



UvA-DARE (Digital Academic Repository)

The Interplay between International Human Rights Law and International Humanitarian Law during International Criminal Trials

Bartels, R.

DOI

[10.2139/ssrn.3207194](https://doi.org/10.2139/ssrn.3207194)

Publication date

2018

Document Version

Author accepted manuscript

Published in

Human Rights and International Legal Discourse

[Link to publication](#)

Citation for published version (APA):

Bartels, R. (2018). The Interplay between International Human Rights Law and International Humanitarian Law during International Criminal Trials. *Human Rights and International Legal Discourse*, 12(1), 44-61. <https://doi.org/10.2139/ssrn.3207194>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

UvA-DARE is a service provided by the library of the University of Amsterdam (<https://dare.uva.nl>)



UNIVERSITY OF AMSTERDAM

THE INTERPLAY BETWEEN INTERNATIONAL HUMAN RIGHTS
LAW AND INTERNATIONAL HUMANITARIAN LAW DURING
INTERNATIONAL CRIMINAL TRIALS

Rogier Bartels

Amsterdam Law School Legal Studies Research Paper No. 2018-19

Amsterdam Center for International Law No. 2018-05

The Interplay between International Human Rights Law and International Humanitarian Law during International Criminal Trials

*Rogier Bartels**

**Forthcoming in:
Journal of Human Rights &
International Legal Discourse (2018)**

Abstract

The protection regimes of international human rights law (IHRL) and international humanitarian law (IHL) partially overlap. Certain unwanted conduct may therefore violate both human rights norms, which – subject to derogation – apply at all times, as well as humanitarian law rules, which only apply during armed conflicts. For the purposes of international criminal law (ICL), such conduct may therefore qualify as both a crime against humanity and a war crime, which are systematic or widespread violations of specific human rights and serious violations of IHL, respectively. The present contribution discusses the interplay between the crimes against humanity and war crimes regimes, including the impact of the existence of an armed conflict on the status of alleged victims of crimes against humanity. It further highlights the risk that certain acts that form part of military operations in times of armed conflict may be qualified as crimes against humanity even though they are not contrary to IHL. The author concludes that crimes against humanity and war crimes have to be considered with care, and kept separate when necessary, in order to avoid any negative impact on the development of IHL and/or IHRL, and to safeguard the rights of the accused under ICL.

Key words: International humanitarian law; international human rights law; war crimes; crimes against humanity; international criminal law; International Criminal Tribunal for the former Yugoslavia; International Criminal Court

* Legal Officer in Chambers (Trial Division) at the International Criminal Court, research fellow at the Netherlands Defence Academy, researcher at the Amsterdam Center for International Law of the University of Amsterdam. The views expressed in this article are the author's and do not necessarily represent those of the aforementioned institutions.

The Interplay between International Human Rights Law and International Humanitarian Law during International Criminal Trials

1. INTRODUCTION

It has been submitted that international human rights law (IHRL) and international humanitarian law (IHL) interact in two main ways: first, in a complementary manner, whereby human rights norms and humanitarian law rules, especially those related to the protection of persons in the power of a party to the conflict, mutually reinforce each other; second, by application of the principle of *lex specialis* in cases of conflict between the norms.¹ As a result of the first interaction, certain conduct may qualify for the purposes of international criminal law (ICL) as both a crime against humanity and a war crime. As IHRL and IHL, in part, share the same terminology,² and to a certain extent aim to protect common values, IHRL has been relied upon to fill in lacunae in the definition of war crimes, as was done at the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) with respect to the war crimes of rape and torture,³ for example, or to find additional support for the existence of a prohibition under IHL.⁴ The first interaction has had the (mostly) positive result⁵ of developing and clarifying IHL and ICL, thereby contributing to the protection of those affected by armed conflict, yet may also be considered as mainly serving the interests of victims of alleged

¹ C. Droege, The interplay between international humanitarian law and international human rights law in situations of armed conflict, 40(2) Israel Law Review 310-355 (2007). The various approaches to the interaction between IHRL and IHL and the *lex specialis* principle is discussed more in detail elsewhere in this special issue.

² Examples include the terms ‘civilian’, ‘dignity’, ‘humane treatment’ and ‘attack’.

