Chapter 14
Discrepancies Between International Humanitarian Law on the Battlefield and in the Courtroom: The Challenges of Applying International Humanitarian Law During International Criminal Trials

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Abstract International humanitarian law and international criminal law are distinct but related fields. The application of international humanitarian law to concrete facts by international tribunals and courts has contributed to the development and clarification of this body of law. However, using a law in the courtroom that was created instead, to be applied on the battlefield poses significant challenges. In the process of such use, the law may have been distorted to fit facts that it was not envisioned to cover. Its use is as a means to punish unwanted behaviour during armed conflicts and to combat impunity risks contorting the balance on which international humanitarian law is based: military necessity and humanity. This chapter highlights some findings by international criminal tribunals and courts that do not sit easily with international humanitarian law as applied by armed forces, and discusses the consequences that applying the laws of armed conflict during criminal trials may have for this branch of international law.

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14.1 Introduction

International humanitarian law (hereinafter: IHL), also referred to as laws of war, laws of armed conflict, or as *ius in bello*, has been around for a long time. Whereas States concluded humanitarian law treaties well before the conception of international criminal justice,[1] IHL was not drafted to be applied in a courtroom. It *was* not, and *is* not, intended to be "the international equivalent of a comprehensive national criminal code".[2] Instead, IHL aims to protect those who are not, or are no longer, taking part in hostilities, the wounded and sick, prisoners of war and civilians during armed conflict. In fulfilling its aim to protect, it places certain restrictions on warring parties, whilst at the same time it acknowledges wartime reality. As "a body of preventive law", it is usually applied in practice by non-lawyers[3] and, in particular, by members of the armed forces of the parties to a conflict. This application on the battlefield requires certain simplicity. Rules of IHL thus differ from a criminal code and do not include elements of crimes.

[1] The first multilateral humanitarian law treaty dates back to 1864 (Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864, http://www.icrc.org/ihl.nsf/FULL/120?OpenDocument). After a failed attempt to set up a tribunal to try the German Emperor Wilhelm II, the International Military Tribunals of Nuremberg and Tokyo saw the light of day in 1945; however, it took until the 1990s for international criminal law to really take off.

[2] Fenrick 1997, p. 26.

[3] Fenrick 1997, p. 26. However, in situations of targeting, military lawyers will normally be involved in the target selection process. See e.g. Boyle 2001, pp. 32–33.

Moreover, violations of a large number of the rules are not even war crimes, and those rules are better considered as 'instruction norms'.[4]

On the other hand, in order to prosecute and try alleged war criminals, the parties in a criminal trial have to have resort to clear rules.[5] Also, an assessment must be made as to whether the elements of an alleged crime have been met for a conviction to be entered.[6] Substantive international criminal law[7] is not an autonomous body of law that happens to be based on IHL, but is instead an accessory to the latter. War crimes law should therefore logically be interpreted with a close eye on the IHL, the very law upon which the violations are based.[8]

Notwithstanding the foregoing, international criminal law (hereinafter: ICL) has developed greatly since the 1990s and has, through the numerous judgments of the international tribunals and courts, e.g. the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY) and the International Criminal Tribunal for Rwanda (hereinafter: ICTR), contributed to the implementation of IHL in general, and to the development and clarification of the substance of IHL.[9] Viewing IHL through the lens of ICL also entails risks, however.[10] Not all 'clarifications' by such courts and tribunals have actually simplified, or indeed

[4] Examples include Articles 38–41, 57–66, and 79 of the Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, (hereinafter: Third Geneva Convention), United Nations Treaty Series, Vol. no. 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-972-English.pdf. In addition, it was not accepted until the *ad hoc* Tribunals that war crimes included more than only "grave breaches" and that other serious violations of IHL as well as such violations committed during non-international armed conflicts were also to be included. See generally Wagner 2003.

[5] In its report on the North Atlantic Treaty Organisation's (hereinafter: NATO) 1999 bombing campaign in relation to Kosovo, the Office of the Prosecutor of the ICTY acknowledged that sometimes IHL is not clear enough to start an investigation into alleged crimes. See the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia of 2000 (hereinafter: "Final Report to the Prosecutor"), p. 90.

[6] The judges at the *ad hoc* Tribunals had to develop the elements of crimes themselves (albeit aided by the parties that made proposals) for the alleged crimes that they were asked to pronounce upon. The International Criminal Court has elements of crimes that have been drafted by a special working group, and were subsequently adopted by the Assembly of States Parties. The elements of crimes merely serve to "assist" the judges and are not binding on the chambers, however. See Article 9(1) of the Rome Statute of the International Criminal Court (hereinafter: Rome Statute), Rome, 17 July 1998, U.N. Doc. A/CONF. 183/9, http://untreaty.un.org/cod/icc/statute/romefra.htm.

[7] Besides war crimes, substantive international criminal law also includes the crime of genocide and crimes against humanity. Both of these crimes can be committed outside a situation of armed conflict. See further Sect. 14.2 below.

[8] See Werle 2009, p. 358, para 964, referring to the ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 81.

[9] See on this issue e.g. Darcy 2010; Heinsch 2007; Danner 2006; van den Herik 2005; Kress 2001; Green 1999; Greenwood, 1998; Meron 1998a; Fenrick 1998.

[10] Sassòli 2009, pp. 111, 117–119.

clarified, IHL. Whilst certain rulings might be understandable from a criminal law point of view, the impact on IHL when applied on the battlefield, instead of in the courtroom, could actually lead to confusion and to a blurring of the (usually) clear and basic rules of IHL. Under IHL, a soldier can legitimately attack his enemy in order to kill the enemy or make him retreat, as long as in doing so, he does not cause excessive incidental damage to civilian objects or uses a forbidden means or method of warfare. However, as will be discussed below, this soldier could be found guilty of having committed a crime against humanity of deportation, if the enemy indeed retreats.[11] This is a confusing situation for the soldier in the field, indeed.

This chapter highlights and discusses some of the discrepancies between IHL and ICL and explains why applying IHL in retrospect, that is, before international courts and tribunals, is challenging and thus requires a good understanding not only of the foundations of IHL, but also of the way IHL is meant to apply on the battlefield. In doing so, it will first briefly address some of the challenges with which the international criminal institutions are faced when alleged violations of IHL are prosecuted before them. The discussion then focuses on the way these institutions have contributed to the clarification of IHL. The next section discusses some issues of IHL that have been addressed by the institutions in a way that, from an IHL perspective, could be seen as incorrect, and some issues that have been addressed as crimes against humanity, but appear to be at odds with the rationale of IHL. The third and final section provides an explanation of the reasons why discrepancies exist between IHL itself and the way this body of law is dealt with in international criminal justice.

Whilst critical of certain findings by the international courts and tribunals, and the negative effect these findings could potentially have on IHL and the protection afforded by it, this contribution also acknowledges the important work done by these institutions. It merely wishes to contribute to academic debate that aims to assist the work of those at these very tribunals and courts.

14.2 From IHL to ICL

In addressing the Office of the Prosecutor of the International Criminal Court (hereinafter: ICC), Frits Kalshoven qualified the "colossal distance" travelled from IHL to ICL as a "quantum jump".[12] He added that he wanted "to remove any suggestion that in moving from IHL to international criminal law we might have lost IHL somewhere on the road. Far from it, IHL is still very much with it […]".[13]

[11] See Sect. 14.6.

[12] See Kalshoven's speech, published as Kalshoven 2004, p. 151.

[13] Ibid., at p. 153.

The *ad hoc* tribunals, and therefore (modern) international criminal law,[14] are founded on IHL: the ICTY's and ICTR's full names make this very clear.[15] Whilst the Special Court for Sierra Leone (hereinafter: Special Court) does not specifically refer in its name to "serious violations of international humanitarian law", the first article of its Statute clearly states that the Special Court's jurisdiction is mandated to adjudicate over such violations.[16] IHL, as referred to in the statutes of the *ad hoc* Tribunals, is used in a broad sense.[17] In this chapter, the term "international humanitarian law" is used in the narrow sense, i.e. referring to the rules governing the parties to an armed conflict (the laws of war, laws of armed conflict, or *ius in bello*). It does not, therefore, include the law of genocide or crimes against humanity. Be that as it may, acts constituting the latter two crimes, when committed in times of armed conflict, will often also constitute war crimes. As long as there is a nexus with the armed conflict, the same behaviour, e.g. the directing of an attack at civilians, may qualify—depending on the circumstances and the fulfilment of the mental and subjective elements—as a war crime, a crime against humanity and/or genocide.

International law is a man-made phenomenon and is shaped by actors (e.g. States, organisations and individuals) that are driven and brought together by their perceived need to solve particular problems at the international level. Triggering events, opportunities and ideas are key factors behind this development of

[14] 'Modern' vis-à-vis the criminalisation of, e.g., piracy and slavery. Extradition and mutual assistance in criminal cases are often—besides the term that is also used: transnational criminal law—grouped under the heading of "international criminal law". ICL is used herein for the law criminalising genocide, crimes against humanity, and violations of IHL.

[15] The full name of the ICTY is the "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991". The ICTR's full name is the "International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994". See, respectively, UN SC Resolutions 827 (S/RES/827 (25 May 1993)) and 955 (S/RES/955 (8 November 1994)). The United Nations Secretary-General's report to the Security Council on the establishment of the ICTY also made clear that the Tribunal was to apply "rules of international humanitarian law which are beyond any doubt part of customary law" (see Report of the Secretary-General, 'Report pursuant to Article 2 of Security Council Resolution 808' (1993) U.N. Doc. S/25704, 34).

[16] Article 1(1) of the Special Court Statute reads: "The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996" (Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 17 January 2002).

[17] As such "serious violations of international humanitarian law" would also include acts of genocide and crimes against humanity. In 1966, Pictet described IHL "in the wide sense" as "compromising two branches: the law of war and human rights" (Pictet 1966, p. 10).

international law.[18] This accounts for "the fragmentation of international law into a great number of issue related treaty regimes established on particular occasions, addressing specific problems created by certain events. But as everything depends on everything, these regimes overlap".[19]

This overlap, as will be discussed below, is in fact one of the challenges to a good application of IHL when prosecuting and adjudicating alleged violations; that is, applying IHL in court in retrospect.

14.3 Challenges in Applying IHL in Retrospect

As noted above, IHL was originally created to guide warring states in their conduct of hostilities and to determine state responsibility for the way they would conduct their military operations. Importantly, though, it was not created for evaluating the individual criminal responsibility of the commanders for unlawful conduct.[20] This also explains why the rules of IHL include highly subjective notions, such as 'military necessity', 'excessive damage', and 'military advantage'.[21] Whilst such notions are already difficult to apply correctly during combat, the fact that they are difficult both to qualify and to quantify provides the flexibility to enable their use during armed conflicts. Applying them afterwards in a courtroom, however, "is an uphill task, as they involve value-based, individual judgements".[22]

This task is even more daunting, given the fact that—naturally—not everybody who works in international criminal justice is an experienced military or humanitarian lawyer. The successful prosecution of international crimes requires criminal lawyers who are used to, and capable of, dealing with very large amounts of evidence, a vast volume of procedural rules, and examining witnesses. At the same time, those with knowledge of, and experience with, IHL, are not always well divided over the various parties, teams or chambers.

