of NIAC-based war crimes was thus not a surprise, but the final outcome was also a compromise with States that believed that the preceding international tribunals had engaged more in legal innovation than the application of existing law. As a result, among the enumerated crimes under the Rome Statute, only about one-third are specifically applicable in NIACs, with the other two-thirds limited to IACs. Simply put, various forms of wartime misconduct that are subject to prosecution under international criminal law when they occur within an IAC are not subject to prosecution when they occur within a NIAC.

There are also some definitional discrepancies between the definitions of crimes as they apply in IACs and NIACs. These language discrepancies,

50. Int’l Comm. Red Cross, *International Humanitarian Law Databases, Rules*, <https://ihl-databases.icrc.org/en/customary-ihl/v1> (last visited Mar. 21, 2023) [hereinafter ICRC Customary Law Study]. The ICRC study is not universally embraced as authoritative on identifying customary international law; yet, the mirroring application, in general, and with a few notable exceptions (mostly with regard to rules on the status and treatment of prisoners of war) is generally accepted.

in turn, might lead to some unintended differences in the way that the corresponding IHL norm is applied by military planners in these respective theaters of conflict.⁵¹

A much more serious concern is that the inapplicability of many war crimes to the NIAC context not only generates a serious accountability gap but also introduces a dramatic departure from the norm of IHL customary law that calls for uniformity of legal obligations in both types of conflicts—a uniformity that, ironically, the *Tadić* tribunal had originally advocated.⁵²

Among the crimes that are limited under the Rome Statute to IACs are disproportionate targeting,⁵³ the intentional targeting of civilian objects,⁵⁴ the intentional starvation of a civilian population,⁵⁵ the use of prohibited weapons,⁵⁶ the intentional and unjustified destruction of property,⁵⁷ perfidy,⁵⁸ and more. All of these crimes, however, are also recognized in IHL and hence provide the basis for condemnation and sanctions when they occur in NIACs—a fact that is easy to lose sight of given that the Rome Statute does not treat them as war crimes when committed in NIACs.

Under present conditions, the failure to appreciate that disproportionate targeting and other offenses are as much IHL violations as ICL violations means that less attention may be given to them when they occur in NIACs. This concern is especially pressing when one bears in mind that the majority of conflicts since the end of World War II have been NIACs.

C. Proportionality

The principle of proportionality appears throughout IHL. For example, API Article 51(4) prohibits indiscriminate attacks, with Article 51(5)(b) defining

51. Compare, e.g., Rome Statute, *supra* note 26, art. 8(2)(a)(ii) (“torture or inhuman treatment, including biological experiments”), *with id.* art. 8(2)(c)(i) (“violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture”), *and id.* art. 8(2)(a)(iii) (“wilfully causing great suffering, or serious injury to body or health”), *with id.* art. 8(2)(c)(i) (“violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture”).

52. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶¶ 88–97 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (stating the importance of uniform application of IHL in an armed conflict).

53. Rome Statute, *supra* note 26, art. 8(2)(b)(iv).

54. *Id.* art. 8(2)(b)(ii).

55. *Id.* art. 8(2)(b)(xxv).

56. *Id.* art. 8(2)(b)(xx).

57. *Id.* art. 8(2)(a)(iv).

58. *Id.* art. 8(2)(b)(vii).

such attacks to include “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Article 57(2)(a) further instructs States that “those who plan or decide upon an attack shall: . . . refrain from deciding to launch any attack which” is disproportionate, repeating the language of Article 51(5)(b). There is a general agreement that the proportionality *in bello* principle does not only require the avoidance of excessive collateral harm, but also the duty to employ precautions to minimize such harm, as provided under Article 51(7) of API. Indeed, Article 57 adds that States must cancel or suspend any attack that “may be expected” to cause disproportionate harm, as well as give advance warning “of attacks which may affect the civilian population, unless circumstances do not permit.”

Disproportionate targeting is not only an IHL violation, but, if sufficiently culpable, can also amount to a serious breach with criminal consequences. Article 85(3) defines indiscriminate attacks, which are serious breaches, as those “committed wilfully” and with the “knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.” The ICRC *Commentary* explained that “wilfully” means that:

the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them (“criminal intent” or “malice aforethought”); this encompasses the concepts of “wrongful intent” or “recklessness”, viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences.⁵⁹

Presumably, however, the proportionality obligations as enumerated in Articles 51 and 57 aim to capture more, for purposes of States’ obligations, than what would constitute a grave breach under Article 85 for purposes of individual liability; but how much more?

The different standards of proportionality that were presented in API have caused, and continue to cause, much confusion. Though every published military manual stresses proportionality obligations, and though pro-

59. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 3474 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON ADDITIONAL PROTOCOLS].

proportionality is widely considered a foundational principle of IHL, most commentators regard it as vague, malleable, requiring the weighing of incommensurate values, and thus very difficult to apply in practice. Indeed, the principle's potential penal ramifications were on the minds of the drafters of Article 57, who had considered the vague wording of the provision and the difficulty inherent in balancing military advantage and expected incidental advantage. As the *Commentary* explains, differing opinions were

mainly related to the very heavy burden of responsibility imposed by this article on military commanders, particularly as the various provisions are relatively imprecise and are open to a fairly broad margin of judgment. These concerns were reinforced by the fact that, according to Article 85 (*Repression of breaches of this Protocol*), failure to comply with the rules of Article 57 may constitute a grave breach and may be prosecuted as such. Those who favoured a greater degree of precision argued that in the field of penal law it is necessary to be precise, so that anyone violating the provisions would know that he was committing a grave breach.⁶⁰

Echoing these concerns, Hays Parks would observe years later that the principle of proportionality as contained in API would, by “American domestic law standards . . . be constitutionally void for vagueness.”⁶¹

The immediate consequence of this vagueness, however, is that, to date, it is simply unclear what it takes for a *State* to be responsible for a violation of the principle (as opposed to an individual committing a war crime). How should the phrase “may be expected to cause,” per Article 57, be applied to State action in the absence of any meaningful “State mens rea”? Does Article 57 suggest a negligence-like standard? What would amount to negligence? And, if negligence, would following the other requirements—of a duty to employ precautions and provide advance warning—suffice to establish lack of negligence? Or, alternatively, does Article 57 require a showing of recklessness on the part of the individual carrying out the attack, without which there is no State responsibility?

Against the indeterminacy of the IHL's proportionality principle, the corollary crime of disproportionate targeting, listed in the Rome Statute, looms large, precisely because it not only specifies the requisite mens rea but

60. *Id.* ¶ 2187.

61. W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1, 173 (1990).

also the standard for what would be considered a disproportionate effect of an attack. Article 8(2)(b)(iv) reads as follows:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be *clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated.⁶²

Unlike its IHL articulation, to constitute a crime under this ICC provision, an attack must result in harm that is “clearly” excessive. The harm must also be measured against not only the direct advantage anticipated from the attack but against the “overall” advantage as well. And the attack must be intentional.⁶³ Evidently, these additions were meant to raise the bar for the conduct to amount to a crime.⁶⁴

62. Rome Statute, *supra* note 26, art. 8(2)(b)(iv) (emphasis added). The ICC document ELEMENTS OF CRIMES elaborates on the mens rea requirements and states that the prosecutor must prove that:

The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

ICC ELEMENTS OF CRIMES, *supra* note 44, art. 8(2)(b)(iv) element 3. Footnote 37 of the ELEMENTS OF CRIMES further explains that: “[T]his knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of the value judgement must be based on the requisite information available to the perpetrator at the time.” *Id.* at 13 n.37.

63. On the difficulty of interpreting what “intentional” means in this context, see an excellent analysis in Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICHIGAN JOURNAL OF INTERNATIONAL LAW 79 (2013). Ohlin claims that in some sense the ICC has lowered the bar in comparison with the grave breaches regime. Since I focus here on the relationship between the criminality of the offense and the general State obligation, I do not take full account of Ohlin’s analysis in this context.

64. The word “overall” was a crucial point of debate at the Geneva Conference. Whereas some delegations at the conference (such as Australia, New Zealand, Germany, and Canada) considered the addition of the word “overall” a mere improvement on the drafting of the Additional Protocol I provision, several delegations worried that it would allow the long-term advantages of winning the war per se to be taken into account. See Julian Wyatt, *Law-Making at the Intersection of International Environmental, Humanitarian and Criminal Law: The Issue of Damage to the Environment in International Armed Conflict*, 92 INTERNATIONAL REVIEW OF THE RED CROSS 593, 634 (2010).