³ See mainly ICTY (Trial Chamber) 22 February 2001, *Prosecutor v. Kumarac et al.*, IT-96-23-T&IT-96-23/1-T, in which the Trial Chamber observed that ‘[b]ecause of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law’. (ibid, para. 467) The discussion in this judgment of the definition of rape as an international crime was preceded by the debate in *Akayesu* and *Furundžija*; see ICTR (Trial Chamber) 2 September 1998, *Prosecutor v. Akayesu*, ICTR-96-4-T; and ICTY (Trial Chamber) 10 December 1998, *Prosecutor v. Furundžija*, IT-95-17/1-T.

⁴ E.g., ICTY (Trial Chamber) 15 March 2002, *Prosecutor v. Krnojelac*, IT-97-25-T, para. 353, noting that ‘the prohibition against slavery in situations of armed conflict is an inalienable, non-derogable and fundamental right, one of the core rules of general customary and conventional international law’; and ICC (Trial Chamber VI) 4 January 2017, *The Prosecutor v. Ntaganda*, Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06 (*Ntaganda* Decision on Jurisdiction), paras 51-52, in which the *Ntaganda* Trial Chamber referred to human rights instruments in support of its conclusions and considered the prohibition against rape and sexual slavery to be peremptory norms, ‘prohibited at all times, both in times of peace and during armed conflicts, and against all persons, irrespective of any legal status’.

⁵ For some words of caution, see D. Robinson, The Identity Crisis of International Criminal Law, 21 Leiden Journal of International Law 925-963 (2008); and R. Cryer, The Interplay of Human Rights and Humanitarian Law: The Approach of the ICTY, 14(3) Journal of Conflict and Security Law 511-527 (2009).

international crimes and fighting impunity. For the conceptual differences between these branches of international law can lead to developments and/or explanations of terms and concepts by international criminal courts or tribunals with regard to one of the branches that are not necessarily compatible with the rationale or meaning of these concepts in one of the other branches.⁶ Moreover, whereas one has to be mindful of the effects of the fragmentation of international law, safeguarding the fair rights of the accused – which, coincidentally, also form part of human rights law – requires a strict application of the *lex specialis* principle.

Given the partial overlap between crimes against humanity and war crimes, a certain tension exists in ICL.⁷ At the *ad hoc* tribunals, as well as the International Criminal Court (ICC), notwithstanding strong opposition by the defence, cumulative convictions have been entered for conduct that ‘clearly violates two distinct provisions of the Statute, each demanding proof of a “materially distinct” element not required by the other’.⁸ In this regard, an element is considered ‘distinct’ if it requires proof of a fact that is not required for the other crimes concerned.⁹ Someone may therefore be convicted of the killing of certain civilians, for example, as both the war crime of murder and murder as a crime against humanity, if the persons killed were protected under IHL and the killings formed part of a larger, widespread or systematic attack on a civilian population. This is so because for a war crime to be proven, it is not required that the conduct be part of a broader attack against a civilian population, while for members of the civilian population to become victims of crimes against humanity, a nexus to an armed conflict need not exist. However, when looking at conduct that forms part of military operations in times of armed conflict, there is a risk that certain conduct is qualified as crimes against humanity even though the acts would be legitimate under IHL, thereby penalising the behaviour of warring parties in times of armed conflict, provided such acts formed part of a larger, criminal plan.

⁶ Darryl Robinson perfectly expressed the concerns, shared by the present author, as follows: ‘Many of the prohibitions of ICL are drawn from, and similar to, prohibitions in human rights and humanitarian law. Faced with familiar-looking provisions, ICL practitioners often assume that the ICL norms are coextensive with their human rights or humanitarian law counterparts, and uncritically transplant concepts and jurisprudence from other domains to flesh out their content. Such assumptions overlook the fact that these bodies of law have different purposes and consequences and thus entail different philosophical commitments.’ Robinson, *supra* note 5, p. 946.

⁷ Rob Cryer notes that IHRL, IHL, ICL are not ‘fused’, but are ‘currently engaged in a mutually reinforcing process of interaction’. Cryer, *supra* note 5, p. 517.