Discussed next are some legal and practical challenges with which the international institutions dealing with alleged violations of IHL are faced.

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[18] Bothe 2004, p. 37.

[19] Ibid. For the fragmentation of international law and the consequences for the separate branches, see the Report of the Study Group of the International Law Commission (2006), which was prepared by Martti Koskenniemi.

[20] Wuerzner 2008, p. 929.

[21] Ibid.

[22] Ibid.

14.3.1 Legal Challenges in the Adjudication of Violations of IHL

IHL and ICL have different objectives. Whereas the former aims to regulate warfare and thereby to mitigate the suffering resulting therefrom,[23] the latter seeks to counter the impunity of those having violated the rules of IHL in such a manner as to give rise to individual criminal responsibility.[24] In striving to limit suffering in times of armed conflict, IHL has an in-built presumption of protection: only those who qualify as combatants or take a direct part in hostilities can be targeted. In case of doubt about the status of a person or object, IHL proscribes that the person or object concerned is to be considered as protected and thus cannot be attacked.[25] Under ICL, those who are alleged to have committed international crimes, by *inter alia* breaching IHL, are prosecuted. One of the essential principles of criminal law thus forms part of ICL: the presumption of innocence.[26] As a corollary of this principle, the prosecution has to prove beyond reasonable doubt that the accused has committed the crimes as charged. In doing so, another corollary of this principle, *in dubio pro reo*, requires that "the accused is entitled to the benefit of doubt as to whether the offence has been proven".[27] If then, an accused is charged with directly attacking civilians not directly participating in hostilities or persons *hors de combat*, the prosecution has to prove that the alleged victims could not legitimately be attacked for being combatants or for directly participating in hostilities, and therefore were not, at the time of the attack, protected by IHL. On this issue, the ICTY has found that the prosecution "must show that a reasonable person could not have believed that the individual he or she attacked was a combatant".[28] The presumption of protection as defined in IHL

[23] Fleck 2008, p. 11; Kalshoven 2011, p. 2.

[24] Cryer et al. 2010, p. 1; Werle 2009, pp. 29–36.

[25] See Articles 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."), 50(1) ("In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."), and 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.") of Protocol (I) Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 9 December 1978) 1125 United Nations Treaty Series 3 (hereinafter: Additional Protocol I), http://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf.

[26] See Article 21(3) ICTY Statute, Article 20(3) ICTR Statute, and Article 66 Rome Statute.

[27] ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Delalić et al.* Judgement") para 601. See generally Raimundo 2008, pp. 110–111.

[28] ICTY, *Prosecutor v. Stanislav Galić,* Case No. IT-98-29-T, Judgement, 5 December 2003 ("*Galić* Judgement"), para 55.

thus—for obvious and understandable reasons—works in reverse in ICL.[29] IHL's aim to protect those not or no longer taking part in hostilities then 'clashes' with the protection under criminal law of the accused's right to a fair trial.

The opposite objectives of the parties in an (international) criminal trial, which in short boil down to the prosecution seeking to achieve a conviction and the defence an acquittal, can lead to submissions by the parties on the law that best serve their desired outcome, respectively. This, in turn, can lead to judicial findings that follow the approach taken by one of the parties and so do not necessarily reflect the law in a correct manner.[30]

ICL gives rise to individual criminal responsibility, which results in certain provisions of war crimes law being interpreted more narrowly than their IHL counterparts. Care should therefore be taken to make clear that the narrower reading of a war crime will come to replace the broader interpretation of the rule of IHL on which it is based.[31] One scholar warns in this regard that "[i]f appropriate care is not taken, interpretations of the war crime could end up in the narrowing of the protections afforded by international humanitarian law".[32]

The protection under ICL is not always narrower than under IHL, however. The next example shows that alleged perpetrators can more easily be held accountable for war crimes than that they would lose their protected status under IHL. When looking at individual criminal responsibility and modes of liability, one can also see that dealing with IHL in retrospect does not always correspond to battlefield reality. For example, a joint criminal enterprise (hereinafter: JCE) can include persons who (initially by the prosecution and subsequently by the judges seized of the case) are deemed to have been of vital importance to the commission of war

[29] This challenge obviously also exists for the adjudication of violations of IHL on the national level. See on the issue of the civilian presumption and the principle of *in dubio pro reo*, Hayashi 2006, pp. 76–84, which also includes a discussion on the approach taken by the ICTY with regard to "doubt" as to direct participation and prisoner of war status.

[30] See below the discussion of the *Lubanga* case (ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06) at "Military targets vs civilian objects". Naturally, case law is formed by the decisions of the chambers and not by the view of a prosecutor's office or the defence. However, with regard to submissions by the parties, it is interesting that the Final Report to the Prosecutor (see *supra* note 5) has been so widely referred to in both academic writings and in case law. Similarly, the reliance of the Customary IHL Study on the First Indictment in *Karadžić and Mladić* as evidence of the customary nature of the prohibition to attack UN personnel appears not to take into account the fact that, although the indictment has been confirmed by the Pre-Trial Chamber, it is still merely the view of one of the parties to a criminal trial and a chamber at trial has yet to pronounce thereon (see Henckaerts and Doswald-Beck 2005b, Rule 33 and accompanying text, p. 113).

[31] Sivakumaran 2011, p. 220.

[32] Ibid., at p. 230.

crimes, [33] and yet whose acts do not fall within the definition of direct participation in hostilities.[34] During the armed conflict then, the opposing party would not have been allowed under IHL to target these persons, and thereby prevent the

[33] For its part, a joint criminal enterprise (JCE) is purely an ICL concept that was first introduced by the ICTY in *Prosecutor v. Tadić*. The judges deemed it necessary to introduce this extra-statutory mode of liability because

> to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.
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> (ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, Judgement (Appeals Chamber), 15 July 1999 ("*Tadić* Appeal Judgement") para 192).

This mode of participation was found (and has since been found by later ICTY Trial and Appeals Chambers, as well as at the ICTR, Special Court and the Extraordinary Chambers in the Courts of Cambodia) to exist for war crimes. There are three different types of JCE, namely:

> i. *A plurality of persons.* They need not be organised in a military, political or administrative structure […].
>
> ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.
>
> iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose. (*Tadić* Appeal Judgement, para 224).

[34] Direct participation in hostilities is purely an IHL concept that has been subject to extensive legal debate. A study initiated by Avril McDonald, together with the International Committee of the Red Cross (hereinafter: ICRC), seeking to clarify the concept of direct participation in hostilities, was published by the ICRC in 2009: the Interpretive Guidance on the notion of direct participation in hostilities under international humanitarian law. According to this Interpretive Guidance (herein referred to as Melzer 2009), the notion of direct participation in hostilities "refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict." (Melzer 2009, p. 16). Such acts must meet the following cumulative criteria:

> 1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
>
> 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
>
> 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus). (Melzer 2009, p. 16).

commission of war crimes. Members of the opposition themselves could even be prosecuted for war crimes if they would have undertaken military action against the (protected) persons in question. The foregoing is difficult indeed to explain to members of the armed forces when teaching them about the rules of IHL and about individual criminal responsibility.[35]

Sometimes the rules of IHL might themselves be problematic. Consider, for example, the following: although members of the armed forces would assume that they should not cause excessive collateral damage to persons *hors de combat* when taking targeting decisions, the prosecution of an act having caused extensive casualties[36] amongst persons *hors de combat* that were foreseeable to the attacker would be impossible under the current regimes of e.g. the ICTY and the ICC, as long as the object of the attack was a legitimate military target. Since the principle of proportionality, as codified in Articles 51(5)(b) and 57(2) of Additional Protocol I, requires commanders to make an assessment as to whether the military advantage to be obtained by an operation outweighs the possible damage to civilians and/or civilian objects that could result from this military action.[37] The law is very strict on this issue. It is only *civilian* damage that has to be balanced against the military advantage.[38] Persons *hors de combat*, such as prisoners of war (POW) or wounded soldiers, do not therefore benefit from the 'protection' of the principle of proportionality. If a high value military object, e.g. a commander of the opposing forces, the elimination of which would result in a significant military advantage, would be in the direct vicinity of a POW camp or field hospital, then the number of persons *hors de combat* who would possibly be killed or (further)

[35] Interestingly, this issue was discussed only briefly during the expert meetings that formed part of the drafting of the Interpretive Guidance. IHL and ICL are (arguably) separate legal regimes, and academic experts in both or either of these fields might not view this issue as being problematic because they have a clear understanding of each of the two concepts. However, those practicing in these fields, and those with less in-depth knowledge of IHL and of ICL, have trouble in understanding how someone can be responsible for committing war crimes without losing his/her protection as a civilian under the laws of war.

[36] The Commentary to the Additional Protocol I uses the term "extensive". The Commentary's substitution of the word "excessive" by "extensive" is criticised by, *inter alia*, Anthony Rogers for negating the balancing process inherent in the idea of proportionality (see Rogers 2004, p. 18). Extensive is deliberately used here, however, as it should be clear that a large number of casualties is at issue, which does not fall within the required equation, and thus need not be balanced against the military advantage that would be gained.

[37] See e.g. Kolb and Hyde 2008, p. 48; and Dinstein 2004, p. 59.

[38] Articles 51(5)(b) and 57(2) of Additional Protocol I refer only to "civilian life, injury to civilians, damage to civilian objects, or a combination thereof" that would be "excessive in relation to the concrete and direct military advantage anticipated".

injured as a result of a strike would not have to be taken into consideration by the attacking party. The same applies to an attack on a building or location that would qualify as a military object, which at the moment of the attack would house persons *hors de combat*. In both situations, even if the number of persons *hors de combat* who would be killed would—if the same number of civilians would have been killed—appear to be clearly excessive, no war crime charges could be brought for ordering or carrying out the attack.[39]

14.3.2 Practical Challenges in the Adjudication of Violations of IHL

Since violations of IHL occur by definition during a situation of armed conflict, which is normally a situation of chaos,[40] the process of the international prosecution of the alleged perpetrators and the judging of their behaviour is inherently difficult.[41] This is especially the case with regard to alleged violations occurring in the conduct of hostilities. In fact, one author has raised the question whether this is actually a 'mission impossible'.[42] The 'fog of war' that influences decisions taken on the battlefield has to be taken into account during a subsequent criminal trial also.

Challenges occur firstly with regard to the determination of the facts and the knowledge and intent of the accused at the time of the alleged violation. Documentary evidence often does not exist, or is difficult to obtain.[43] Indeed, States have shown to be unwilling to hand over sensitive information stating reasons of national security.[44] The *ad hoc* tribunals have the power to *subpoena*, but their

[39] It is submitted by the present author that the fundamental principle of proportionality underlying Articles 52 and 57 of Additional Protocol I would include any person who cannot directly be targeted under IHL, i.e. in addition to civilians, also persons *hors de combat*.

[40] Of course also during an armed conflict certain (international) crimes can be very well organised, planned and far from 'chaotic'. One need only think of the Holocaust as being a case in point.

[41] It is acknowledged that courts at the national level are faced with many problems also when dealing with war crimes. Some of these problems are of a similar nature as those on the international level. Because of the substance of the applicable law and the situations in which the alleged crimes were committed, some problems are due to the national criminal justice systems. See, generally, Witteveen 2010.