Unsurprisingly, international criminal tribunals, to date, have rarely attempted to adjudicate prosecutions for disproportionate targeting, and where they have, they have not found any defendant guilty,⁶⁵ although they have frequently convicted those who meet the elements of the distinct offenses of indiscriminate bombardment of civilian areas or the intentional targeting of civilians.⁶⁶ The ICTY trial chamber in the case of *Gotovina et al.* found disproportionate targeting that resulted in the killing of civilians, but the decision—in a widely criticized judgment—was overturned by a 3-2 panel of the appeals chamber.⁶⁷ As one of the dissenting judges remarked, if *Gotovina* was not the case in which to find disproportionate attacks to be criminal, no attack would be *disproportionate* enough (as opposed to deliberate or indiscriminate) to amount to a war crime.⁶⁸ More broadly, as Jens Ohlin has put it, “[i]nstead of dealing with the fraught legal complications of proportionality . . . proportionality is sidestepped as legally irrelevant.”⁶⁹ Indeed, Article 8(2)(b)(iv) has been interpreted as capturing only obvious cases of indiscriminate attacks, as was made clear by the ICC Office of the Prosecutor when looking into alleged breaches of proportionality by British forces in Iraq.⁷⁰

65. The ICTY trial chamber in the case of *Gotovina et al.* found disproportionate targeting that resulted in the killing of civilians, but the decision was overturned by the appeals chamber. Prosecutor v. Gotovina et al., Case No., IT-06-90-A, Appeals Judgment, ¶ 82 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

66. Rogier Bartels, *Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials*, 46 ISRAEL LAW REVIEW 271 (2013); Rogier Bartels, *Prlić et al.: The Destruction of the Old Bridge of Mostar and Proportionality*, EJIIL:TALK! (July 31, 2003), <https://www.ejiltalk.org/prlic-et-al-the-destruction-of-the-old-bridge-of-mostar-and-proportionality/>.

67. In the case of *Prlić*, the ICTY trial chamber held that the defendant’s attack against a bridge was disproportionate to its military advantage, though no civilians were directly harmed in the attack. Prosecutor v. Prlić, Case No. IT-04-74-T, Trial Judgment, ¶ 1584 (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2013).

68. *Gotovina*, *supra* note 65, ¶¶ 6–11, 14 (dissenting opinion of Fausto Pocar, J.).

69. Ohlin, *supra* note 63, at 87.

70. See Luis Moreno-Ocampo, Letter from the Office of the Prosecutor dated Feb. 9, 2006, at 6–7, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (noting that “[w]ith respect to Article 8(2)(b)(iv) allegations, the available material with respect to the alleged incidents was characterized by . . . a lack of information indicating clear excessiveness in relation to military advantage” and that subsequent evidence from the UK and publicly available sources “did not allow for the conclusion that there was a reasonable basis to believe that a clearly excessive attack within the jurisdiction of the Court had been committed”).

When transposed back to IHL, the potentially detrimental effects of the stricter definitions under the Rome Statute become apparent: The proportionality principle is meant to guide combatants, *ex ante*, in their combat decisions, and it is presumably meant to be broader in reach than the sort of willfully overbroad attacks that would also constitute a grave breach or a war crime. But since we have few guiding principles on how to interpret and apply the original proportionality principle, placing the bar for compliance at the criminal conduct level threatens to shrink the IHL principle substantially. Note also that the other related IHL requirements that States cancel or suspend any attack that may cause disproportionate harm and give warning in advance of attacks that may affect civilians have not been incorporated into the Rome Statute, nor do their violations count as grave breaches.

Though the IHL principle of proportionality could arguably incorporate such standards as negligence and recklessness, for purposes of State responsibility, the corollary war crime under the ICC would exclude any liability for, among other things, disproportionate harms resulting from mistake. If an attacker errs in their evaluation of the excessiveness of the damage or simply fails to conduct an evaluation, it has arguably failed to act with criminal intent. This appears to be the basis for the result in the ICTY Prosecutor's Committee investigation into NATO's 1999 bombing campaign over the Federal Republic of Yugoslavia.⁷¹ Notably, footnote 36 of the ICC *Elements of Crimes* adds the following (non-clarifying) clarification:

The expression "concrete and direct overall military advantage" refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. *The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict.*⁷²

This cautionary note was no doubt added with the appreciation that the Rome Statute definition sets the bar higher than IHL does. Indeed, the ICRC emphasized at the Rome Conference that the addition of the word "overall"

71. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶ 55 (June 8, 2000), *reprinted in* 39 INTERNATIONAL LEGAL MATERIALS 1257 (2000) [hereinafter NATO-FRY Report] ("As a general statement, in the particular incidents reviewed by the Committee, it is the view of the Committee that NATO was attempting to attack objects it *perceived to be legitimate military objectives*") (emphasis added).

72. ICC ELEMENTS OF CRIMES, *supra* note 44, at 13 n.36 (emphasis added).

could not be interpreted as changing existing IHL. But since we do not know what exactly *is* a violation of IHL, the cautionary note does little to prevent the overshadowing effects that the crime of disproportionate targeting has on its IHL counterpart.

Finally, as noted earlier, the corollary obligations to employ precautions in attacks, as well as to give early warning, have not been incorporated into the Rome Statute. I will say more about the effects of that omission later, but for now it is clear that without criminal repercussions, compliance with these IHL obligations allows military planners greater discretion in how they understand and implement them. In relevant jurisprudence by the ICTY, the tribunal held that the precautionary provisions in the API were “loose,” further threatening to weaken their importance for IHL compliance.⁷³

Several militaries have, in recent years, developed their own codex for the assessment of proportionality, both *ex ante* and *ex post*. For example, the collateral damage estimate is an algorithmic calculations methodology employed by the U.S. military⁷⁴ and other advanced militaries⁷⁵ to gauge the impact of a military strike. As the estimated harm to civilians rises, the planned operation must be pre-approved by higher ranking officers, up to the U.S. Secretary of Defense or the President.⁷⁶

It is not publicly known how the algorithms were designed or what the baseline input given to them is. More importantly, for our purposes, the U.S. military has never claimed that the collateral damage estimate is *required* under IHL. In fact, when describing its approach in other contexts, such as the counter-insurgency doctrine or targeted killings outside the active zone of hostilities, it explicitly has stated that the constraints it assumes upon itself in military operations are a matter of tactical and strategic expediency, not legal requirements.

73. Prosecutor v. Kupreškić et al., Case No. IT-95-16, Trial Judgment, ¶ 524 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) (characterizing precautionary provisions as “loose international rules” with a “wide margin of discretion [afforded] to belligerents”); *Id.* ¶ 526 (referring to the “loose prescriptions of Articles 57 and 58”).

74. See Chairman, Joint Chiefs of Staff, Instruction 3160.01, No-Strike and the Collateral Damage Estimation Methodology (2009).

75. See Scott Graham, *The Non-Combatant Casualty Cut-off Value: Assessment of a Novel Targeting Technique in Operation Inherent Resolve*, 18 INTERNATIONAL CRIMINAL LAW REVIEW 655, 678–79, 684–85 (2018) (describing application of the collateral damage estimate by coalition forces, including Canada, in Operation Inherent Resolve).

76. Chairman, Joint Chiefs of Staff, Joint Publication 3-60, Joint Targeting ¶ I-8 (2013).

The concerns I am raising here are not merely theoretical. There are clear examples of the ICL's more demanding definition of proportionality impacting the IHL's understanding of the principle. The Danish Military Manual, for instance, instructs the armed forces that "Foreseeable collateral damage may under no circumstances be *clearly* disproportionate to the concrete and direct military advantage anticipated to be gained."⁷⁷ And the New Zealand Manual of Armed Forces Law (2017) states that: "To be disproportionate the attack must be 'launched wilfully and in the knowledge of circumstances giving rise to the expectation of excessive civilian casualties.' See also . . . ICRC Customary IHL rule 14."⁷⁸ In fact, however, ICRC Rule 14 makes no reference to attacks done "wilfully" or to the element of knowledge of circumstances. Instead, it says that States are under an obligation "to reach their decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time."⁷⁹ The term "wilfully" comes from the grave breaches regime and its ICL expressions, including the ICTY decision in the *Galić* case,⁸⁰ which the New Zealand manual references in the same footnote.

The shadowing effects are not limited to military manuals. In 2010, the German Federal Court of Justice investigated alleged IHL violations in the *Fuel Tankers* case.⁸¹ The case arose after a German colonel ordered an airstrike on two fuel tanker trucks that had been stolen by members of the Taliban in Afghanistan. By the time the trucks were bombed, however, the Taliban had abandoned them and the tanker trucks were surrounded by civilians siphoning off fuel for their own use. As a result, the bombs killed or severely injured more than one hundred civilians.