⁸ ICC (Trial Chamber II) 7 March 2014, *The Prosecutor v. Katanga*, ICC-01/04-01/07, para. 1695, referring to ICTY (Appeals Chamber) 20 February 2001, *Prosecutor v. Delalić et al.*, IT-96-21-A, paras 412-13; ICTY (Appeals Chamber) 17 December 2004, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, para. 1032; ICTY (Appeals Chamber) 12 June 2002, *Prosecutor v. Kunarac et al.*, IT-96-23-A, 23/1-A, para. 173.

⁹ *Ibid.*

IHRL plays an important role in safeguarding the rights of the accused. It underlies the fair trial provisions included in the statutes and rules of procedure and evidence of the international courts and tribunals. However, the present paper does not address the procedural role of IHRL and instead focuses on the interplay between IHRL and IHL as applied substantively before international courts and tribunals. It does so by first briefly describing the difference in origin and scope of crimes against humanity and war crimes, followed by an explanation of ICL practice with respect to cumulative charging and convictions. The contribution then focusses on how the differences between the legal regimes underlying crimes against humanity and war crimes impact on the criminality or justification of certain conduct that may on the one hand be a violation of someone's right to life or property, while at the same time not be prohibited, or even explicitly permitted, under IHL. It ends with a call for caution and some comments on how best to address the interplay between these two branches of international law when dealt with in ICL, in order to avoid any negative impact on the practical application of the rules, *inter alia*, when applied by soldiers on the battlefield.

2. SYSTEMATIC VIOLATIONS OF IHRL VS SERIOUS VIOLATIONS OF IHL

International crimes, in their broad meaning, are generally committed in peacetime and the related international instruments 'are generally "peacetime" conventions'.¹⁰ However, as only a handful of international crimes have been subject to prosecution before international criminal courts and tribunals, and these have mostly addressed situations of war or armed conflict, ICL is often seen as part of the laws related to war, functioning as a sort of subspecies of IHL.¹¹

It has been observed that '[t]he law of crimes against humanity was initially created to fill certain gaps in the law of war crimes'.¹² Indeed, at the International Military Tribunal at Nuremberg, where crimes against humanity were first prosecuted, such charges were

¹⁰ In 1997, M. Cherif Bassiouni identified 323 international criminal law instruments that had been elaborated since 1815. These instruments deal with topics ranging from crimes against humanity, theft of nuclear materials, as well as the unlawful use of mail. The general meaning of "international crime" therefore extends beyond the scope of the present contribution and besides crimes against humanity and war crimes (both discussed herein) also includes acts of piracy, for example. See M.C. Bassiouni, *International criminal law conventions and their penal provisions* (Ardsley (NY): Transnational Publishers, 1997), as referred to by L.N. Sadat, *Putting peacetime first: Crimes against humanity and the civilian population requirement*, 31 *Emory International Law Review* 199 (2017).

¹¹ *Ibid.*

¹² R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* 230 (2nd edn, Cambridge: Cambridge University Press 2010).

essentially used for those situations not covered by the laws of war. Mindful of the concerns of the drafters of the military tribunal's Charter that there was no basis in customary law for setting up this new category, the tribunal's Chief Prosecutor, Justice Robert H. Jackson, insisted that crimes related to German conduct against Germans or within German-occupied territories must be tied to other more traditional war crimes or to the – also new – crime of aggressive war.¹³ Therefore, only those parts of the Holocaust and related crimes¹⁴ committed after 1 September 1939, the date that the Second World War formally started, were considered eligible for prosecution.¹⁵

With the first rekindling of ICL since Nuremberg, at the ICTY, the link between crimes against humanity and war or armed conflict continued to be a requirement. The ICTY Statute also requires the existence of an 'armed conflict' for crimes against humanity, as its Article 5 reads, in relevant part: 'The International Tribunal shall have the power to prosecute persons responsible for the [crimes against humanity] when committed in *armed conflict*, whether international or internal in character, and directed against any civilian population [...].' Moreover, the full names of the two *ad hoc* tribunals reinforce the idea that (modern) ICL is founded on IHL.¹⁶ However, IHL, as referred to in the names and statutes of the *ad hoc* tribunals, is used in a broad sense¹⁷ and the phrase 'serious violations of international humanitarian law' must therefore be understood as also comprising acts of genocide and crimes against humanity.¹⁸

The various chambers at the ICTY have, however, interpreted this provision purely as a jurisdictional requirement. In case of alleged crimes against humanity, the existence of an

¹³ P.M. Wald, *Genocide and crimes against humanity*, 6(3) *Washington University Global Studies Law Review* 622 (2007).