[42] The question is answered in the negative, but it is held that the prosecution of conduct of hostilities crimes meets with many difficulties. Wuerzner 2008, pp. 907–930.

[43] Nazi Germany documented the Holocaust meticulously and the ICTY has been able to make use of thousands of documents produced by the parties to the Balkan conflict. However, obtaining documents containing, e.g., the targeting decisions or orders to commit a violation, is difficult as the armed forces will normally attempt to prevent these documents from falling into the hands of a third party. Furthermore, written documents by militia, whose activities may more often be before the ICC, rarely exist, if indeed at all; or such documents may be few in number.

[44] See, *inter alia*, Dawson and Dixon 2006, pp. 112–134; and Neuner 2002, p. 163.

powers are limited when it concerns States or State officials,[45] and the ICC has no such power at all.[46] Much of the evidence is obtained through witnesses, but witness testimonies have inherent problems, due in part to the lapse of time between the moment the alleged crime took place and the testimony, the nature of the crimes and the various psychological reasons that influence the credibility of this type of evidence.[47]

Notwithstanding the obligation to take all feasible precautions when launching an attack, certain attacks that have resulted in the death of and/or serious injury to civilians or those *hors de combat* would only constitute a violation of IHL if the attacker intended to cause the resulting harm to the persons protected by IHL.[48] Mistakes or faulty weaponry can result in outcomes that IHL aims to prevent, but these outcomes do not necessarily constitute violations of IHL.[49] The United States Military Tribunal in Nuremberg developed the so-called "*Rendulic* rule", which entails that one should not lightly second-guess the reasonableness of battlefield decisions.[50] This rule is reflected in the declarations made by several States to Additional Protocol I. Canada's statement of understanding in relation to provisions dealing with the general protection against the effects of hostilities highlights that

> [i]t is the understanding of Canada that, in relation to Art 48, 51 to 60 inclusive, 62 and 67, military commanders and others responsible for planning, deciding upon or executing attacks have to reach decision on the basis of their assessment of the information

[45] ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoena Duces Tecum,* 29 October 1997. The Appeals Chamber held that the Tribunal "does not possess any power to take enforcement measures against sovereign States" and that States can only receive "orders" or "requests" from the Tribunal pursuant to Article 29 of the ICTY Statute.

[46] See, *inter alia*, Sluiter 2009, pp. 590–608.

[47] See Combs 2010. It should be noted that Combs' extensive research did not include the ICTY, but some of the problems that she highlights also apply to witness testimonies at the ICTY.

[48] Individual criminal responsibility thus also only arises when the attacker intended the outcome (or at least an outcome contrary to IHL) to occur. See, *inter alia*, Article 8(2)(a)(i), (iii), (iv) and (vi) of the Rome Statute, using the wording "willful(ly)" and "wantonly"; and 8(2)(b)(i)–(iv), (ix) of the Rome Statute, proscribing that the acts should have been carried out "intentionally".

[49] Examples include the 7 May 1999 attack by NATO on the Chinese Embassy in Belgrade as part of Operation Allied Force (see the Final Report to the Prosecutor, *supra* note 5, paras 80–85); as well as the attack by the United States on the Amiriyah shelter/Al Firdus bunker during the 1991 Gulf War (United States Department of Defense 1992, pp. 615–616).

[50] In the *Hostage* case, the Military Tribunal held that "The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions. These things when considered on his own military situation provided the facts or want thereof which furnished the basis for the defendant's decision […]. [T]he conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgement but he was guilty of no criminal act." (*United States of America v. Wilhelm List et al.*, in Trials of War Crimes before the Nuremberg Military Tribunals under Control Council No. 10, Vol. XI TWC (1948) ("*Hostage case*") 1297).

> reasonably available to them at the relevant time and that such decisions cannot be judged on the basis of information which has subsequently come to light.[51]

This approach has also been adopted by the ICTY in, e.g., *Galić*,[52] and has been incorporated in the study of the International Committee of the Red Cross on customary international humanitarian law.[53]

Secondly, all parties involved in the trial must have a proper understanding of both IHL and military operations. For example, the *Martić* Trial Chamber of the ICTY, which was seized of a case involving conduct of hostilities issues, has been questioned for its (lack of) understanding of military operations,[54] highlighting the need for military experts to be involved in the proceedings. Hayashi observes, in this regard, that whilst judges need not have been soldiers themselves, some degree of familiarity with, and sensitivity to, the nature of the military profession is essential for realistic judicial decisions.[55] And whilst at the ICTY there have been quite a number of persons with (extensive) military experience working for all parties involved, this number is (at present) very low at the ICC. This does not have to be problematic at the present time, because the cases do not currently deal with large-scale military operations carried out by a conventional army. Nevertheless, with preliminary investigations into situations such as the 2009/2010 Gaza Conflict, the 2008 Russia-Georgia War, and the ongoing conflict in Afghanistan,[56] a good knowledge of military affairs and battlefield reality at the Office of the Prosecutor is essential; not only for a correct legal assessment, but also for knowing what to investigate and what information to bring before the judges.

The parties involved in international criminal justice cannot rely solely on expert witnesses for their own information on military issues, such as weapons systems,[57]

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[51] Canada, Reservations and statements of understanding made upon ratification of the 1977 Additional Protocol I, 20 November 1990, para 7. Similar statements have been made by, e.g., Austria, the Netherlands and the United Kingdom (see the reservations/declarations to Additional Protocol I at www.icrc.org/ihl).

[52] *Galić* Judgement, *supra* note 28, para 58.

[53] Rules 24 and 15 of ICRC, 'Study on Customary International Humanitarian Law' (2005) (hereinafter: ICRC Customary IHL Study). Since 2005 updated and available at http://www.icrc.org/customary-ihl/eng/docs/home.

[54] See Van Schaack and Slye 2007, pp. 252–253.

[55] Hayashi 2006, pp. 87–88.

[56] Office of the Prosecutor of the ICC Press Release, 'Georgia preliminary examination: OTP concludes second visit to the Russian Federation' (4 February 2011) ICC-OTP-20110204-PR625; and the overview available at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/, stating that the ICC's Office of the Prosecutor is conducting preliminary examinations, e.g. into the situations in Georgia, Afghanistan and Palestine.

[57] The various *ad hoc* Tribunals and the ICC have often made use of expert witnesses, called by both the Prosecution and the Defence. An example is the *Gotovina* case before the ICTY, where Lieutenant Colonel Konings, an artillery expert in the Royal Netherlands Army, called by the Prosecution, and Professor Corn, a former US army officer, called by the Defence, testified on issues such as the feasibility of taking precautions and targeting with artillery. See ICTY, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Judgement, 15 April 2011 (*Gotovina* Trial

for the simple reason that these witnesses must be asked relevant questions, and the correct legal analysis should be made based on the evidence given.[58]

Recently, the ICTY *Gotovina* Trial Chamber was criticised by a group of military experts for not having done the latter in a report that "provides perspectives on whether particular artillery attacks which were analyzed by the Trial Chamber complied with specific tenets of international humanitarian law".[59] The report states that the *Gotovina* Trial Judgement's "legal conclusions […] lack the appropriate measure of operational sophistication that is necessary for understanding both how to apply the law and the consequences of that legal application to the implementation of IHL in future operations",[60] and that the judgement "conflates the criminal standard with the operational standard in IHL".[61]

Despite the challenges discussed hitherto, ICL has nevertheless contributed to the clarification of IHL, to which the discussion now turns.

14.4 The Clarification of IHL by ICL and the Criticisms Thereof

With regard to the clarification of IHL by ICL, William Fenrick has described the judgments of the *ad hoc* Tribunals as having added "flesh to the bare bones of treaty provisions or to skeletal legal concepts" of IHL.[62] Similarly, Theodor Meron—before himself joining the ICTY as a judge—has held that the jurisprudence of the *ad hoc* Tribunals helped IHL "to come of age" and to develop more rapidly between 1991 and 1998 than during the 45 years after the Nuremberg Tribunals.[63] Indeed, in their case law the Tribunals have clarified many issues of

(Footnote 57 continued)
Judgement), paras 36, 1163–1175; See also ICTY, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005, paras 130–131, 203–204; ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgement, 12 June 2007, para 29.

[58] This is also true for the testimony of crime-based witnesses.

[59] ICTY, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-A, Decision on Application and Proposed Amicus Curiae Brief, 14 February 2012, para 7. The group of military experts (from Canada, the United Kingdom and the United States) attempted to submit its report as an *amicus curiae* brief to the ICTY's Appeals Chamber, but its request was denied by the Appeals Chamber. See the aforementioned decision.

[60] International Humanitarian Law Clinic at Emory University School of Law 2012, p. 12. See, however, http://opiniojuris.org/2012/02/01/significant-problems-with-the-gotovina-expert-report/ for a critique of the report by Kevin Jon Heller. The present author shares some of the concerns as to the effect on the application of the law in military practice, mentioned in the report, and agrees that the law has to continue being realistic, but does not share all the criticisms included in the report.

[61] International Humanitarian Law Clinic at Emory University School of Law, p. 7.

[62] Fenrick 1998, p. 197.

[63] Meron 1998b, pp. 463, 464. See for similar remarks Schabas 2001, p. 42

IHL. Notable examples include the notion of armed conflict,[64] the lower threshold of non-international armed conflicts,[65] rape as a war crime,[66] and the war crime of terrorising the civilian population.[67] Although the findings by the tribunals are not binding on States, they nevertheless have a great influence on IHL,[68] as demonstrated by the references made by States and national courts to the Tribunals' case law, as well as by the impact that this case law has had on the negotiation of international treaties, including the Rome Statute and the Convention on Cluster Munitions.[69] The extensive references to the case law of the Tribunals in the ICRC Customary IHL Study is perhaps the best example of the impact that the Tribunals have had on IHL.[70]

However, in the process of clarification, the Tribunals might not always have struck the right balance. There has been criticism in academic writings about certain decisions that are said to misstate IHL as such, or the customary status of certain rules of IHL.[71] One such example is the criticism of the findings by the ICTY on the notion of belligerent reprisals in *Kupreškić*[72] and in *Martić*.[73] Whilst

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[64] See ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 66–70.

[65] In first *Limaj* and then in *Haradinaj*, the ICTY clarified the definition of non-international armed conflict that had been used by this Tribunal since *Tadić* (see ICTY, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Judgement, 3 April 2008). In *Boškoski*, the Trial Chamber elaborated on this clarification by giving a detailed overview of what constitutes such a conflict, and by reviewing how the relevant elements of Common Article 3 that were recognised in *Tadić*, namely 'intensity' and 'organisation of the armed group' are to be understood (ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Judgement, 10 July 2008, paras 175–206). The Appeals Chamber later confirmed the approach taken by the Trial Chamber. See ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Appeal Judgement, 19 May 2010, paras 19–24.

[66] See mainly ICTY, *Prosecutor v. Kunarac, Kovač and Vuković*, Case No. IT-96-23-T& IT-96-23/1-T, Judgement, 22 February 2001. The debate in this judgment on the definition of rape as an international crime was preceded by the debate in the ICTR's *Akayesu case* and the ICTY's *Furundžija* case. See ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998; and ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998.