In attempting to determine whether the attack was proportionate, the court held that there were no excessive civilian casualties in the bombing of

77. DANISH MINISTRY OF DEFENCE, MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS 284 (2016) [hereinafter DANISH MANUAL].

78. 4 NEW ZEALAND DEFENCE, DM (2 ed.), MANUAL OF ARMED FORCES LAW: LAW OF ARMED CONFLICT § 8.6.1 n.33 (2019) [hereinafter NEW ZEALAND MANUAL].

79. ICRC Customary Law Study, *supra* note 50, r. 14.

80. Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

81. Bundesgerichtshof [BGH], Fuel Tankers Case, Decision, Apr. 16, 2010, III ZR 140/15 (Ger.), <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=071de1999c01f5114ea9e467f0e843dd&nr=76401&pos=1&anz=2>.

the tanker trucks, referring to the NATO-FRY bombing report and evoking the language of “obvious” disproportionality in its legal analysis:

Colonel (Oberst) Klein’s actions were lawful under international law and therefore justified under domestic criminal law. . . . Even if the killing of several dozen civilians would have had to be anticipated (which is assumed here for the sake of the argument), from a tactical-military perspective this would not have been out of proportion to the anticipated military advantages. . . . *an infringement is only to be assumed in cases of obvious excess where the commander ignored any considerations of proportionality and refrained from acting “honestly,” “reasonably,” and “competently.”* This would apply to the destruction of an entire village with hundreds of civilian inhabitants in order to hit a single enemy fighter, but not if the objective was to destroy artillery positions in the village. *There is no such obvious disproportionality in the present case.*⁸²

As Joshua Andresen has pointed out, “the opinion conflates the legal standard of proportionality with the evidentiary requirements of holding someone criminally liable for its violation. While it may be right to think that criminal liability should be reserved only for the most egregious violations of the law, there is no reason to think that the criteria of criminal liability define the threshold of proportionality violations.”⁸³ The German government offered payments to the families of the victims of the attack, *ex gratia*, denying any wrongdoing as a matter of law.

D. Doubt in Target Selection

One of the crucial principles of IHL is the inbuilt presumption of protection: in case of doubt regarding the targetability of a person or an object, IHL imposes an obligation to refrain from targeting.⁸⁴

82. *Id.* (emphases added).

83. Joshua Andresen, *Challenging the Perplexity Over Jus in Bello Proportionality*, 7 EUROPEAN JOURNAL OF LEGAL STUDIES 18, 19 (2014).

84. *See* API, *supra* note 15, art. 50(1) (“In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”); *Id.* art. 52(3) (“In case of doubt whether an object which is normally dedicated to civilian purposes . . . is being used to make an effective contribution to military action, it shall be presumed not to be so used.”); *see also id.* art. 45(1) (“Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal”).

“Doubt,” in this context, is factual, not legal. It concerns the absence of information about the identity and actions of persons or the nature and use of a device or instrument, not about whether these facts should, as a matter of law, put the person or instrument in the “combatants/military” or “civilian” categories. This distinction is especially important given the voluminous debates over the application of Article 51(3) and the category of “direct participation in hostilities” (DPH) for purposes of targeting decisions.⁸⁵

Neither the Protocol itself nor its official commentary defines “doubt” nor clarifies its operation in the various provisions of API. Is the standard beyond a reasonable doubt? Or is it enough for the actor to rely on a more-likely-than-not judgment, or on the basis of a reasonable suspicion that some person is a combatant, or some device is a weapon? Or perhaps one needs “near certainty” that the person is a combatant before targeting, in the way that the Presidential Policy Guidelines on the targeted killings of suspected terrorists outside the zone of active hostilities suggests (again, presumably as a matter of policy)? Very little attention has been given to this question, and military manuals, if they address it, simply restate the vague general rule.⁸⁶

With no clear guidance in the IHL doctrine, ICL has emerged with a potential—and problematic—contender for the answer. Concerned primarily with the prosecution of individuals, ICL embraces the essential criminal law principle of the presumption of innocence.⁸⁷ This presumption is enshrined in Article 66 of the Rome Statute, which also elaborates that, as a corollary to this principle, “in order to convict the accused, the Court must be convinced of the guilt of the accused beyond a reasonable doubt.”⁸⁸ As the ICTY has affirmed, this includes the concept of *in dubio pro reo*—in other words, “the accused is entitled to the benefit of the doubt as to whether the

85. *Id.* art. 51(3) (instructs that civilians enjoy immunity from attack “unless and for such time as they take direct part in hostilities”).

86. *See, e.g.*, Michael N. Schmitt & Michael Schauss, *Uncertainty in the Law of Targeting: Towards a Cognitive Framework*, 10 HARVARD NATIONAL SECURITY JOURNAL 148 (2019); Adil Haque, *Killing in the Fog of War*, 86 SOUTHERN CALIFORNIA LAW REVIEW 63, 67 (2012).

87. *See, e.g.*, Statute of the International Criminal Tribunal for the Former Yugoslavia art. 21(3), S.C. Res. 827 (May 25, 1993) (adopting the Secretary General report pursuant to ¶ 2 of S.C. Res. 808 (Feb. 22, 1993)); Statute of the International Criminal Tribunal for Rwanda art. 20(3), S.C. Res. 955, annex, (Nov. 8, 1994), *reprinted in* 33 INTERNATIONAL LEGAL MATERIALS 1598 (1994); Rome Statute, *supra* note 26, art. 66(3).

88. Rome Statute, *supra* note 26, art. 66(3).

offence has been proved.”⁸⁹ Thus, in cases involving the unlawful targeting of civilians, the prosecutor must prove beyond a reasonable doubt that the targets were not combatants or civilians directly participating in hostilities.

In recognizing the IHL presumption of protection, international criminal tribunals have held that in cases of doubt the prosecution “must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.”⁹⁰ Yet in practice, it seems that as long as an actor acts in good faith—a relatively undemanding standard of conduct—they will not face criminal prosecution, much less punishment. The ICTY Prosecutor’s Committee, when tasked with determining whether to initiate investigations into alleged violations of IHL by NATO during its 1999 bombing campaign, was satisfied by the fact that “NATO was attempting to attack objects it perceived to be legitimate military objectives.”⁹¹ In its final recommendation, the committee stated:

NATO has admitted that mistakes did occur during the bombing campaign; errors of judgment may also have occurred. . . . [yet] [i]n all cases, either the law is not sufficiently clear or investigations are unlikely to result in the *acquisition of sufficient evidence to substantiate charges* against high-level accused or against lower accused for particularly heinous offences.⁹²

The ICL approach to doubt in the case of targeting thus imposes on the prosecution relatively high burdens of production and persuasion, which seems to raise the bar for proof of noncompliance with IHL to something closer to “near certainty” or “beyond a reasonable doubt” than “reasonable suspicion.” The consequence is, in some sense, a reversal of the rule: instead of an IHL presumption of civilian status, which gives way to targeting only where there is no doubt that the person is a legitimate military target, ICL, in effect, permits targeting up until the point there is no doubt that the person is a civilian.

Indeed, when one refers back to some military manuals, the effects of the ICL approach become evident: The UK Law of Armed Conflict Manual

89. Prosecutor v. Delalić et al., Case No. IT-96-21-T, Judgment, ¶ 601 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998). See generally FABIAN RAIMUNDO, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS 110–11 (2008).

90. *Galić*, *supra* note 80, ¶ 55.

91. NATO-FRY Report, *supra* note 71, ¶ 55.

92. *Id.* ¶ 90 (emphasis added).

(2004) specifies that “it is only in cases of *substantial doubt* after [the] assessment about the status of the individual in question, that the latter should be given the benefit of the doubt and treated as a civilian.”⁹³ The U.S. Law of War Manual (2016) disputes the customary status of any legal presumption of civilian status; still, it goes on to state that

commanders and other decision-makers must make the decision [to attack] in good faith based on the information available to them in light of the circumstances ruling at the time. A legal presumption of civilian status in cases of doubt may demand a degree of certainty that would not account for the realities of war.⁹⁴

Interestingly, the manual continues to observe: “In applying AP I rules on ‘doubt,’ some Parties to AP I have interpreted these rules in a more limited way (e.g., applying a ‘substantial doubt’ standard) than AP I’s text would suggest.”⁹⁵ The reference it offers is to the UK manual.⁹⁶

E. *Child Soldiers*

Article 77(2) of API states that parties “shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a *direct* part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.”⁹⁷ Article 4(3)(c) of APII, which is specific to NIACs, similarly prohibits the participation of children under the age of fifteen in hostilities but omits the qualification of “direct” participation, though the API *Commentary* suggests that this discrepancy is immaterial.⁹⁸ The corresponding war crime, enshrined in Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute, criminalizes “[c]onscripting or enlisting children under the

93. UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 5.3.4 (2004) [hereinafter UK MANUAL] (emphasis added). *But cf.* NEW ZEALAND MANUAL, *supra* note 78, § 6.5.11 (requires avoiding targeting of civilians who might fall under the category of “direct participants in hostilities” if there is a reasonable doubt in their direct participation).