¹⁴ The crimes prosecuted in Nuremberg as 'crimes against humanity' would now constitute genocide.

¹⁵ *Ibid.*, pp. 622-623.

¹⁶ The ICTY's full name 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 full name of its sister tribunal 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 UN 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).

¹⁷ In 1966, Jean Pictet described IHL 'in the wide sense' as 'comprising two branches: the law of war and human rights' (J. Pictet, *The principles of international humanitarian law* 10 (Geneva: ICRC, 1966)).

¹⁸ In the present contribution, the term 'international humanitarian law' is used in the narrow sense, only referring to the rules governing the parties to an armed conflict (also known as the law of armed conflict, or *jus in bello*). It does not, therefore, include the law of genocide or crimes against humanity. Be that as it may, as discussed below acts constituting the latter two crimes, when committed in times of armed conflict, will often also constitute war crimes.

armed conflict had to be proven, but not a nexus between the alleged crimes and the conflict,¹⁹ as was the case for war crimes.²⁰ In addition, later international criminal tribunals and courts, such as the ICTR and ICC, no longer required the existence of an armed conflict for crimes against humanity to be committed.

Crimes against humanity, which are generally referred to as ‘systematic or mass violations of human rights’,²¹ are based on IHRL,²² and the prohibition of the conduct that forms the various crimes against humanity is included in the major human rights treaties, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention to Suppress the Slave Trade and Slavery.²³ On the other hand, the prohibitions underlying war crimes are found in IHL treaties, such as the Geneva Conventions of 1949 and their Additional Protocols of 1977, and the Hague Convention respecting the Laws and Customs of War on Land of 1907.²⁴ Naturally, a major difference

¹⁹ On this issue, see, e.g., Cryer *et al.*, *supra* note 12, pp. 234-235; and, in more detail, D. Robinson, ‘Crimes Against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience’, in: F. Lattanzi and W.A. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court: Volume I* 139-149 (Ripa di Fagnano Alto: Il Sirente, 1999).

²⁰ The leading test on the nexus requirement for war crimes was set out by the ICTY Appeals Chamber in its judgment in *Kunarac et al.* It explained that ‘[t]he armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed’. Although the ICTY Appeals Chamber also considered that war crimes can be temporally removed from the fighting or occur in areas far away from the fighting, it highlighted that the alleged incidents would need to be ‘closely related to the hostilities occurring in the other parts of the territories’ (ICTY (Appeals Chamber) 12 June 2002, *Prosecutor v Kunarac et al.*, IT-96-23-A, 23/1-A, paras 57-59).

²¹ E.g., International Law Commission, Report on the Work of Its Forty-Third Session, UN Doc. A/46/10 102 (1991), referring in Article 21 of its Draft Code of Crimes against the Peace and Security of Mankind to crimes against humanity as ‘systematic or mass violations of human rights’. Bill Schabas has referred to crimes against humanity (and genocide) as ‘human rights crimes’. W.A. Schabas, *Criminal Responsibility for Violations of Human Rights*, in: J. Symonides (ed.), *Human Rights, International protection, Monitoring, Enforcement* 281-282 (Aldershot: Ashgate, 2003).

²² A scholar recently noted that the creation of crimes against humanity as a category of crimes in international criminal law was ‘linked from the beginning to the idea of human rights as a category of international law, that is, to the idea that states have obligations not only to each other, but also to their own citizens’. C. Roberts, *On the Definition of Crimes Against Humanity and Other Widespread or Systematic Human Rights Violations*, 20(1) *University of Pennsylvania Journal of Law and Social Change* 5 (2017); see further B. Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 *Columbia Journal of Transnational Law* (1999); ICC (Pre-Trial Chamber I) 30 September 2008, *The Prosecutor v. Katanga and Ngudjolo*, Decision on the Confirmation of Charges, ICC-01/04-01/07, para. 450, in which the ICC Pre-Trial Chamber found that the crimes against humanity of ‘other inhumane acts’ (as referred to in Article 7(1)(k) of the Rome Statute) ‘are to be considered as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law’.

²³ See, for the purposes of the ICC, Article 7(1)(f) and (c) of the Rome Statute, respectively.