[67] The prohibition of acts or threats the primary purpose of which is to spread terror among the civilian population (Article 52(2) Additional Protocol I), as clarified by the ICTY in the *Galić* Judgement, *supra* note 28.

[68] Sandoz 2009, p. 1061.

[69] See e.g. Graditzky 1999, p. 199; Darcy 2010, p. 321; Meron 1998c, p. 1518. Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) CCM/77, http://www.icrc.org/ihl.nsf/FULL/620?OpenDocument.

[70] See Cryer 2006, pp. 239–263; and Darcy 2010, p. 321.

[71] See, *inter alia*, the "critical analysis" by Wolff Heintschel von Heinegg in Heintschel von Heinegg 2003, pp. 35–43.

[72] ICTY, *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić et al* Judgement").

[73] ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-R61, Judgement, 8 March 1996 ("*Martić* Judgement").

resorting to belligerent reprisals has been restricted by the 1949 Geneva Conventions and a further limitation on its use was agreed upon in 1977, several States entered reservations or made declarations concerning the belligerent reprisals provisions of Additional Protocol I; also, certain important States have not ratified the said Protocol.[74] Indeed, the way belligerent reprisals were dealt with in the Protocol has even been said to be one of the very reasons for which the United States of America has not ratified it.[75] Additional Protocol II[76] is silent on the issue of belligerent reprisals and apart from the Amended Protocol to the 1980 Certain Conventional Weapons Convention that extends the prohibition of the use of landmines as reprisals against civilians to non-international armed conflicts, there is no positive international rule dealing with reprisals in non-international conflicts.

Despite the foregoing, the ICTY held in *Kupreškić* that the provision in Additional Protocol I prohibiting such reprisals is declaratory of customary international law and thus binding on all States, including those that have not ratified the Protocol.[77] And in *Martić*, the same Tribunal held that the prohibition of belligerent reprisals against the civilian population or individual civilians "is an integral part of customary law and must be respected in all armed conflicts".[78] Two authors, who also happen to be the most authoritative scholars who have written on the law of belligerent reprisals, Frits Kalshoven and Christopher Greenwood, have both heavily criticised these findings as not being properly founded on customary law.[79]

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[74] See the list of state parties and reservations made to Additional Protocol I at www.icrc.org/ihl.

[75] Sofaer 1988, pp. 784, 785.

[76] Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter Additional Protocol II), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125 ("Additional Protocol II"), http://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17513-English.pdf

[77] *Kupreškić et al* Judgement, *supra* note 72, paras 527–535.

[78] *Martić* Judgement, *supra* note 73, paras 16–17.

[79] Kalshoven 2003, pp. 481–509; Greenwood 2001, pp. 539–557, who concludes that in relation to the customary prohibition found by the Tribunal, "the general statement about customary law is flawed", and that "the remarks about reprisals in non-international armed conflicts are more attractive but were made without consideration (or, at least, without any discussion in the text of the decision) of State practice" (at pp. 556–557).

Similar criticism has also come from several other scholars,[80] as well as the United Kingdom's Ministry of Defence.[81]

The way in which the ICTY has pronounced on command responsibility for commanders of non-state actors in *Hadžihasanović*,[82] on protection based on allegiance to a party to the conflict rather than on nationality,[83] and on the concept of perfidy in non-international armed conflicts,[84] has also met with academic criticism.

Clearly, then, continued discussion is warranted about certain 'clarifications' of IHL made by the Tribunals.

14.5 Discrepancies Between Legal Findings and IHL

Determinations have been made in some decisions by the international tribunals that show a clear discrepancy between the (retrospective) ICL approach to alleged criminal conduct in an armed conflict situation and IHL, the law applicable at the time of the alleged crimes. A well-known example is the erroneous approach to the principle of military necessity, one of IHL's fundamental principles, in relation to the protection of civilians by the ICTY Trial Chamber in *Blaškić*, when it stated that "[t]argeting civilians or civilian property is an offence when not justified by military necessity".[85] This was later addressed by another trial chamber as a misstatement of IHL,[86] and by the Appeals Chamber in *Blaškić*, which deemed it "necessary to rectify the Trial Chamber's statement" and to "underscore that there is an absolute prohibition on the targeting of civilians in customary international

[80] Robert Cryer *et al*. wrote that the *Kupreškić* Judgement "rather unconvincingly derived the prohibition of practically all reprisals from contradictory practice and a bold interpretation of the Martens clause" (Cryer et al. 2010, p. 134). See also the discussion of *Kupreškić* in Kuhli and Günther 2011, pp. 1261–1278.

[81] The United Kingdom Ministry of Defence's *Manual of the Law of Armed Conflict* states that it "is unconvincing and the assertion that there is a prohibition in customary law flies in the face of most of the state practice that exists. The UK does not accept the position as stated in this judgment" (United Kingdom Ministry of Defence 2004, pp. 420–421).

[82] ICTY, *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, 16 July 2003. See Greenwood 2004, p. 601; See also Mettraux 2009, p. 22.

[83] Sassòli 2009; Sassòli and Olsen 2000; Compare Dörmann 2003, pp. 45–74.

[84] Greenwood 1998.

[85] ICTY, *Prosecutor v. Tihomir Blaškić,* Case No. IT-95-14-T, Judgement, 3 March 2000, para 180. The *Kordić* Trial Chamber used a different, but similarly ambiguous wording when it stated that "prohibited attacks are those launched deliberately against civilians or civilian objects in the course of an armed conflict and are not justified by military necessity." (ICTY, *Prosecutor v.* Dario *Kordić and Mario Cerkez,* Case No. IT-95-14/2-T, Judgement, 26 February 2001, para 328).

[86] *Galić* Judgement, *supra* note 28, paras 42–45.

law".[87] However, as will be discussed below, there have been *dicta* or similar erroneous findings by trial chambers that have not been 'rectified'.

Also with regard to the principle of military necessity (which, given its nature to justify certain actions in times of armed conflict that would otherwise be prohibited,[88] has often been subject to discussion before chambers dealing with alleged violations of IHL), Nobuo Hayashi has noted that it remains problematic in the ICTY's case law that

> [w]hile some ICTY judgements clearly indicate the absence of military necessity as an element of persecutions by way of property destruction, others do not. This discrepancy is unfortunate because the destruction of property justified by military necessity constitutes neither a grave breach of the Geneva Conventions nor a violation of the laws and customs of war.[89]

These legal findings, which have been said to be contrary to existing IHL, are not restricted to the ICTY, however. Also at other international institutions, including the Special Court and the ICC,[90] some determinations have been made that appear to show a discrepancy between the (retrospective) ICL approach to

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[87] ICTY, *Prosecutor v. Tihomir Blaškić,* Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para 109.

[88] See, e.g., Article 23 (g) of the 1907 Hague Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (better known as the Hague Regulations), http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument; Articles 8, 33, 34, 50 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter First Geneva Convention), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-970-English.pdf; Articles 8, 28, 51 of Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter Second Geneva Convention), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-971-English.pdf; Article 126 of 1949 Geneva Convention III; Articles 49, 53, 143, 147 of Convention (IV) relative to the Protection of Civilian Persons in Time of War (hereinafter Fourth Geneva Convention), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-973-English.pdf; Articles 54(5), 62(1), 67(4), 71(3) of Additional Protocol I; Articles 4(2), 11(2) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, United Nations Treaty Series, Volume Number 249, http://treaties.un.org/doc/Publication/UNTS/Volume%20249/volume-249-I-3511-English.pdf; Article 17(1) of Additional Protocol II; but also Article 8(2)(b)(xiii), 8(2)(e)(viii), 8(2)(e)(xii) of the Rome Statute.

[89] Hayashi 2006, p. 108 (footnote omitted).

[90] See, *inter alia*, the way in which the pillage of military supplies (such as ammunition), which is by all means legal under IHL, was considered a crime by the Special Court (SCSL, *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-A, Appeal Judgement, 28 May 2008) and is considered to be an alleged war crime by the ICC's Prosecutor and Pre-Trial Chamber II (ICC, *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, 8 December 2010; and ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-CORR-RED, Corrigendum of the "Decision on the Confirmation of Charges", 7 March 2011 ("*Banda and Jerbo* Confirmation Decision").

alleged criminal conduct in an armed conflict situation and IHL, the law applicable at the time of the alleged crime. These include the following topics, which are dealt with next: pillage, the spreading of terror, protected persons and military targets versus civilian objects.

14.5.1 Pillage

The Special Court's Trial Judgement in *Moinina Fofana and Allieu Kondewa* identifies the taking of ammunition from a police officer's house as having satisfied "both the general requirements of war crimes and the specific elements of pillage as a war crime".[91] This finding was made despite the prohibition of pillage in Article 33 of the Fourth Geneva Convention leaving "intact the right of requisition or seizure".[92] In addition to the right of requisition or seizure, a party to an international armed conflict may also lawfully take weapons and military equipment from the enemy as war booty.[93] The ICRC Customary IHL Study could not, as it had done so with regard to international armed conflicts, identify with respect to non-international armed conflicts a rule that would allow, according to international law, the seizure of military equipment belonging to an adverse party. However, it also did not identify a rule that would prohibit such seizure under international law.[94] In light of this, the finding by the Special Court is questionable at best, and would have merited a more elaborate explanation as to why ammunition could qualify as property, the taking of which would constitute pillage.

Similar findings have been made at the ICC, albeit at the Pre-Trial level, that demonstrate a discrepancy between pillage under ICL and under IHL. Notwithstanding the reference in the Elements of Crimes that "appropriations justified by military necessity cannot constitute the crime of pillaging", the Pre-Trial Chamber in *Banda and Jerbo* confirmed charges for pillage of "vehicles, refrigerators, computers, cellular phones, military boots, and uniforms, fuel, ammunition and

[91] SCSL, *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-T, Judgement, 2 August 2007, paras 839–841.

[92] Pictet 1958, pp. 226–227.

[93] The ICRC Customary IHL Study states at Rule 49: "The parties to the conflict may seize military equipment belonging to an adverse party as war booty." See further Dörmann 2002, p. 277, referring to Oppenheim 1952, p. 401 and further. "War booty" is in various military manuals defined as "enemy military objects (or equipment or property) captured or found on the battlefield." (E.g. the Argentinian, Australian, Canadian, Dutch, French and German manuals as referred to in: ICRC Customary IHL Study, Rule 49, under "Definition").

[94] Henckaerts and Doswald-Beck 2005b, p. 174 (Commentary to Rule 49 on "War Booty") or Henckaerts and Doswald-Beck 2005b, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule49.

money".[95] Whilst some of these items cannot be seen as war booty and their appropriation could thus constitute pillage, it is unclear how the ICC Prosecution views that the taking of vehicles,[96] military boots and uniforms, and ammunition (and arguably also fuel) would not be justified by military necessity. The Pre-Trial Chamber made no distinction, however, between the various items when confirming the charges with respect to pillage.[97]

14.5.2 The Spreading of Terror

Another such discrepancy between legal findings and IHL has been made with regard to the spreading of terror. The prohibition under IHL to spread terror amongst the civilian population was for the first time considered by an international tribunal in two cases before the ICTY dealing with the siege of Sarajevo between 1992 and 1995.[98] It did so, notwithstanding the fact that the ICTY Statute did not expressly provide for the crime. At the Special Court, on the other hand, jurisdiction over the crime was set forth in the Statute as "acts of terrorism",[99] and was subsequently addressed in multiple cases. In *Prosecutor v. Norman et al.*, the Trial Chamber sought to define "acts of terrorism", which were drawn from Article 4(2)(d) of Additional Protocol II, and found Article 13(2) of Additional Protocol II to be useful in interpreting the meaning of terrorism in Article 4(2) of the same Protocol. Relying on the ICRC Commentaries on Article 51 of Additional Protocol I, upon which Article 13(2) of Additional Protocol II is based, the Chamber held that "the prospective ambit of Protocol II in respect of 'acts of terrorism' does extend beyond acts or threats of violence committed against protected persons to 'acts directed against installations which would cause victims terror as a side effect'",[100] inserting the word "terror" into the quote, as we shall see below.