94. U.S. LAW OF WAR MANUAL, *supra* note 20, § 5.4.3.2.

95. *Id.*

96. *Id.* at 201 n.93.

97. API, *supra* note 15, art. 77 (emphasis added).

98. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 59, ¶ 3187.

age of fifteen years into armed forces or groups or using them to participate *actively* in hostilities.”⁹⁹

Interpretation of these provisions relies in part on the definition of direct and active participation in hostilities. Though the two concepts are understood to be synonymous in IHL, the ICC departed from this understanding in 2012 when it convicted Thomas Lubanga of the war crime set out in Article 8(2)(e)(vii).¹⁰⁰ The court found that Lubanga, the head of the Union of Congolese Patriots, conscripted child soldiers to fight on the frontlines, as well as serve as sex slaves. The trial chamber interpreted “active participation in hostilities” as distinct from, and broader than, the IHL concept of direct participation in hostilities:

The use of the expression “to participate actively in hostilities,” as opposed to the expression “direct participation” (as found in Additional Protocol I to the Geneva Conventions) was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence. It is noted in this regard that Article 4(3)(c) of Additional Protocol II does not include the word “direct.”¹⁰¹

For the trial chamber, active participation was judged by reference to “whether the support provided by the child to the combatants exposed him or her to real danger as a potential target.”¹⁰² Ultimately, the trial chamber declined to define the outer limits of “active participation,” particularly when it comes to whether the use of children to participate actively in hostilities included sexual violence against or sexual enslavement of children and forced marriages.¹⁰³

Though the decision was undoubtedly intended to broaden the protections that the legal regime could offer to children in war, it may have opened

99. Rome Statute, *supra* note 26, art. 8(2)(e)(vii); *see also* Statute of the Special Court for Sierra Leone art. 4(c), Jan. 16, 2002, 2178 U.N.T.S. 145 (emphasis added).

100. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2842, Judgment (Mar. 14, 2012). For more on this, *see* Demetra Loizou, *The Impact of the International Criminal Court’s Establishment on the Further and Future Development of the Crimes Within its Jurisdiction* (2016) (Ph.D. dissertation, SOAS, University of London), https://eprints.soas.ac.uk/24392/1/Loizou_4378.pdf; Urban, *supra* note 8.

101. *Lubanga*, *supra* note 100, ¶ 627.

102. *Id.* ¶ 628.

103. *Id.*

the door to a weakening of the general targeting rules under IHL by introducing a tension between ICL and IHL approaches to participation in hostilities and its consequences.

Although the concept of participation is not defined in any IHL treaty, it is alluded to in other provisions regarding targeting and distinction, not limited to children. Article 51(3) of API and Article 13(3) of APII both state that civilians are protected from attack “unless and for such time as they take a direct part in hostilities.” This rule is considered to be part of customary law.¹⁰⁴ Common Article 3 of the Geneva Conventions, which applies to non-international armed conflicts, outlines a similar rule but substitutes “active” for “direct”: “Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely.” Direct participation in hostilities resurfaces in the relevant provision in API on the use of child soldiers, as well as Article 28 of the UN Convention on the Rights of the Child.¹⁰⁵

As earlier noted, despite the alternating use of the two terms, “active” and “direct” are considered synonymous in this context. Indeed, though the Additional Protocols and the Geneva Conventions diverge in word choice, the French texts of each treaty use the phrase *participant directement* consistently across provisions.¹⁰⁶ The ICRC has also noted that the notion of direct participation is used interchangeably with active participation and that the former indeed evolved from the expression “taking no active part in hostilities.”¹⁰⁷

104. ICRC Customary Law Study, *supra* note 50, r. 1.

105. API, *supra* note 15; The Convention on the Rights of the Child art. 38, Nov. 20, 1989, 1577 U.N.T.S. 3.

106. Compare French language version of Common Article 3 of the 1949 Geneva Conventions (“*Les personnes qui ne participent pas directement aux hostilités*”) and French language version of API, art. 51(3) (“*Les personnes civiles jouissent de la protection accordée par la présente Section, sauf si elles participent directement aux hostilités et pendant la durée de cette participation*”), with the English language versions of Common Article 3 (“Persons taking *no active part* in the hostilities”) and API, art. 51(3) (“Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a *direct part* in hostilities”) (emphases added). The ICRC noted this fact in INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 43 n.83–84 (2009) [hereinafter ICRC INTERPRETIVE GUIDANCE].

107. ICRC INTERPRETIVE GUIDANCE, *supra* note 106, at 43 (“the terms ‘direct’ and ‘active’ refer to the same quality and degree of individual participation in hostilities”); *id.* at 43–44 (“The notion of direct participation in hostilities has evolved from the phrase ‘taking no active part in hostilities’ used in Article 3 [of Geneva Conventions I through IV]. . . . Furthermore, as the notion of taking a direct part in hostilities is used synonymously in the

Though the semantics are clear, the exact interpretation of what direct or active participation in hostilities amounts to under IHL is much debated among IHL scholars and practitioners. The ICRC has issued its own interpretive guidance on the matter, but this guidance has attracted much contestation among experts in the field.¹⁰⁸

The ICC's interpretation in *Lubanga* thus not only diverged from accepted practice in IHL, creating a distinction between the two concepts of "active participation" and "direct participation" that has not otherwise been recognized. More importantly, the distinction it drew threatens to further exacerbate the debates over the direct-participation-in-hostilities category under IHL for purposes of targeting operations and thus to erode protections for civilians more generally.

The *Lubanga* trial chamber elaborated that "[t]hose who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants." Though not explicitly stated, this framing seems to create two categories of participation in hostilities: (1) direct participation in combat "on the front line," and (2) active participation in "combat-related activities."¹⁰⁹ This approach was also followed by the Special Court for Sierra Leone in applying Article 4(c) of its statute, which is identical to Article 8(e)(vii) of the Rome Statute.¹¹⁰

Additional Protocols I and II, it should be interpreted in the same manner in international and in non-international armed conflict.").

108. *Id.*; Michael Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARVARD NATIONAL SECURITY JOURNAL 5 (2010); Shannon Bosch, *The International Humanitarian Law Notion of Direct Participation in Hostilities—A Review of the ICRC Interpretive Guide and Subsequent Debate*, 17 POTCHEFSTROOM ELECTRONIC LAW JOURNAL 999 (2014).

109. *Lubanga*, *supra* note 100, ¶ 622; *see also* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 261 (Jan. 29, 2007) ("'Active participation' in hostilities means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints").

110. Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Trial Judgment, ¶ 737 (June 20, 2007) ("An armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation. Hence carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are some examples of active participation as much as actual fighting and combat.").

The relationship between the concepts was similarly framed in the Preparatory Committee's draft Rome Statute, which distinguished "direct" participation from "active" participation in its proposed wording of ICC Article 8(2)(e)(vii) and which gave several examples of the latter, such as "scouting, spying, sabotage, and the use of children as decoys, couriers, or at military check-points."¹¹¹ Notably, the Preparatory Committee explicitly acknowledged that this approach was a departure from IHL. The "active" option, it noted, sought "to incorporate the essential principles contained under accepted international law while using language suitable for individual criminal responsibility *as opposed to state responsibility*."¹¹²

If active participation denotes a broader scope of activities than previously understood—and if this interpretation bleeds into other areas of IHL—opposing parties could legitimately attack civilians on the basis that the civilians were "actively" participating in hostilities. Children, in particular, might risk losing their protected status against attack by engaging in "indirect" participation in hostilities—a prospect that the ICRC implicitly warned against in its *Commentary* to API:

There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context.¹¹³

The *Lubanga* trial chamber indeed recognized this paradox by stating that the crucial determinant of active participation was whether the individual's participation "exposed him or her to real danger as a potential target."¹¹⁴ To take this to its logical extreme, if the ICC went so far as to suggest that sexual exploitation of and sexual violence against child soldiers rendered the victims "active" participants in hostilities under one rubric—as urged to do so in

111. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Court*, U.N. Doc. A/CONF.183/2/Add.1, at 108 n.12 (Apr 14, 1998), <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/CONF.183/2/Add.1&Lang=E>.