²⁴ The ICTY, ICTR and ICC statutes, for example, refer explicitly to the Geneva Conventions of 1949 (in Article 2 of the ICTY Statute, Article 4 of the ICTR Statute and Article 8(2)(a) and (c) of the Rome Statute, respectively) and further use the phrases ‘violations of the laws and customs of war’ and ‘serious violations of the laws and customs applicable in [international armed conflict/armed conflicts not of an international character]’ (see Articles 3 of the ICTY Statute, and 8(2)(b) and (e) of the Rome Statute, respectively). For some of the war crimes included in the Rome Statute, the language, despite often being somewhat archaic, was taken verbatim from, e.g., the Hague Regulations annexed to the Hague Convention (IV) respecting the Laws and

between IHRL and IHL provisions is the fact that the former apply, subject to derogation, at all times, in other words also during peacetime. War crimes, by their nature can only be committed when IHL applies, in other words during an international or a non-international armed conflict.²⁵ Yet, while war crimes law should therefore logically be interpreted with a close eye on IHL, i.e. the law that is actually violated or upon which criminalisation of the alleged violations is based,²⁶ the fact that crimes against humanity law applies (also) in peacetime ‘suggests that the legal framework surrounding this crime needs a divorce – or at least a legal separation – from [IHL]’.²⁷

The discussion below shows that (more) clearly separating the two legal frameworks, or a strict application of the *lex specialis* principle,²⁸ would indeed lead to more clarity, and as such, due to more legal certainty, be beneficial for the rights of the accused in ICL.

3. CUMULATIVE CHARGING AND CONVICTIONS

International crimes often overlap in terms of the conduct they criminalise. In the type of situation dealt with in ICL, namely, situations of tension, often rising to the level of armed conflict, during which (mass) atrocities take place, it is therefore common for certain conduct to meet the definition of more than one, or even several, crimes. One and the same act of killing, for example, may be prosecuted simultaneously as genocide, a crime against humanity and the war crime of murder. It is even possible that the same conduct fulfils the elements of different forms of the same type of crime. Sexual violence, for example, may

Customs of War on Land of 1907. For example, Article 8(2)(b)(vi), (xi), (xii), (xiii), (xiv) and (xv) take their wording from Article 23(c), (b), (d), (f), and (h), respectively, of the Hague Regulations, and Article 8(2)(b)(xvi) repeats the wording of Article 28 of the Hague Regulations.

²⁵ Certain provisions of IHL, and thereby the protection afforded by these provisions, continue to apply after the relevant international or non-international armed conflict has ended. Consequently, also after an international armed conflict has ended, war crimes can still be committed against, for example, prisoners of war who were detained during the conflict and have not yet been released and repatriated at the time of the criminal conduct.

²⁶ See G. Werle, *Principles of international criminal law* 358/para. 964 (The Hague, 2nd ed., TMC Asser Press: 2009), referring to the ICTY (Appeals Chamber) 2 October 1995, *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, para. 81.

²⁷ Sadat, *supra* note 10, p. 200.

²⁸ It may, however, be recalled that recently it has been advocated to apply the *lex specialis* principle in a less strict manner, allowing for co-existence of the rules of IHRL and IHL. See, e.g., J. d’Aspremont and E. Tranchez, *The Quest for a Non-Conflictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle?*, in: R. Kolb and G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* 223-250 (Cheltenham: Edward Elgar Publishing, 2013); S. Borelli, *The (Mis)-Use of General Principles of Law: Lex Specialis and the Relationship between International Human Rights Law and the Laws of Armed Conflict*, in: L. Pineschi (ed.), *General Principles of Law: The Role of the Judiciary* 265-294 (Cham: Springer, 2015); and M. Milanovic, *The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law*, in J.D. Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights* 78-117 (Cambridge: Cambridge University Press, 2016).

amount to the war crimes of rape, torture and the wilful causing of great suffering, as well as outrages upon personal dignity.²⁹ It may further be part of the war crimes of sexual slavery or enforced prostitution,³⁰ and can result in the war crime of forced pregnancy.³¹

While charging in the alternative, as is customary in most civil law systems, is occasionally also done in ICL,³² the influence of common law has caused the bringing of cumulative charges to be far more prevalent, even if one charge is fully subsumed in another charge.³³ The statutes of the various international courts and tribunals do not contain specific provisions addressing so-called *concursum delictorum*, but the case law is unified in considering cumulative charging admissible. Moreover, an accused can also be convicted of more than one crime for the same conduct ‘if each statutory provision involved has a materially distinct element not contained in the other’,³⁴ unless one of the crimes is *lex specialis*.³⁵

The present contribution does not address the fairness of cumulative convictions, which has been extensively debated elsewhere,³⁶ but analyses the impact on the interaction between the substantive law of the two legal regimes that underlie the crimes concerned and the potential impact on the said law, to which the discussion turns to next.