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[95] ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-79-Red, Document Containing the Charges Submitted Pursuant to Article 61(3) of the Statute, 11 November 2010, para 44.

[96] According to some witnesses, the African Union markings appearing on AMIS vehicles were later removed and covered with mud (*Banda and Jerbo* Confirmation Decision, *supra* note 90, para 121). This is a common practice in Darfur, where the non-state actors cover captured vehicles in mud for camouflage and use the vehicles in their fight against the government forces and militias. See e.g. Ferguson, 'Sudan rebels tell war stories over sheep feast', 26 December 2010, http://edition.cnn.com/2010???/WORLD/africa/12/14/sudan.darfur.rebels/index.html.

[97] *Banda and Jerbo* Confirmation Decision, *supra* note 90, paras 110–117.

[98] In *Galić* (*supra* note 28) and ICTY, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1.

[99] Article 3(d) of the Special Court's Statute.

[100] SCSL, *Prosecutor v. Norman et al.*, Case No. SCSL-03-14-I, Decision on Motions for Judgement of Acquittal Pursuant to Rule 98, 21 October 2005 ("*Norman* Rule 98 Decision"), para 111.

This approach was also adopted by later chambers, including in *Prosecutor v. Brima et al*., wherein the Trial Chamber rejected the argument by the Kanu Defence that the crime of acts of terrorism encompasses acts or threats of violence that target only protected *persons* and not protected *property*. Instead, the Trial Chamber endorsed the finding in the *Norman* decision that acts of terrorism includes both acts and threats of violence committed against protected persons and installations that cause "victims terror as a side effect".[101]

This excerpt from the ICRC Commentary on which the *Norman* decision and the *Brima* Judgement rely, actually reads in the relevant part that "the prohibition of acts of terrorism, with no further detail, covers not only acts directed against people, but also acts directed against installations *which would cause victims as a side-effect*".[102] The misquote by the Special Court thus allows for the war crime of terror to lose its *dolus specialis* as a constituent element of the crime. Victims' terror is a side-effect, according to these holdings by the Special Court, and not the primary reason for the attack on installations. However, such was not the intention of the Diplomatic Conference of 1977, which intended to prohibit solely *dolus specialis* acts of terror. It is important to recall in this regard, and as was done so by the ICTY in *Galić*,[103] that all (otherwise lawful) attacks are likely to cause terror as a by-product, since "acts of violence related to a state of war almost always give rise to some degree of terror among the population".[104]

14.5.3 Protected Persons

With regard to protected persons, the ICTY in *Tadić* expanded the notion of protection under the Fourth Geneva Convention of 1949 from which civilians could benefit, by no longer restricting it to a nationality requirement (Bosnian citizens, despite generally being divided into ethnic groups of Croats, Serbs and Muslims, all shared the same nationality, and therefore did not benefit from protected persons status when they fell into the hands of the other Bosnian ethnic group(s)). The Tribunal's Appeals Chamber found that the nationality requirement no longer hinges on formal bonds, but on the factors of (ethnic) allegiance and

[101] SCSL, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Judgement, 20 June 2007, paras 668, 669, referring to the *Galić* Appeal Judgement, para 671, and referring to the *Norman* Rule 98 Decision, para 111.

[102] Sandoz et al. 1987, para 4538 (emphasis added).

[103] *Galić* Judgement, *supra* note 28, para 136. See more in detail, Bartels and Wagner 2008, pp. 296–299; and Bianchi and Naqvi 2011, pp. 232, 233.

[104] Sandoz et al. 1987, para 1940.

effective protection.[105] This approach has been criticised for being impractical in the field.[106]

For its part, Article 8(2)(b)(i) of the Rome Statute criminalises intentionally directing attacks against the civilian population, but does not explain what is to be understood under this term. As the Elements of Crime are also silent on this issue, the Pre-Trial Chamber in *Katanga and Ngudjolo*, in accordance with Article 21(1)(b), looked at IHL when determining who were to fall within the category of "civilians", when dealing with the alleged crime of intentionally directing attacks against civilians. It appears, however, that the Pre-Trial Chamber misinterpreted IHL when it concluded that "civilians" for the purposes of this article meant "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".[107] It is submitted here that this is an incorrect interpretation of IHL. Although there is discussion as to whether or not one's own combatants are protected by IHL,[108] there can be no doubt that a party to an armed conflict can violate IHL in its dealings with civilians whose allegiance would be to the said party, or who could be regarded as neutral.

For example, for the purpose of proportionality, one also has to take into account one's 'own civilians'. Imagine that if the ICC would be seized of a case dealing with alleged disproportionate airstrikes as part of the International Security Assistance Force (hereinafter: ISAF) or Operation Enduring Freedom in Afghanistan, or NATO as part of Operation Unified Protector in Libya, and the concerning trial chamber were to apply the same view as that in *Katanga and Ngudjolo*. The civilian population in Afghanistan and Libya, respectively, would then not be included in the meaning of the word "civilian" for the purposes of an indiscriminate or disproportionate attack. Similarly, 'neutral civilians' such as (international) humanitarian or non-governmental personnel should be protected, even though these persons are not aligned with any party to the conflict.

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[105] ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, paras 164–166. Earlier, in the *Čelebići* Trial Judgment, the ICTY had also addressed the nationality issue in a similar way. See ICTY, *Prosecutor v. Mucić et al*., Case No. IT-96-21-T, Judgement, 16 November 1998.

[106] Sassòli 2009; Sassòli and Olsen 2000; Compare Dörmann 2003, pp. 45–74.

[107] ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008 ("*Katanga* Confirmation Decision"), para 266 (footnotes omitted).

[108] See Jann Kleffner, Chap. 11 of this book. The Special Court determined in *Prosecutor v. Issa H. Sesay, Morris Kallon and Augustine GBAO*, SCSL-04-15-T, Judgement, 2 March 2009, paras 1108, 1452, 1453, that when a party to an armed conflict kills members of its own forces, this does not amount to a war crime because those killed were neither civilians nor persons *hors de combat* and as such could not benefit from the protection that IHL grants to both categories. This issue might also be addressed by the ICTY Trial Chamber seized of the *Prlić et al.* case, which has to determine whether the killing by the HVO of some of its Muslim members is a violation of the laws and customs of war.

The Pre-Trial Chamber's problematic take on allegiance becomes all the more clear when comparing the decision on the confirmation of charges in *Katanga and Ngudjolo* with that in *Banda and Jerbo* relating to the attack on the Haskinita camp of the African Union Mission to Sudan (hereinafter: AMIS).[109] In *Katanga and Ngudjolo*, the Pre-Trial Chamber held that the "war crime of pillaging under article 8(2)(b)(xvi) of the Statute requires that the property subject to the offence belongs to an 'enemy' or 'hostile' party to the conflict".[110] Hence, the pillaged property "must belong to individuals or entities who are aligned with or whose allegiance is to a party to the conflict who is adverse or hostile to the perpetrator".[111] Whilst the Pre-Trial Chambers dealing with the Haskanita situation did not go into the elements of the war crime of pillaging,[112] the standard as set out in *Katanga and Ngudjolo* would prove problematic indeed, if followed in *Banda and Jerbo* when dealing with the pillage of goods that were allegedly taken from personnel involved in a peacekeeping mission in accordance with the United Nations Charter. This would clearly leave the Trial Chamber in an impossible conundrum: the other crime charged is the allegedly unlawful attack of personnel involved in a peacekeeping mission, for which a finding of guilt requires that the AMIS soldiers were neutral, i.e. showed no allegiance to nor aligned with a party to the conflict in Sudan. For the accused to be found guilty of the crime of pillage, AMIS would, if the *Katanga and Ngudjolo* Pre-Trial Chamber reasoning were to be followed, have to have done precisely that.

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[109] *Banda and Jerbo* Confirmation Decision, *supra* note 90. The AMIS camp was situated in Darfur.

[110] *Katanga* Confirmation Decision, *supra* note 107, para 329.

[111] Ibid. The Pre-Trial Chamber explained that "part of the doctrine endorses the view that, as any war crime, the crime of pillage is committed against the adverse party to the conflict" and refers to Dörmann 2002, pp. 279, 280. The ICTY Prosecution in *Delalić* argued that one of the material elements of plunder, a term that is often used synonymously with pillage, was that the "accused unlawfully destroyed, took, or obtained any public or private property belonging to institutions or persons linked to the other side of the armed conflict." (ICTY, *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Closing Statement of the Prosecution, 25 August 1998). The Trial Chamber in that case held that "international law today imposes strict limitations on the measures which a party to an armed conflict may lawfully take in relation to private and public property *of an opposing party*" and that "the prohibition against the unjustified appropriation of *public and private enemy property* is general in scope" (*Delalić et al.* Judgement, paras 587–590; emphasis added. See also Dörmann 2002, pp. 273–275).

[112] Before the *Banda and Jerbo* Confirmation Decision, the ICC dealt with the same attack in the ICC, *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, 8 December 2010. The charges against Abu Gharda were not confirmed. In its decision, the Pre-Trial Chamber did not deal with the alleged crime of pillage.

14.5.4 Military Targets Versus Civilian Objects

In 2010, the ICC Prosecutor announced that his office had opened a preliminary examination into two actions by North Korea, "to evaluate if some incidents constitute war crimes under the jurisdiction of the Court".[113] These incidents are

> the shelling of Yeonpyeong Island on the 23 November 2010 which resulted in the killing of South Korean marines and civilians and the injury of many others; and […] the sinking of a South Korean warship, the Cheonan, hit by a torpedo allegedly fired from a North Korean submarine on 26 March 2010, which resulted in the death of 46 persons.[114]

Whilst the former incident could involve indiscriminate targeting or excessive collateral damage, it appears that the latter attack, which was directed at a military object, was legitimate under IHL. Because the ICC does not, for the time being, have jurisdiction over the crime of aggression,[115] any investigation into the death of these sailors of the South Korean naval forces would be futile.[116] Although it is possible that, on the one hand, the Prosecutor intended to use the press release as a means to influence the behaviour of the States concerned, it appears to indicate some confusion in the understanding of IHL in the Office of the Prosecutor, on the other. In any event, it is submitted here that IHL should not be (ab)used for political purposes because incorrect references to the law, like the example given, risk IHL becoming too strict and, as a consequence, being ignored by armed forces.