112. *Id.* (emphasis added).

113. COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 59, ¶ 1945.

114. *Lubanga*, *supra* note 100, ¶ 628.

dissent by Judge Benito¹¹⁵—they might, perversely, be considered as such under others, becoming liable to direct and intentional targeting under IHL. One can only hope that the criminal law expansion of the term “active” would serve only to enhance the protection of children, as the trial chamber meant to do, and not expose them to additional risks as potential targets, as the trial chamber had also feared.

F. *Damage to the Environment*

IHL incorporates protection of the natural environment, in part via Articles 35(3) and 55 of API. Article 35(3) prohibits “methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.”¹¹⁶ Article 55 of API introduces a positive obligation, stating:

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.¹¹⁷

In 1996, the International Court of Justice found that API Articles 35 and 55 “embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage.”¹¹⁸ The

115. *Id.* ¶¶ 15–21 (separate and dissenting opinion by Benito, J.).

116. API, *supra* note 15, art. 35(3).

117. *Id.* art. 55. Other provisions of API further protect the natural environment, albeit indirectly: Art. 54 (protecting objects indispensable to the survival of the civilian population by prohibiting attacks on “foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works”); Art. 56 (prohibiting attacks on “dams, dykes and nuclear electrical generating stations . . . even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population”). *See also* ICRC Customary Law Study, *supra* note 50, r. 44; SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICT AT SEA, r. 44 (Louise Doswald Beck ed., 1995); HPCR, *supra* note 16, r. 88.

118. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 ¶ 31 (July 8). The ICJ concluded that “while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of implementation of the principles and rules of the law applicable in armed conflict.” *Id.* ¶ 33.

Environmental Modification Convention (ENMOD, formerly the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques) further prohibits contracting parties from engaging in “military or any other hostile use of environmental modification techniques having widespread, long-lasting *or* severe effects as the means of destruction, damage or injury to any other State Party.”¹¹⁹ Note that this formulation uses the disjunctive formula rather than the conjunctive formula that appears in the API.

Moreover, the ICRC *Commentary* on Article 35 states that “Any method or means of warfare which are planned to cause, or may be expected (albeit *without the intention*) to cause serious damage to the natural environment, *even if this effect is incidental*, are prohibited.”¹²⁰

The associated war crime appears in Article 8(2)(b)(iv) of the Rome Statute—the provision on disproportionate targeting—and criminalizes “intentionally launching an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”¹²¹ Effectively, it imposes near-impossible conditions for the prosecution of environmental war crimes and is much more stringent than its associated IHL violation.¹²²

First, it places environmental damage within the framework of a proportionality analysis, implying that environmental damage that is not excessive to military advantage is permissible. On its face, at least, the IHL rule could

119. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques art. 1, May 18, 1977, 31 U.S.T. 333, 1108 U.N.T.S. 151 (emphasis added).

120. COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 59, art. 35 ¶ 1440 (emphasis added).

121. Rome Statute, *supra* note 26, art. 8(2)(b)(iv).

122. Camilo Ramírez Gutiérrez & A. Sebastián Saavedra Eslava, *Protection of the Natural Environment Under International Humanitarian Law and International Criminal Law: The Case of the Special Jurisdiction for Peace in Colombia*, 25 UCLA JOURNAL OF INTERNATIONAL LAW AND FOREIGN AFFAIRS 123, 149 (2020) (“it seems that there exists a consensus among different authors that the Rome Statute standard for an attack to be considered as a war crime is much higher than the one contained in ENMOD or in ICRC Customary Rules 43 to 45”); Roberta Arnold & Stefan Wehrenberg, *Paragraph 2(b)(iv): Intentionally Launching an Attack in the Knowledge of Its Consequences to Civilians or to the Natural Environment*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 378, ¶ 253 (Otto Triffterer & Kai Ambos eds., 3d ed. 2016).

be read as prohibiting environmental damage above a certain threshold regardless of its relationship to military advantage. Indeed, the ICRC study on customary IHL stresses that:

The difference between this rule and the rule requiring the application to the environment of the general rules of international humanitarian law applicable to civilian objects (see Rule 43) is that this rule is absolute. If widespread, long-term and severe damage is inflicted, or the natural environment is used as a weapon, it is not relevant to inquire into whether this behaviour or result could be justified on the basis of military necessity or whether incidental damage was excessive.¹²³

Second, the war crime introduces the requirement of “clearly excessive,” introducing the same high bar it set for the proportionality principle in general before such environmental damage might give rise to criminal liability. Third, an attack that results in widespread, long-term, and severe damage to the environment will only give rise to criminal liability if it is intentionally launched with the *knowledge* that such damage will, in fact, be caused.¹²⁴ Once again, it is not clear what—if anything—is the relevant mens rea requirement for conduct to trigger a State IHL violation as opposed to individual criminal responsibility.

Importantly, neither IHL nor ICL offers interpretive guidance on the meanings of “widespread,” “long-term,” and “severe” damage within the international criminal context. ENMOD and its “understandings,” for example, define “widespread” as encompassing an area of several hundred square kilometers, “long-lasting” to mean lasting for a period of months or approximately a season, and “severe” as involving serious or significant disruption or harm to human life, natural and economic resources, or other assets.¹²⁵

123. ICRC Customary Law Study, *supra* note 50, r. 45.

124. ICC ELEMENTS OF CRIMES, *supra* note 44, art. 8(2)(b)(iv) element 3.

125. See *Report of the Conference of the Committee on Disarmament, Vol. I*, U.N. GAOR Supp. No. 27, at 91, U.N. Doc. A/31/27 (1976) (Annex I, Report of the Working Group on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques). Note that the *travaux préparatoires* for API indicate that some members of the working group considered that “long-term” was a matter of decades. (“References to twenty or thirty years were made by some representatives as being a minimum. Others referred to battlefield destruction in France in the First World War as being outside the scope of the prohibition. . . . However, it is impossible to say with certainty what period of time might be involved. It appeared to be a widely shared assumption that battlefield damage incidental to conventional warfare would not normally be proscribed by this provision.”) 15 OFFICIAL

But these understandings do not necessarily apply to either the IHL or ICL prohibitions. In articulating the IHL rule, the UK Military Manual states, “Those who negotiated the Protocol understood ‘long-term’ as relating to a period of decades and not the damage on the scale of that suffered in France during the First World War or to battlefield damage incidental to conventional warfare. Unfortunately, there was no such understanding as to the meaning of ‘severe’ or ‘widespread.’”¹²⁶

Karen Hulme, in attempting to shed some light on these ambiguous terms, has suggested that in the criminal context “widespread” might amount to tens of thousands of kilometers, “long-term” might imply twenty to thirty years at a minimum, and “severe” might suggest significant interference with human life or human utilities.¹²⁷ The ICTY Prosecutor’s Committee similarly found that “long-term” damage to the environment was measured in years, not months.¹²⁸

The degree of harm necessary for environmental damage during armed conflict to amount to a war crime under the ICC Statute is thus higher than that required under international humanitarian law. IHL imposes a blanket prohibition on means and methods of warfare that cause widespread, long-term, and severe damage to the environment, as well as a positive obligation to protect the environment during armed conflict. Under ICL, on the other hand, even if damage to the natural environment is found to be widespread, long-term, and severe, it could still fall short of a war crime if the anticipated military advantage of destroying it is sufficient. This, coupled with the subjective mens rea approach endorsed by the Rome Statute, suggests that ICL would tolerate most—if not all—decisions to intentionally target the environment.

Indeed, this impossible-to-meet criminal liability standard is evident in ICL practice and jurisprudence. Though it took place decades before the drafting of API or the Rome Statute, the 1948 trial of Austrian General Lothar Rendulic at Nuremberg is instructive of how Article 8(2)(b)(iv) might

RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 268–69 (1978) (¶ 27 of the Committee III report).

126. UK MANUAL, *supra* note 93; *see also* DANISH MANUAL, *supra* note 77, at 424 (stating “The conditions for the damage to be widespread, long-term and severe must all be met. ‘Long-term’ means several decades, presumably 20–30 years. However, it is as yet unclear under international law what ‘widespread’ and ‘severe’ mean precisely.”).