4. CHALLENGES RESULTING FROM DUAL APPLICATION

In terms of substantive ICL concerning the crimes, IHRL, as mentioned above, may be relied upon to fill in lacunae in the definition of war crimes. In this regard, it must be acknowledged

²⁹ See, for example, for the purposes of the ICC and in a situation of international armed conflict, Articles 8(2)(b)(xxii), 8(2)(a)(ii), 8(2)(a)(iii), and 8(2)(b)(xxi) of the Rome Statute, respectively. In the case of a non-international armed conflict, these crimes are included in Articles 8(2)(e)(vi), 8(2)(c)(i), and 8(2)(c)(ii) of the Rome Statute, respectively. While ‘[w]ilfully causing great suffering’ is not included as such for non-international armed conflicts, ‘cruel treatment’, criminalised under Article 8(2)(c)(i), can be seen as comparable.

³⁰ For the ICC, included in Article 8(2)(b)(xxi) of the Rome Statute.

³¹ *Ibid.*

³² See ICTY (Appeals Chamber) 3 May 2006, *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, paras 102 and further.

³³ See, e.g., the overview provided in the following *amicus curiae* brief: Special Tribunal for Lebanon (Amicus curiae: The War Crimes Research Office at American University Washington College of Law) 10 February 2011, *The Practice of Cumulative Charging before International Criminal Bodies*, STL-II-01/I/AC/R176bis.

³⁴ ICTY (Appeals Chamber) 30 January 2015, *Prosecutor v. Popović et al.*, IT-05-88-A, para. 537; see also ICTR (Appeals Chamber), *Prosecutor v. Karemera and Ngirumpatse*, ICTR-98-44-A, para. 710; and ICTR (Appeals Chamber), *Prosecutor v. Gatete*, ICTR-00-61-A, para. 259 and footnote 630.

³⁵ ICTY (Appeals Chamber) 20 February 2001, *Prosecutor v. Mucić et al.* (Delalić et al.), IT-96-21-A, paras 412 and further.

³⁶ E.g., I. Erdei, *Cumulative Convictions in International Criminal Law: Reconsideration of a Seemingly Settled Issue*, 34 *Suffolk Transnational Law Review* 317-345 (2011).

that ICTY trial chambers have been mindful of the differences between IHRL and IHL.³⁷ Furthermore, as also mentioned above, IHRL has been relied on to find additional support for the existence of a prohibition under IHL. Nevertheless, it is first and foremost the body of law that underlies crimes against humanity, over which almost all international criminal courts and tribunals have (had) jurisdiction, yet for which no separate convention exists.³⁸ In recent years at the ICC, crimes against humanity appear to have been the ‘crime of choice’ for the Office of the Prosecutor (Prosecution),³⁹ including in cases where an armed conflict existed at the relevant time.⁴⁰

Notably, in cases such as *Gbagbo and Blé Goudé*, concerning the violent change of power in Côte d’Ivoire in 2010-2011, despite the Defence agreeing that an armed conflict took place at the relevant time and the Pre-Trial Chamber having found that a non-