An incident that occurred during the closing arguments in the *Lubanga* case is also worth mentioning in this regard. When asked by Judge Odio Benito about the relevance of sexual violence to the case,[117] Prosecutor Moreno-Ocampo answered that the OTP

> believe[s that] when a commander ordered to abduct girls to use them as sexual slaves or rape them, this order is using the children in hostility. […] [T]here's a border between

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[113] Office of the Prosecutor of the ICC Press Release, 'ICC Prosecutor: alleged war crimes in the territory of the Republic of Korea under preliminary examination' (6 December 2010) ICC-CPI-20101206-PR608, http://www.icc-cpi.int/menu/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/pr608 (last visited on 7 April 2012).

[114] Ibid.

[115] Whether or not the crime of aggression would be an issue concerning the Koreas, which are said to be still at war with each other because no peace treaty has ever been signed, is interesting food for thought, but lies outside the scope of this contribution.

[116] There is no doubt that the warship itself was a legitimate target. Since the dead and the injured, according to South Korea, were all "servicemen", and hence, were also legitimate targets, there is no proportionality issue. See the Letter dated 4 June 2010 from the Permanent Representative of the Republic of Korea to the United Nations addressed to the President of the Security Council, 4 June 2010, S/2010/281.

[117] ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcript (ICC-01/04-01/06-T-356-ENG ET WT 25-08-2011 1-90 PV T), 25 August 2011 (hereinafter: "*Lubanga* Transcript"), p. 53, lines 15–25, p. 54, line 1.

> hostilities and no hostilities, and cooking could be a good example, maybe, but ordering to abduct girls in order to rape them is an order to – and use children in hostilities.[118]

Even though the concept of direct participation in hostilities[119] is subject to extensive debate,[120] there can be no doubt that this view of the OTP is contrary to what is to be understood as using children under the age of fifteen "to participate actively in hostilities",[121] and is thus a clear misstatement of IHL.[122] It would have the absurd consequence that these girls, besides falling victim to rape and possibly to sexual slavery, could also be legitimately targeted by an attacking force.[123] Unfortunately, the proposal to include the girls held as sexual slaves into the heading of active participation in hostilities was followed by Judge Odio Benito in her dissenting opinion to the *Lubanga* Trial Judgment.[124]

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[118] *Lubanga* Transcript, *supra* note 117, p. 55, lines 15–21.

[119] "Active participation in hostilities" (the wording used in Article 8(2)(b)(xxxvi) of the Rome Statute) is to be understood as synonymous with "direct participation in hostilities". See Dörmann 2002, pp. 378, 379; and ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007; ICC, *Prosecutor v. Germain Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008.

[120] See the ICRC 2008 and the resulting academic debate in e.g. 42 *Journal of International Law and Politics* 3.

[121] The Interpretive Guidance states unequivocally that the notion of direct participation has evolved from, and is used interchangeably with, that of active participation: "The notion of direct participation in hostilities has evolved from the phrase "taking no active part in hostilities" used in [Common] Article 3. Although the English texts of the Geneva Conventions and Additional Protocols use the words "active" and "direct", respectively, the consistent use of the phrase "*participent directement*" in the equally authentic French texts demonstrate that the terms "direct" and "active" refer to the same quality and degree of individual participation in hostilities" (Melzer 2009, 43; footnotes omitted).

[122] The war crime of conscripting, enlisting or using child soldiers is found in Article 8(2)(b)(xxxvi) for international armed conflict and in Article 8(2)(e)(iv) of the Rome Statute for non-international conflict. It has to be added that another member of the OTP earlier during the closing arguments had correctly (from an IHL point of view) answered a similar question posed by Presiding Judge Fulford (*Lubanga* Transcript, *supra* note 117, p. 23, lines 8–18). Also the Prosecution's Final Brief is much more nuanced on this point (ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, OTP Final Brief, 20 July 2011, pp. 59–61). Whether the 'last expressed view', i.e. by the Prosecutor during the closing arguments, or the text of the final brief should be taken as the official view of the OTP, is not clear from the rules. However, the Prosecutor made very clear during the closing arguments that he believes that the former should prevail (see *Lubanga* Transcript, *supra* note 117, p. 55, line 25–p. 56, line 1).

[123] See Article 51(3) of Additional Protocol I, which states that "[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities." Article 13(3) of Additional Protocol II provides that civilians are immune from direct attack "unless and for such time as they take a direct part in hostilities." See further *inter alia* Common Article 3 of the Geneva Conventions, Articles 8(2)(b)(i) and 8(2)(e)(i) of the Rome Statute.

[124] ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Separate and Dissenting Opinion of Judge Odio Benito, 14 March 2012, paras 17–21.

The judgment itself does not conclude that girls used as sex slaves are considered to be actively participating in hostilities; it found instead that it need not pronounce on the matter.[125] However, it did significantly broaden the scope of active participation to acts that are considered as indirect participation.[126] In doing so, it stated that apart from "those on the front line (who participate directly)" also "the boys or girls who are involved in a myriad of roles that support the combatants", such as "finding and/or acquiring food", would be potential targets and thus needed to be protected by Article 8(2)(e)(iv) of the Rome Statute.[127] This approach risks victimising children in a twofold manner: firstly, by the fact that they would be child soldiers, and secondly, by removing their protective status against attack[128] when engaging in what otherwise constitutes mere participation in the war effort, which normally should not make them targetable.[129] However, this is precisely what the *Lubanga* Trial Chamber appears to do, when stating that

[125] ICC, *Prosecutor v. Thomas Lubanga Dyilo,* Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, 14 March 2012 ("*Lubanga* Judgment"), paras 629, 630.

[126] The Trial Chamber explained that "active participation" is not the same as "direct participation", when it held that: "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 of using children under the age of 15 actively to participate in hostilities. It is noted in this regard that Article 4(3)(c) of Additional Protocol II does not include the word 'direct'." (*Lubanga* Judgment, *supra* note 125, para 627). However, this is not a convincing argument as the drafting history should only be resorted to if the language of the Statute is unclear, which is not the case. The Trial Chamber's reliance on treaty law does not make sense as (i) Additional Protocol II was not applicable to the armed conflict concerned (as the requirements by Article 1 of the said Protocol had not been met), ii) the subparagraph following the one referred to (i.e. Article 4(3)(d) of Addition Protocol (II) *does* include "direct", and (iii) the omission of a word in Additional Protocol II does not change the fact that the Rome Statute uses the wording "active participation". The Trial Chamber's reference to Triffterer's commentary does not support the finding in footnote 1801, nor does the article that said commentary refers to as this contains the *opinion* of the ICRC with regard to the draft text of the Optional Protocol to the Convention on the Rights of the Child concerning Involvement of Children in Armed Conflicts—a treaty that was adopted two years after the adoption of the Rome Statute. (See in this regard Louise Doswald-Beck, who held: "This provision reflects the prohibition in the 1977 Additional Protocols, rather than treaty developments since then. This was intentional as the negotiators of the Rome Statute based their reasoning on prohibitions that were considered to represent customary international law at the time, ie in 1998." Doswald-Beck 2011, p. 529).

[127] *Lubanga* Judgment, *supra* note 125, paras 624–628.

[128] The ICRC has noted in this regard that even civilians forced to participate directly in hostilities and children under the lawful recruitment age may lose their protection against direct attack, but regain it once they no longer so participate. See ICRC 2008, p. 60 and Footnote 154.

[129] See Sandoz et al. 1987, para 1945 ("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").

children who indirectly participate form a "potential target".[130] It is submitted here that this is an erroneous circular reasoning. For those not directly participating cannot (legally) be targeted and thus cannot be considered as "potential targets". The protection afforded by IHL is based on this distinction, and if it were to take into account all the potential consequences of indiscriminate attacks, the purpose of this body of law would be lost and indeed worthless. The *Lubanga* Trial Judgment therefore could well set a dangerous precedent that could, regrettably, be referred to by those trying to broaden the scope of targetable persons. Whilst the intention of the bench was to broaden the protection for children recruited by parties to an armed conflict, its interpretation of the meaning of active participation could easily be abused.[131] The expansion of this IHL term, in order to be able to find one man guilty of an additional charge,[132] could in fact lessen the protection afforded to civilians, amongst whom are children, during armed conflicts. It would therefore be advisable if such judgments would make explicit reference to the fact that the explanation given to such a term that exists in both IHL and ICL was only done for ICL, and should not be interpreted for IHL purposes.

The discrepancies between legal findings and IHL are not limited to the law of armed conflict itself, but also extend to the realities on the battlefield, as examined next.

14.6 Discrepancies Between Legal Findings and Battlefield Reality

The role of the international tribunals as a means to enforce in retrospect—as opposed to the preventive working of the law—becomes especially clear when looking at cases where crimes against humanity are charged and pronounced upon.[133] The prohibition against committing war crimes and genocide is laid down

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[130] *Lubanga* Judgment, *supra* note 125, para 628.

[131] See in this regard also the warning given by Sivakumaran 2011, p. 230.

[132] For the charges of "conscripting and enlisting children under the age of fifteen years", an expansion would not have been necessary.

[133] ICL has unfortunately not been an effective deterrent for violations of IHL. For the International Military Tribunals, the ICTR and the Special Court this was, of course, impossible (at least with regard to the conflicts these tribunals related to), because they were established after the fact. The ICTY, however, was established before some of the worst violations (e.g. the killings in Srebrenica, the siege of Sarajevo and the ethnic cleansing in Kosovo) of the Balkan conflict occurred. Dieter Fleck observes that "[c]riminal sanctions are not the most decisive tool during military operations" and that "the prospect of being tried for war crimes by international tribunals post-conflict is still too vague to influence the behaviour of insurgents during combat" (Fleck 2003, p. 66). David Scheffer, on the other hand, gives a more hopeful account, when describing that there "already are signs of deterrence emerging from the work of the International Criminal Court" and that the fear of being taken to The Hague has an effect on war criminals. (Scheffer 2011, p. 6).

in comprehensive conventions; no such prohibition in a convention can be found for crimes against humanity, however.[134] Crimes against humanity comprise instead crimes such as murder, torture and rape that are committed as part of a widespread or systematic attack directed against a civilian population.[135] Because crimes against humanity are comprised of these underlying criminal acts, certain behaviour may qualify, in times of armed conflict, as both a war crime and as a crime against humanity. However, whilst certain acts, including rape and torture, are never excusable, the factual act of killing a person or forcibly transporting a person to another location can be legitimate under IHL, and does not necessarily amount to murder, or indeed to forcible transfer or deportation.[136] As aptly noted by Payam Akhavan, disregarding IHL in dealing with crimes against humanity "risks rendering crimes against humanity a legal utopia so divorced from reality that it becomes irrelevant to military commanders acting in good faith in combat situations".[137]

The ICTY, in defining whether a certain act constituted a war crime or a crime against humanity, initially chose a somewhat unfortunate direction.[138] Consider, for example, when the *Mrkšić* Trial Chamber found the accused guilty of crimes against humanity, even though the accused were determined to be responsible for the killing of members of Croatian armed forces. These members of the armed

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[134] On this issue and an effort to have such a convention created, see generally Sadat 2011.

[135] The "attack" does not refer to an attack within the meaning of Article 49 of Additional Protocol I. For the determination of what constitutes a civilian population, IHL is used as guidance. See ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Appeal Judgment, 8 October 2008 ("*Martić* Appeal Judgement").