127. KAREN HULME, WAR TORN ENVIRONMENT: INTERPRETING THE LEGAL THRESHOLD 92 (2004).

128. NATO-FRY Report, *supra* note 71.

be applied in practice. General Rendulic was charged for his scorched earth policy during the German Army's retreat from Norway in *United States v. Wilhelm List & Others*.¹²⁹ Rendulic asserted the defense of military necessity, as the physical destruction carried out on his orders was committed "in an attempt to extricate [German troops] from a strategically perilous situation arising out of the withdrawal from the war of Finland."¹³⁰ The tribunal agreed and acquitted Rendulic for the scorched earth offenses, despite the fact that the military necessity had been entirely subjective: Rendulic had proceeded from the false assumption that the Russians were advancing.¹³¹ Ultimately, the tribunal concluded, what mattered was that "the conditions as they appeared to the defendant at the time were sufficient" to exonerate Rendulic of the decision "to carry out the 'scorched earth' policy in Finnmark as a precautionary measure against an attack by superior forces."¹³²

The ICTY Prosecutor's Committee would echo this reasoning in its evaluation of the potential "widespread, long-term and severe" environmental damage committed by NATO in its 1999 bombing of Yugoslavia. After examining the text of API Article 55, the committee curiously concluded that, despite no instruction to do so in API, evaluation of environmental damage during armed conflict was "best considered from the underlying principles of the law of armed conflict such as necessity and proportionality."¹³³ Accordingly, the committee framed the inquiry as a proportionality analysis:

It is difficult to assess the relative values to be assigned to the military advantage gained and harm to the natural environment, and the application of the principle of proportionality is more easily stated than applied in practice. In applying this principle, it is necessary to assess the importance of

129. *United States v. List et al. (The Hostage Case)*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 69 (1950) (describing the destruction: "Villages were destroyed. Isolated habitations met a similar fate. Bridges and highways were blasted. Communication lines were destroyed. Port installations were wrecked. A complete destruction of all housing, communication and transport facilities was had. This was not only true along the coast and highways, but in the interior sections as well. The destruction was as complete as an efficient army could do it. Three years after the completion of the operation, the extent of the devastation was discernible to the eye.").

130. *Id.* at 67.

131. *Id.* at 45.

132. *Id.* at 69.

133. NATO-FRY Report, *supra* note 71, ¶ 15.

the target in relation to the incidental damage expected: if the target is sufficiently important, a greater degree of risk to the environment may be justified.¹³⁴

Citing the acquittal of General Rendulic, the committee also found that

the requisite *mens rea* on the part of a commander would be actual or constructive knowledge as to the grave environmental effects of a military attack; a standard which would be difficult to establish for the purposes of prosecution and which may provide an insufficient basis to prosecute military commanders inflicting environmental harm in the (mistaken) belief that such conduct was warranted by military necessity.¹³⁵

The high threshold imposed by the proportionality framework, coupled with the strict *mens rea* requirement, convinced the committee to conclude that there was no basis for prosecution.

It is hard to imagine a situation in which there would be. Julian Wyatt has applied this approach to the hypothetical prosecution of U.S. actions in Vietnam (spraying defoliants over vast tracts of Vietnamese territory) and Iraqi actions in Kuwait (allegedly igniting oil wells to create smoke cover against U.S. aircraft and jettisoning millions of barrels of oil into the Persian Gulf to obstruct U.S. naval movements) and has concluded that it would be “enormously difficult to imagine a situation in which a court would definitely deem the environmental damage caused clearly excessive to the overall military advantage anticipated.”¹³⁶

The ICL interpretation of the prohibition has clearly had effects on IHL applications: The Australian War Manual, for instance, incorporates the proportionality requirement when it states that “destruction of the environment, not justified by military necessity, is punishable as a violation of international law.”¹³⁷ The German manual incorporates both the proportionality principle as well as the intentional elements drawn from ICL: “the intentional damag-

134. *Id.* ¶ 19.

135. *Id.* ¶ 23.

136. Wyatt, *supra* note 64, at 635–36.

137. AUSTRALIAN DEFENCE HEADQUARTERS, ADDP 06.4, LAW OF ARMED CONFLICT ¶ 5.50 (2006).

ing and destroying of the natural environment not justified by military necessity is prohibited.”¹³⁸ It adds that “The prohibition of environmental warfare means that such methods and means of warfare are prohibited that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.”¹³⁹

The fate of the legal protection of the environment in war might change if efforts to introduce a crime of ecocide into the Rome Statute bear fruit.¹⁴⁰ If so, this might prove an instance in which ICL serves to further enhance the protections offered by IHL—a category of cases I allude to later in this article.

IV. THE CHANNELS OF OVERSHADOWING, INSTITUTIONAL SPILLOVERS, AND EFFECTS

The overshadowing of IHL by ICL takes place through various channels. These include the fact that a number of regimes that regulate the conduct of war coexist simultaneously, pulling in different directions; the contentious craft of interpreting oft-vague and malleable IHL rules; the far more robust institutional enforcement of ICL; the sociological profile of the relevant lawyers; media, and public attention, as well as political forces.

As earlier noted, IHL rules are binding on States. Yet, the parallel and growing regime of ICL has shifted our focus from the general compliance of States to the compliance of individual soldiers and commanders. As previously noted, this is far from a new phenomenon. For instance, the criminalization of violations of the proportionality principle back in the grave breaches regime of the Fourth Geneva Convention began the trend of conflating individual and State responsibility in the context of military actions; we now answer the question of what makes for a violation of the principle of proportionality by reference to what makes for a grave breach of indiscriminate targeting.

138. *Bundesministerium der Verteidigung, Druckschrift Einsatz Nr. 03, Humanitäres Völkerrecht in bewaffneten Konflikten* 5 (Aug. 2006) (Ger.).

139. *Id.*

140. See, e.g., Rosemary Mwanza, *Enhancing Accountability for Environmental Damage Under International Law: Ecocide as a Legal Fulfilment of Ecological Integrity*, MELBOURNE JOURNAL OF INTERNATIONAL LAW (Dec. 2018), https://law.unimelb.edu.au/__data/assets/pdf_file/0005/2983055/Mwanza-unpaginated.pdf.

The malleability and vagueness of some IHL rules play significant contributing factors here. These rules, like many others, are often open to competing interpretations and different visions for their applications in various theaters of war. Sometimes, their very status as binding on the parties to a particular conflict might be in question; other times, as some of the examples above demonstrate, it is not clear what constitutes a violation by a State. As the international rules on State responsibility contain no independent “fault regime” of their own, but merely depend on whatever is required by the primary rules, they cannot be of service in determining when precisely a violation of IHL occurs. Against this backdrop, the availability of a related, more detailed, and more precise legal articulation serves as a naturally attractive focal point. At least for those rules that occupy both IHL and ICL, the determination of what counts as a violation is—as a matter of legal interpretation—much easier under the latter.

It is not a coincidence, therefore, that numerous military manuals now routinely refer to the Rome Statute in expounding the IHL rules with which they are ostensibly concerned, as did the ICRC in its comprehensive study on customary IHL. Reference to the Rome Statute is also routine in UN reports, countries’ statements, and NGOs’ reports. Scholars, too, often revert to the Rome Statute to interpret or clarify an IHL norm. In some instances, care is taken to distinguish more clearly between the sources and operation of these two bodies of law¹⁴¹—but not in all—and as we have seen, there is a creeping interpretation of IHL rules in light of their ICC counterparts.

The institutional apparatus around the enforcement of ICL is a related, accelerating channel of shadowing. There is little case law that lawyers can turn to in interpreting or applying IHL. Instead, most judicial decisions on incidents that implicate IHL are rendered by transnational human rights courts applying international human rights laws (IHRL) (e.g., the European Court of Human Rights or the Inter-American Court of Human Rights) or transnational criminal courts applying ICL (e.g., the ICTY, the ICTR, or the ICC). Domestic courts, too, occasionally consider the criminal liability of wartime conduct, either of their own citizens or of foreigners, including through universal jurisdiction. There are far fewer domestic courts applying or interpreting IHL, especially outside of any criminal adjudication, for fear

141. *See* HUMAN RIGHTS WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ (Dec. 11, 2003) (a notable example in which the organization took great care in referencing IHL rather than ICL and demanding compliance with the former).

of encroaching on military policy matters (the Israeli High Court of Justice is an exception here). And the International Court of Justice, in its occasional treatment of IHL, has done so either at a very high level or with a focus on the gravest violations, which would also constitute crimes.¹⁴²

For lawyers entrusted with interpreting and applying IHL, judicial decisions are an irresistible source of jurisprudence, and they therefore rely on those decisions that do exist, even where the court's analysis was undertaken through a different legal lens. Even for those States that are not officially subject to the jurisdiction of these courts, the case law—and its reasoning—is often compelling. It is thus no surprise that when, in recent decades, lawyers have increasingly been employed throughout the chain of command of western militaries, their legal analysis has been greatly influenced by the doctrine and jurisprudence of ICL.