[136] Combatants and those directly participating in hostilities can legally be targeted (i.e. killed). Even the death of a civilian does not necessarily mean a war crime was committed, because this civilian may have been part of non-excessive incidental damage resulting from an attack on a military target (see e.g. Article 51(5)(b) of Additional Protocol I). With regard to deportation, see, *inter alia*, Articles 19 and 20 of the Third Geneva Convention, which deal with the obligation to evacuate POWs after their capture away from the combat zone.

[137] Akhavan 2008, p. 23.

[138] That for a crime against humanity, the attack has to be directed against the "civilian population", indicates at the *ad hoc* Tribunals that it is the civilian population that is the primary object of the attack (see also Article 3 of the ICTR Statute). The victims of a crime against humanity need not be civilians *strictu sensu*, but can include persons *hors de combat* or those not afforded the protective status of civilians. (See ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-94-14-A, Appeal Judgement, 29 July 2004, para 113; *Martić* Appeal Judgement, para 313; ICTY, *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-89/1-T, Judgement, 23 February 2011, para 1591). In *Mrksić*, the Appeals Chamber overturned the Trial Chamber's Judgement in part, but—albeit for different reasons—concurred with the Trial Chamber that the jurisdictional prerequisites of crimes against humanity (before the ICTY) had not been established. The Appeals Chamber reasoned that the nexus between the acts of the accused and the attack on the civilian population was not established now that the perpetrators of the alleged crimes "acted in the understanding that their acts were directed against members of the Croatian armed forces", and as such, could not have intended their acts to be part of an attack against a civilian population. ICTY, *Prosecutor v. Mile Mrksić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Appeal Judgement, 5 May 2009, paras 42–44.

forces lay wounded in Vukovar hospital, and as persons *hors de combat* were certainly protected under IHL. Nevertheless, the Trial Chamber found the accused guilty of having attacked a civilian population, rather than convicting the accused for the war crimes of murder or torture of persons *hors de combat*, with which they were also charged. The Appeals Chamber overturned the Trial Chamber's finding and held that since the perpetrators of the crimes knew that their victims were *hors de combat*, they could not have intended their attack to be against a civilian population, and that a conviction based on violations of the law and customs of war (i.e. a war crime) was thus in order.[139]

Such a finding as that by the *Mrkšić* Trial Chamber (even when a conviction for a crime against humanity related to acts that are prohibited under IHL and could otherwise have been qualified as war crimes) does not necessarily have to result in problems, so long as the rulings are read with care and the opinions of the tribunals do not affect IHL. However, a certain ruling can easily be taken out of context, creating even further discrepancies between the relevant regulatory law and battlefield reality.

In the view of the author, it is even more problematic that some rulings qualify acts as crimes against humanity although they would be legitimate under IHL, thereby penalising the behaviour of warring parties in times of armed conflict, if such behaviour formed part of a larger, criminal plan.[140]

For example, in 2010, the Trial Chamber in *Popović et al.* pronounced on the alleged criminality of the forced retreat of Bosnian-Muslim soldiers[141] across the Drina River upon the advance of Bosnian-Serb VRS.[142] The Trial Chamber found the accused guilty of forcible transfer[143] as an inhumane act[144]:

> As for the military and those participating in hostilities, the circumstances were very different from those which their counterparts in Srebrenica had faced. The Trial Chamber is satisfied that, by 24 July 1995, these men would have been well aware of the reports of mass killing after the fall of Srebrenica. Their decision to flee cannot be categorised as a strategic one taken in military terms. Simply, they fled the enclave in fear for their lives.

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[139] ICTY, *Prosecutor v. Mile Mrksić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Appeal Judgement, 5 May 2009, Disposition, p. 169.

[140] For the relationship between crimes against humanity and war crimes, and the elements of crimes against humanity, see Cryer et al. 2010, p. 233 and further.

[141] The Bosnian-Muslim forces were part of the Armija Republike Bosne i Hercegovine (i.e. the Army of the Republic of Bosnia and Herzegovina; hereinafter: ABiH).

[142] *Vojska Republike Srpske*: the army of the Republika Srpska.

[143] Forcible transfer or forced displacement means that people are moved against their will or without having had a genuine choice. See ICTY, *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Appeal Judgement, 17 September 2003, paras 229, 233; and ICTY, *Prosecutor v.Milomir Stakić*, Case No. IT-97-24-A, Appeal Judgement, 22 March 2006 ("*Stakić* Appeal Judgement"), para 279.

[144] ICTY, *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 ("*Popović et al.* Trial Judgement"), paras 955–961. The Trial Chamber did not find that this (also) constituted the crime of deportation, since it was not clear whether the Bosnian-Serb forces meant for the Bosnian-Muslim soldiers to cross a border when swimming across the Drina.

> That the majority chose to escape to Serbia to face surrender and detention as POWs evidences their desperation. While the VRS maintained that those men who surrendered their weapons would be exchanged with the VRS POWs held by the ABiH, it is clear that the able-bodied men had no faith in those words. The Trial Chamber is satisfied that the able-bodied men – civilian and military – fled the enclave because they had no other genuine choice but to do so. That was the only option left for them to survive.[145]

Nevertheless, during wartime, forcing the enemy to retreat across frontlines or state borders is perfectly legal, and is in fact one of the goals of waging war.[146] That retreating was exactly what the Bosnian-Muslims planned to do is demonstrated by the evidence presented before the Chamber in the form of a report by the ABiH general army staff, according to which "there were about 1260 soldiers and 250 able-bodied civilians in Žepa, as well as 650 soldiers from Srebrenica. Up to date, 163 soldiers have arrived in the free territory of Kladanj, whereas 14 soldiers have arrived in the area of responsibility of the 81st Army Division [in] Goražde. Around 1000 soldiers are still in the mountains around Žepa and are waiting for favourable conditions for retreating".[147]

If the VRS would have been allowed under IHL to attack and kill any member of the ABiH whilst the latter were defending Žepa, and moreover, when they were fleeing across the Drina,[148] how, then, can a crime have been committed if these persons were not shot and survived their retreat? This discrepancy between what appears to be a legitimate military action under IHL and criminal liability under ICL lies in the fact that the forcible transfer, for which the accused were found guilty, was charged and found to have constituted a crime against humanity.[149]

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[145] *Popović et al.* Trial Judgement, *supra* note 144, para 956 (footnotes omitted).

[146] A goal that has also been recognised in IHL given the fact that the forced movement of civilians across state borders *is a violation of IHL* (e.g. Article 49 of the Fourth Geneva Convention of 1949), whilst the forced movement of combatants during active hostilities, as well as when combatants are made POWs, *is in conformity with IHL* and, at times, even an obligation under these rules (e.g. Articles 19 and 111 of the Third Geneva Convention of 1949). It has also been recognised by the ICTY that POWs cannot be forcibly transferred or deported: *Stakić* Appeal Judgement, *supra* note 143, para 284. See also *Prosecutor v. Mile Mrksić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Judgment, 27 September 2007, para 458 (stating that "deportation cannot be committed against prisoners of war").

[147] *Popović et al.* Trial Judgement, *supra* note 144, para 736.

[148] Fleeing combatants remain legitimate military targets as long as they have not surrendered or otherwise fallen *hors de combat* (*nota bene*: also, after surrender, a POW can be shot when fleeing, i.e., when the POW attempts to escape from a POW camp; see Article 42 Third Geneva Convention, and Preux 1960, pp. 246, 247). Arguably, the principle of military necessity applied in a restricting manner or the principle of chivalry would limit to right to attack fleeing combatants. However, in itself such an attack on combatants would not be unlawful. See Hampson 1992, pp. 53, 54; and Hampson 1993.

[149] In a decision on jurisdictional issues, the *Gotovina* Trial Chamber held that "as to the [Defence's] argument that the victims of deportation must be in the hands of a party to the conflict, the Trial Chamber recalls that crimes against humanity must be 'directed against any civilian population'. Article 5 of the Statute therefore applies to 'any' civilian population including one within the borders of the state of the perpetrator. There is no additional requirement in the jurisprudence that the civilian be in the power of the party to the conflict." (ICTY,

The Indictment alleged a joint criminal enterprise, the purpose of which, *inter alia*, was "to force the Muslim populations of Srebrenica and Žepa to leave the area".[150] The Prosecution submitted that the accused carried out several actions in pursuit of this JCE, one of which was "defeating the Muslim forces militarily".[151] Not only does IHL permit the military defeat of the enemy by parties to a conflict[152] (indeed, the way that the Prosecution alleged some of the actions taken by the accused seem to be in line with this legitimate goal[153]), but the intention of the Prosecution becomes clear when looking at one of the actions with which the accused Pandurević was charged in relation to a plan to militarily defeat the ABiH:

> [Pandurević] commanded and ordered forces involved, in the attack on the Srebrenica and Žepa enclaves from 6 July 1995 through 14 July 1995, knowing one of the main objectives of the attack was to force the Muslim population to leave the Srebrenica and Žepa enclaves.[154]

This makes perfect sense when it concerns a form of co-perpetration, like a JCE. A national criminal law example is helpful in illustrating the point made: when one drives a friend to a location, knowing that this friend will be committing a crime at that very location, the act of driving itself—although it might have been

(Footnote 149 continued)
Prosecutor v. Gotovina et al., IT-06-90-PT, Decision on Several Motions Challenging Jurisdiction, 19 March 2007, para 56). Akhavan considers the decision problematic because it does not apply IHL to the *actus reus* of deportation as a crime against humanity. He submits that "[t]he Chamber is clearly confusing the distinction between protection of civilians in occupied territory as distinct from combat situations, with the nationality of such civilians" (Akhavan 2008, pp. 33, 34). This indeed appears to be the case and could lead to the conclusion that civilians leaving an area where bombardments are taking place as part of legitimate combat operations against military forces and structures could be considered to be deported as a crime against humanity. However, in its Judgment, the Gotovina Trial Chamber found that the crime of deportation resulted from the fear installed into civilians as a result of unlawful attacks on civilian objects (*Gotovina* Trial Judgement, *supra* note 57, paras 1742–1763).

[150] ICTY, *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Revised Second Consolidated Amended Indictment, 4 August 2006 ("*Popović et al.* Revised Second Consolidated Amended Indictment"), para 72.

[151] Ibid.

[152] According to the United Kingdom Manual on the Law of Armed Conflict, military necessity permits "a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the *complete or partial submission of the enemy* at the earliest possible moment with the minimum expenditure of life and resources" (United Kingdom Ministry of Defence 2004, pp. 21, 22; emphasis added).

[153] The accused Miletić, for example, was charged with having contributed to the military defeat of the Muslim forces by having "monitored the state of the Muslim forces before, during and after the attacks on Srebrenica and Žepa and communicated this information to his superiors […] and subordinate units". *Popović et al.* Revised Second Consolidated Amended Indictment, *supra* note 150, para 75.

[154] *Popović et al.* Revised Second Consolidated Amended Indictment, *supra* note 150, para 77.

done in line with all applicable traffic regulations—can constitute a criminal contribution to the crime.[155]

At the Special Court, however, the situation was in fact reversed. In the RUF case, the Prosecution alleged that the accused were part of a JCE that shared a common plan "to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone".[156] The crimes charged, including unlawful killings, forced labour, physical and sexual violence, the use of child soldiers and the looting and burning of civilian structures, were said to have been actions within the JCE, or to have been a reasonably foreseeable consequence of the JCE.[157] Here, the goal of the JCE appears to have been legitimate under international (humanitarian) law, but the actions taken in attaining that goal were violations of IHL.[158] Whilst the accused submitted that the common purpose of the JCE could not be considered as criminal, both the Trial Chamber and the Appeals Chamber rejected this argument, the latter of which ruled that

> the Trial Judgment indicate[s] that the Trial Chamber found a common criminal purpose which consisted of the objective to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas, and the crimes as charged under Counts 1 to 14 as means of achieving that objective. This accords with our holding in *Brima et al*. that the common criminal purpose of a JCE comprises both the objective of the JCE and the means contemplated to achieve that objective.[159]

The present author is not in favour of such a mixing of IHL and ICL notions.[160] Given the nature of the cases dealt with on the international level, it appears to be inevitable that IHL is used for situations which this very law was not originally meant to cover. Furthermore, charging someone with crimes against humanity

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[155] However, in a situation like Žepa, the motivation or intent appears to become important. A soldier engaging in an attack could be engaging in lawful action if he is unaware of the ultimate plan (of his superiors), but his acts would be unlawful if he would be aware of this. Factually, his acts would remain the same, however.

[156] SCSL, *The Prosecutor v. Issan Hassan Sesay et al.*, Case No. SCSL-2004-15-PT, Corrected Amended Consolidated Indictment, 2 August 2006 ("*Sesay et al*. Corrected Amended Consolidated Indictment"), para 36.

[157] Ibid., para 37.

[158] The author does not in any way want to justify other actions by the VRS than the one discussed above, in relation to the Srebrenica and Žepa case, such as the extensive killing of POWs and the forced displacement of civilians.

[159] SCSL, *The Prosecutor v. Issan Hassan Sesay et al.*, Case No. SCSL-2004-15-A, Appeal Judgement, 26 October 2009, para 305.

[160] In a dissenting opinion, the ICC Judge Kaul expressed his reservations to the expanded use of crimes against humanity. He considered that "a demarcation line must be drawn between international crimes and human rights in fractions; between international crimes and ordinary crimes; between those crimes subject to international jurisdiction and those punishable under domestic penal legislation. One concludes that the ICC serves as a beacon of justice intervening in limited cases where the most serious crimes of concern to the international community as a whole have been committed" (ICC, *Situation in the Republic of Kenya*, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, Dissenting Opinion Judge Kaul, para 65).

enables the prosecution of certain behaviour that, due to gaps in the protection afforded by IHL, would otherwise go unpunished.[161]

14.7 Consequences of an ICL Approach to IHL

Despite the discrepancies identified herein, judges have a "crucial yet delicate role" in applying IHL.[162] Crucial because of the manner in which the tribunals and courts decide on legal and factual questions affects the effectiveness of the law. Delicate because of the danger that the law or clarifications that are 'created' by the judges may alienate soldiers from the law that they have been taught (and understand). Moreover, it may undermine the ability of IHL to restrain belligerent behaviour and thereby limit the protection of potential war victims.[163] Judgments that

> would effectively compel reasonable and law-abiding combatants to choose between heroic self-sacrifice, on the one hand, and criminal liability, on the other hand, are problematic in this regard. The danger is that, though perhaps inadvertently, these rulings would project judges' unrealistically high expectations onto combatants. The efficacy of international humanitarian law would suffer unless combatants, the primary bearers of protective duties, felt confident that it imposes just constraints on their belligerent action but does not amount to a "suicide pact".[164]

The international courts and tribunals play an increasingly important role in ensuring accountability for violations of IHL. At the same time, however, it is essential that their judgments "are based in law that commanders can reasonably apply in the course of military operations and promote continued adherence to IHL".[165] This is particularly so, because when an overly strict approach in retrospect would effectively leave military commanders—the most direct implementers of the law—unable to fulfil their obligations toward their troops and mandate, "there is a grave risk that they will simply disregard the law", which would then pose a real danger to those who need to be protected by IHL.[166]

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[161] At the international level that is, just as on the national level, in these situations, regular criminal charges, such as manslaughter and murder, could be brought.

[162] Hayashi 2006, p. 70.

[163] Ibid. Hayashi highlights the importance that a judicial decision "strike[s] a sensible balance between the legitimate interests of combatants and civilians alike".

[164] Hayashi 2006, p. 88.

[165] International Humanitarian Law Clinic at Emory University School of Law 2012, p. 3.

[166] Ibid.

Furthermore, reciprocity,[167] which historically has formed the basis of the adherence to IHL, could potentially be undermined by ICL.[168] Kenneth Anderson observes in this regard that "[u]ndermining the sting of reciprocity and replacing it with the mostly stingless future promise of post hoc justice has profound consequences for the incentives and disincentives in the conduct of war, which are only now beginning to express themselves on the battlefield".[169]

At the same time, IHL, to a certain extent, serves to legitimise the judicial process that aims to counter impunity. As noted above, none of the rules of IHL prohibiting certain behaviour that are now used to hold alleged perpetrators criminally liable were drafted and agreed upon with the kind of fighting in mind, which is often inter-ethnic and merciless, that is now attempted to be regulated—in retrospect, no less—with these rules. Whilst there have been numerous claims of violations by American and British forces in the 2003 Iraq war, or during ISAF operations in Afghanistan, there is little debate that (as a minimum) the majority of the attacks were conducted with the aim to comply with the rules for conduct of hostilities (and arguably, they indeed did so). Even during the 2006 Lebanon conflict and the 2008–2009 Gaza conflict, and despite much criticism and international condemnation and numerous incidents that raised serious questions, the Israeli operations by and large took place within the framework of IHL, i.e. they were regulated by IHL.[170] In these situations, IHL works in a restricting, as well as an enabling way: protection can then be afforded to those in need of protection, which is the way in which IHL was meant to work.

However, as soon as conflicts take on an ethnic dimension, it appears that IHL is not able to regulate such fighting. When the purpose of the fighting is contrary to the rationale of IHL, and when the aim of (one of) the parties is not to overcome the enemy militarily, but to attack a people for who they are or to ethnically cleanse a region, IHL cannot serve its restrictive purpose. In these situations, when IHL cannot work preventively, it appears to be relatively uncontested that IHL can nevertheless be used to punish in retrospect.[171] For example, in Rwanda in 1994, the fighting of the Rwandan Patriotic Front against the armed forces of the Hutu

[167] Reciprocity is described in the Max Planck Encyclopedia of Public International Law as "a basic phenomenon of social interaction and consequently a guiding principle behind the formation and application of law" (Simma 2012, para 1). This has long been foundational to international law, and—more specifically—to IHL. Sean Watts observes that "the existing law of war derives from a set of rules that are contingent on reciprocity. Contrary to common understanding, reciprocity strongly influences states' interpretation and application of the law of war." (Watts 2009, p. 365).

[168] Anderson 2009, p. 340.

[169] Ibid. Anderson explains that international criminal law operates *post hoc*, i.e. "after the fact" (p. 343).

[170] One could question the explanation given by Israel to certain provisions of IHL and the way the law was applied in practice. However, this does not detract from the fact that Israel used (its version of) IHL as a guidance during the operations (see e.g. The State of Israel 2010).

[171] It has, however, been suggested that in these cases it is important to 'label' the crimes in a fair way. See Van de Herik 2009 (However, the current author has a different view on the

government was suitable to fall under IHL and be regulated by it. This fighting has not been dealt with by the ICTR, however. The killing and raping that formed part of the genocide had nothing to do with the conduct of hostilities or with the need for the civilian population to be protected against the effects of warfare. Those countless deaths and rapes did not serve a military goal, and could not be justified by a military advantage.[172] Therefore, the charging of war crimes in order to prosecute alleged *génocidaires* has merely been a safety net to ensure conviction of the persons concerned. When doing so, one has to bear in mind, however, that the development of IHL through jurisprudence and the weight attached thereto for the purposes of the development of customary IHL, has consequences for this body of law itself. Potentially, then, the development of IHL by jurisprudence impacts greatly on the way that it can work preventively in the type of situations for which IHL was actually envisioned.

The conceptual differences between the relevant branches of international law, IHL, international human rights law and ICL, which deal in part with the same situations (i.e. the behaviour of individuals in times of armed conflict) and share the same terminology, can lead to developments and explanations of terms and concepts (e.g. the term "civilian" or "attack") in one of the branches that are not necessarily compatible with the rationale and/or concepts in the other branches. Due to the fragmentation of international law, care should thus be taken not to mix the various branches of law.

14.8 Conclusion

This discussion illustrates that despite the valuable contribution of the *ad hoc* Tribunals to the development of international humanitarian law,[173] it remains challenging to apply this branch of law correctly in criminal cases. Illustrative are

(Footnote 171 continued)
Mpambara case discussed in the aforementioned article and considers that in that case a conviction for war crimes would have been warranted).

[172] *Nota bene*: rape, of course, can never be justified by military advantage. A civilian death, however, does not necessarily mean that a war crime has been committed. Civilian casualties that are proportionate to the military advantage that is expected to be gained by the attack constitute legitimate incidental damage.

[173] Whether the ICC has contributed, or will contribute, in a similar significant way remains to be determined. Naturally, the establishment of the Rome Statute and the following reference thereto as an expression of customary law was very relevant. However, apart from the comments hitherto on the way the ICC has dealt with IHL until now, its contribution is likely to be less significant than those of the *ad hoc* Tribunals. The ICC is a treaty-based institution and thus will not need to conduct the same evaluations of the customary status of the individual criminal responsibility for violations of IHL, as done so by the Tribunals. Be that as it may, when seized of a situation that involves alleged crimes committed on the territory of a non-party State, it is submitted here that the ICC's chambers should conduct such an evaluation. At the time of writing, the chambers dealing with Sudan (*Haskanita camp*) have not done so, however.

findings in such cases on, e.g. the customary nature of the prohibition of belligerent reprisals. As discussed herein, this and other similar criticisms, are not insignificant. This contribution has also highlighted some findings that show a discrepancy between current international humanitarian law as applied in military operations and the law as applied by judges on the international level. Focusing solely on the alleged criminality of certain acts, coupled with a desire to counter impunity, can result in case law that—albeit understandable in the given situations—would restrict battlefield behaviour beyond current treaty rules of international humanitarian law, and even beyond its customary status. This, in turn, could affect the subtle equilibrium between the two diametrically opposed stimulants on which this law is based, namely military necessity and humanitarian considerations.[174] It is therefore important that those working in the field of international criminal justice are aware of the consequences their findings can have for humanitarian law, as well as for the reality that members of the military, whose conduct in times of armed conflict is guided by this law, have to work in. At the same time, it is important that such findings are always read in their proper context, so as to leave the protection afforded by humanitarian law intact and to preserve the value of this law as guidance for arms bearers in times of conflict. It is submitted that this is the desired outcome of applying international humanitarian law during international criminal trials. This is indeed more desirable, rather than making the law too strict, causing it to become 'unworkable', which would then have as a consequence that it cannot serve its very purpose: to regulate warfare.

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[174] Dinstein 2010, p. 5.

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