Granted, many more decisions that touch on IHL are rendered by human rights courts, not international criminal tribunals, and additional bodies, such as the ICJ or the Human Rights Committee, also pronounce opinions on the application of IHRL during wartime. Naturally, the scrutiny of wartime conduct through the lens of IHRL tends to be far more restrictive in its delimitation of permissible conduct than scrutiny through the ICL lens and often more restrictive than what a conventional interpretation of IHL would mandate. And without a doubt, the interpretation and application of IHL by western militaries have been heavily influenced by the infusion of IHRL laws, norms, and adjudication, including in targeting policies (recall the “near certainty” requirement of the intended target or zero collateral damage in the American policy on targeted killings outside the zone of hostilities).¹⁴³ This is true even for western countries that are not party to any of the regional IHRL tribunals and those who deny the application of IHRL extraterritorially.

Still, the point here is that in the absence of IHL-specific adjudication, the pull power for lawyers of relevant case law—whether through the lens of ICL or IHRL—remains; and at least in some contexts, and especially among military or government lawyers, there might be a greater pull for the case law that expands States' power than for that which restricts it.

The lack of judicial expounding and enforcement is complemented by the sociological profile of IHL lawyers. The group of lawyers who specialize

142. *See, e.g.*, *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168 (Dec. 19).

143. Gabriella Blum, *The Paradox of Power: The Changing Norms of the Modern Battlefield*, 56 *HOUSTON LAW REVIEW* 745 (2019).

in IHL is relatively small and mostly concentrated in military forces or other government agencies. While there are many insular conversations among IHL lawyers, nationally and internationally, at an increasing number of junctions, IHL lawyers are also in conversations with their ICL and IHRL colleagues. ICL lawyers are more dispersed across government, academia, NGOs, and private practice, and many of them have a domestic criminal law background. Human rights lawyers are even more diverse in their experience, specialties, and professional affiliations. Coupled with the lack of authoritative rulings on the best interpretation or application of IHL doctrines, these cross-disciplinary conversations provide another avenue for the infusion of ICL into IHL debates.

Media attention also plays a significant role in the overshadowing process. Media and public attention tend to follow events that are dramatic. Where civilians and civilian objects are harmed by military attacks, the immediate assumption is that there is a crime; it is an uneasy and complicated truth that IHL admits much harm to civilians as lawful and certainly not as criminal. Moreover, there is a general public skepticism—or at least, enough skeptics—when advanced, powerful militaries claim they have made a mistake, as opposed to a deliberate choice. If deliberate, the ensuing harm to civilians makes the attack criminal. Conspiracy theories abounded when the U.S. Air Force attacked the Chinese embassy in Serbia in 1999, later claiming it was in error. Israel encountered even greater suspicion—including by UN investigators—when, in 1993, artillery rounds shot by the IDF impacted the headquarters of the UN peacekeeping force in Lebanon, killing over 100 Lebanese civilians. The possibilities of incomplete intelligence, faulty weapons systems, and general conditions of uncertainty are much harder to appreciate when professional, technologically-abled militaries are concerned.

On the flip side, there is also an assumption by less informed spectators that if an attack is not criminal, it must be lawful. The middle range of non-criminal violations is less familiar to the everyday news consumer. The label “crime” thus serves a dual purpose: it elevates the gravity of the already grave attack and entices further interest in the coverage of the incident, now limited not only to the human tragedy of the harm but also to the story of the culpability of the attackers.

Unsurprisingly, therefore, public debates over high-level investigations into wartime conduct—whether over the UN Fact-Finding Mission on the Gaza Conflict, a similar mission into the Russian-Georgia war, or the U.S. attack on a *Médecines Sans Frontières* hospital in Kunduz—tend to focus on

whether a crime has been committed, not on whether any violations of IHL occurred.

The threat and possibility of criminal prosecutions are thus double-edged swords. As Sassóli has poignantly remarked:

ICL may also give the impression to the public and even to specialists that all behaviour in armed conflict is either a war crime or lawful. Reactions to the decision of the ICTY Prosecutor not to initiate prosecutions relating to the NATO bombing campaign against the Federal Republic of Yugoslavia are a case in point. That impression increases frustration and cynicism about IHL and its effectiveness, which in turn facilitates violations.¹⁴⁴

Another recent example of the salience of criminal accountability is a statement issued by Human Rights Watch over the U.S. military's decision to not hold anyone criminally accountable for a drone strike in Kabul in August of 2021, which left ten civilians dead:

The government's response is particularly problematic because the US has not released the military's full report into what went wrong in Kabul. Instead, the Pentagon released a characteristically opaque fact sheet with a problematic self-assessment that the strike did not violate the laws of war. To the contrary, the facts of the strike as detailed by the *New York Times* and *Washington Post* provide compelling evidence that the US strike team failed to take all feasible steps to minimize civilian harm. Furthermore, the information provided does not justify the decision to absolve US personnel of criminal recklessness or criminal negligence.¹⁴⁵

Trying one's own soldiers and officers for war crimes, domestically, carries significant political costs, which militaries might often choose to avoid. Alternative charges or disciplinary actions might provide a more convenient path that militaries opt for. And cases might end up with wholesale acquittals.

But there are instances in which criminal trials are in the interest of the relevant countries: Nearly all the individuals who stood trial at the ICC were rebel leaders, not government officials, whom the relevant governments were all too happy to surrender to the ICC. But even with official leaders who, in some sense, serve as metonymies for their collective societies, there

144. Sassóli, *supra* note 6.

145. Human Rights Watch, *US: End Impunity for Civilian Casualties* (Dec. 14, 2021), <https://www.hrw.org/news/2021/12/14/us-end-impunity-civilian-casualties>.

might be a national and global interest, especially after these leaders lose their power, to pursue an individualized trial, which allows the relevant collective to cleanse itself from its own moral or even legal responsibility for the crimes perpetrated. When States are accused of having committed war crimes, they have the obligation—and the opportunity—of trying individual members of their forces for these crimes without having to do more—at the national level—to make amends.

As a political matter, too, it is easier (though not at all easy) to go after an individual than after a State. Forcing a State to concede its violations and, even more so, make reparations, is a near-impossible feat and one that historically followed military vanquish on the battlefield.¹⁴⁶

The cumulative effect of all these considerations is that the true impacts of ICL on the enforcement of IHL remain unclear. Either States review all military actions through the lens of ICL, ultimately to find no wrongdoing (as in the German *Tankers* case), or there is a greater incentive to rely on disciplinary or other military justice adjudication as an alternative to criminal trials.

In terms of the institutional effects of ICL on the internal mechanisms of compliance within militaries, here too the picture is complex. As noted earlier, in recent decades there has been a substantial increase in the number of lawyers occupying advisory and review roles up and down the chain of command. In addition, several western militaries have instituted internal review processes and mechanisms to investigate allegations of war crimes by their members.¹⁴⁷

The precise effects of ICL on the advice given by these military lawyers and the operation of the internal review mechanisms are hard to gauge. One possibility is that the threat of criminal prosecutions under ICL has driven greater attention to compliance with IHL more generally and that militaries, aided and guided by professional military lawyers, now take greater care in adhering to all the laws of war. Indeed, this would be in line with evidence of an overall reduction in civilian casualties in wars fought by liberal democ-

146. This is not to say that military outcomes have no effect on the operation of ICL; see Anderson, *supra* note 6 (Ken Anderson's observations about the relationship between the ICTY and the military achievements on the battlefield).

147. See TURKEL, *supra* note 41, at 43, 152–264 (on comparing several western militaries' internal review processes).

racies more generally in recent decades, though the expansion and reinforcement of IHRL, alongside technological innovations, have no doubt contributed their great share too.¹⁴⁸

But it is also possible that military lawyers, in rendering legal advice, use the definitions of crimes as their focal point for interpreting and applying IHL. In other words, they act more as criminal defense lawyers than as guardians of IHL compliance. If so, their legal advice—for instance, in reviewing the proportionality assessment of any particular engagement—would allow for a wide latitude of interpretation and application of IHL, perhaps wider than it would be without the modern definitions of crimes.

Moreover, the threat of possible prosecutions might deter militaries from being more transparent about their conduct and sharing information about internal decision-making or processes.¹⁴⁹ It might further deter armed forces from participating in new compliance initiatives that are not entirely internal and over which they lack a sense of control, as in the case of the International Humanitarian Fact-Finding Commission, an international body with the mandate to investigate alleged violations of IHL that has been used only once in its nearly thirty years of operation.¹⁵⁰ This concern became evident with some militaries' reluctance to participate in ICRC initiatives that were intended to enhance compliance or provide further guidance on particular doctrines of IHL. Such was the case with both the ICRC study on direct participation in hostilities as well as the 2015 ICRC-Swiss IHL compliance mechanism initiative.¹⁵¹

This last point raises further concerns about militaries' engagement with the ICRC more broadly. While the ICRC operates in general on the basis of

148. Blum, *supra* note 143.

149. Sassóli, *supra* note 6.

150. See David Turns, *Implementation of International Humanitarian Law*, in THE OXFORD GUIDE TO INTERNATIONAL HUMANITARIAN LAW 361 (Ben Saul & Dapo Akande eds., 2020). The commission was used in 2017 to lead an independent forensic investigation in Luhansk province in Eastern Ukraine.

151. See *id.* at 361 (describing the ICRC's proposed meeting of States, a “non-politicized forum for states . . . conceived as something entirely non-partisan and unthreatening to states' sovereignty,” and how “it proved impossible to reach a multilateral agreement on even this relatively harmless proposal”); INT'L COMM. OF THE RED CROSS, STRENGTHENING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW: DRAFT RESOLUTION AND CONCLUDING REPORT (Dec. 10, 2015); *No Agreement by States on Mechanism to Strengthen Compliance with Rules of War*, ICRC (Dec. 10, 2015), <https://www.icrc.org/en/document/no-agreement-states-mechanism-strengthen-compliance-rules-war>; Jelena Pejić, *Strengthening Compliance with IHL: The ICRC-Swiss Initiative*, 98 INTERNATIONAL REVIEW OF THE RED CROSS 315 (2016).

a confidential dialogue with governments and militaries in which the organization can raise concerns about compliance with IHL, the ICRC does occasionally resort to diplomatic *demarche*, and in an environment in which criminal prosecutions hover as a threat, any external scrutiny might deter dialogue. Sassóli noted the concern that both States and nonstate armed groups may become more reluctant to give the ICRC access to victims of IHL violations (whether civilians in conflict areas, prisoners of war, or detainees) for fear that such access would lead to subsequent prosecutions.¹⁵²

It is also notable in this context that since 1977, there have been few, if any, successful efforts to negotiate and agree upon additional rules of IHL or to come to a common understanding of existing ones. Some agreements are negotiated among coalition partners in particular theaters for the purpose of generating a common set of rules of engagement but they are not binding as an authoritative expression of the law in any other theater. Nonbinding rules for particular types of warfare, such as air and missile warfare or cyber warfare, have been proposed by groups of experts but without a clear buy-in from States. There have been virtually no efforts to set up a mechanism for the determination and payment of reparations for cases of violations of IHL.

Though undoubtedly attributable to many reasons, the shadow of ICL may have served to deter further agreement on wartime prohibitions and to provide a convenient excuse for avoiding other types of accountability.

V. SOME COUNTER EXAMPLES (OR HOW ICL HAS STRENGTHENED IHL)

As noted in the introduction, notwithstanding the concerns I have outlined above, no one could responsibly argue that ICL has no humanitarian benefits in general, nor that it fails to provide beneficial effects on the interpretation and application of IHL.

To see how ICL has improved the conditions of armed conflicts from a humanitarian standpoint, one could look at various factors: the doctrinal expansion of recognized war crimes in both IACs and NIACs; the expanded interpretation or application of previously recognized crimes under IHL; or the institutional spillover effects of ICL on IHL. Finally, at least in some instances, IHL and its guardians have proven themselves capable of defending IHL norms against possible crowding out by ICL. In this section, I briefly

152. Sassóli, *supra* note 6.

take note of each of these points to offer a more nuanced picture of the relationship between the two fields.

Doctrinally, ICL law and jurisprudence have established as war crimes certain violations that are not already expressly laid down in IHL conventions as grave breaches or war crimes. Among these are forced labor, sexual violence, and attacks against certain objects. Through case law, ICL has further clarified and made concrete certain IHL norms through the adjudication of corollary war crimes, such as terrorizing a civilian population¹⁵³ or the unlawful appropriation of public or private property.¹⁵⁴ Moreover, ICL, beginning with the work of the ICTY and ICTR, has developed and enshrined in text a whole category of war crimes committed in NIACs, a category that was very thin under traditional IHL.

ICL, on occasion, has also expanded the application of IHL more generally. The ICTR, for instance, has determined that it is not only States or nonstate actors who are bound by IHL, but also individuals who have sufficient nexus to the armed conflict and who exercise public authority through a State organ.¹⁵⁵ The ICTY has also ruled that “allegiance,” and not just nationality, may be used as a criterion to establish the status of a protected person in an ethnic conflict (although this expansion to allegiance may have had detrimental effects on other doctrines, such as the DPH category or the prohibition on pillaging).¹⁵⁶

Institutionally, it is undeniable that today’s militaries, at least in liberal democracies, employ many more lawyers, invest in training, and have more procedures in place to ensure compliance with the law. It is difficult to imagine that the threat of possible prosecutions under ICL had nothing to do

153. *Galić*, *supra* note 80.

154. The core ICC jurisprudence on pillage consists of trial judgments in the cases of *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Judgment (Mar. 7, 2014); *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Judgment (Mar. 21, 2016); *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06-2359, Judgment (July 8, 2019); and *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-1762-Red, Judgment (Feb. 4, 2021). Consistent with the current prevalence of NIACs, the four cases concern pillage under Article 8(2)(e)(v) of the Rome Statute.

155. See YORAM DINSTEIN, *NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW* 173–204 (2014).

156. *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 266 (Sept. 30, 2008). The ICC pre-trial chamber defined civilians—for the purpose of proportionality analyses—as “civilians not taking an active part in hostilities, or . . . a civilian population whose allegiance is with a party to the conflict that is enemy or hostile to that of the perpetrator.” Similarly, they defined the war crime of pillage as applying only to those with allegiance to the other party.

with the greater investment in compliance on the part of these militaries. Even if, in many cases, what is considered “compliance” is now dictated by ICL more than by IHL, and even if the precise nature of the advice rendered by lawyers remains unclear (as I’ve explained earlier), the proliferation of lawyers entrusted with the task of ensuring compliance—either with IHL or ICL—is a generally positive development.

Beyond these spillover effects, there are also some areas in which IHL has clearly withstood the overshadowing effects of ICL. This is particularly the case when one considers omissions by ICL, which have not led to a corollary omission in IHL. One clear example is the operation of the principle of proportionality in NIACs: Though disproportionate targeting is not listed in the Rome Statute as a crime in NIACs, virtually all States recognize the customary prohibition as binding in all conflicts.

VI. CONCLUSIONS

Two opposing narratives could be used to describe the effects of ICL on IHL. The optimistic one celebrates the shadow of ICL as a source of interpretation, expansion, and greater care in the application of IHL. The optimistic narrative has much to support it: the expansion of treaty law that governs NIACs, case law by domestic and transnational courts that reinforces certain IHL doctrines or broadens their scope of application, the increased role played by lawyers, and the introduction of more investigative and review mechanisms in advanced militaries. Undoubtedly, the fear of prosecution, either by international tribunals or domestic courts of various States, deters some of the worst violations of the laws of war, at least some of the time.

The counter-narrative, which is more cautionary and hesitant about the shadowing effects of ICL, is the one I have focused on here. This narrative, too, has legs to stand on: ICL doctrines and jurisprudence that raise the bar for purposes of criminality run the risk of weakening the relevant underlying IHL obligations; the greater attention that is given to war crimes and war crimes trials could just as well be a compliance drag as a pull; advising lawyers in any particular case might see themselves merely as counselors for potential defendants in criminal trials.

Both narratives are available and each captures some truth. ICL has had both beneficial and detrimental effects on IHL. I do not set out to evaluate them against one another or assess whether their upsides ultimately outweigh their downsides. It would also be impossible to imagine the counterfactual

world in which ICL did not develop in the way it did and assess the consequences had IHL remained the dominant field of reference alongside international human rights law.

My purpose here is more modest: in its least ambitious form, it is to urge care and precision when one borrows from one field and transfers to the other. More ambitiously, it is to urge us to think about other mechanisms for further negotiations and agreement over the interpretation, application, and enforcement of IHL rules.