³⁷ The *Kunarac* Trial Chamber, for example, noted differences between IHRL and IHL and explained as follows: ‘The Trial Chamber is therefore wary not to embrace too quickly and too easily concepts and notions developed in a different legal context. The Trial Chamber is of the view that notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law.’ ICTY (Trial Chamber) 22 February 2001, Prosecutor v. Kunarac et al., IT-96-23-T & IT-96-23/1-T, para. 471. A year later, the *Krnjelac* Trial Chamber, consisting of two of the judges of the *Kunarac* bench, adopted – in the words of Rob Cryer – a ‘more (although not perfectly) sophisticated approach’ (Cryer, *supra* note 5, p. 526), when it held: ‘In attempting to define an offence or to determine whether any of the elements of that definition has been met, the Trial Chamber is mindful of the specificity of international humanitarian law. Care must be taken to ensure that this specificity is not lost by broadening each of the crimes over which the Tribunal has jurisdiction to the extent that the same facts come to constitute all or most of those crimes. [...] However, this does not preclude recourse to human rights law in respect of those aspects which are common to both regimes.’ (ICTY (Trial Chamber) 15 March 2002, Prosecutor v. Krnjelac, IT-97-25-T para. 181). However, the cautious approach of these trial chambers has not always been followed: see Cryer, *supra* note 5.

³⁸ Initiatives are underway to ‘forge’ such a treaty on crimes against humanity: see L. Sadat (ed.), *Forging a Convention for Crimes against Humanity* (Cambridge: Cambridge University Press, 2011). On 31 July 2017, the International Law Commission decided to transmit its draft articles on crimes against humanity through the Secretary-General to Governments, international organisations and others for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2018. See ILC Report, A/72/10, 2017, Chapter IV, paras 35-46.

³⁹ See R. Bartels, *Denying Humanitarian Access as an International Crime in Times of Non-International Armed Conflict: The Challenges to Prosecute and Some Proposals for the Future*, 48(3) *Israel Law Review* 301 (2015).

⁴⁰ Having calculated that the ICC has the highest percentage of crimes against humanity charges (vis-à-vis genocide and war crime charges) of all international courts and tribunals, Leila Sadat concludes that ‘the ICC, even more than the *ad hoc* tribunals, is largely going to be a “crimes against humanity” court’ (L.N. Sadat, *Crimes Against Humanity in the Modern Age*, 107 *The American Journal of International Law*, 374 and 377 (2012)). Indeed, in the Kenya, Libya and Côte d’Ivoire situations, only crimes against humanity were or are alleged. See, e.g., ICC (Pre-Trial Chamber) 2 August 2011, *The Prosecutor v Ruto and Sang*, Charges and List of Evidence, ICC-01/09-01/11; and ICC (Pre-Trial Chamber) 27 June 2011, *Situation in the Libyan Arab Jamahiriya, Warrant of Arrest for Saif Al-Islam Gaddafi*, para. 6. In its latest request for an arrest warrant in the Libya situation, the Prosecution does allege war crimes: ICC (Pre-Trial Chamber I) 15 August 2017, *The Prosecutor v. Al-Werfalli*, Warrant of Arrest, ICC-01/11-01/17, p. 16. With regards to the ICTY and ICTR, Bill Schabas remarked in 2003 that ‘the pattern of prosecution by the *ad hoc* tribunals shows that their central and overriding concern is with these “human rights crimes”, rather than with the violations of the laws and customs of war in the classic sense, which tend to be on the periphery of their activity’. Schabas, *supra* note 21, p. 282.

international armed conflict existed, the Prosecution only charged crimes against humanity,⁴¹ even though war crimes might be easier to prove, given the absence of the contextual elements required to demonstrate a manifestation of a widespread or systematic nature.⁴²

A trial revolving around crimes against humanity charges, yet concerning a situation of armed conflict, raises certain interesting questions. Whereas in peacetime, all persons, irrespective of their position and possible membership of an armed force, qualify as civilians for the purposes of crimes against humanity,⁴³ the status of the alleged victims of such crimes is directly relevant to the elements of crime if an international or non-international armed conflict exists.⁴⁴ In a case such as *Gbagbo and Blé Goudé*, where use was made, *inter alia*, of artillery and the charges include the alleged shelling of a densely populated area,⁴⁵ notwithstanding the absence of war crime charges, it will still need to be assessed whether the alleged victims might have been legitimate targets at the time and whether the group attacked was in fact a ‘civilian population’ – in other words: was predominantly made up of civilians or of persons qualifying as combatants or ‘fighters’.⁴⁶ Only recently, this issue has attracted

⁴¹ In *Gbagbo*, both the Prosecution and the Defence considered a non-international armed conflict to have been in existence (see ICC (Prosecution) 17 January 2013, *The Prosecutor v. Gbagbo*, Document amendé de notification des charges, ICC-02/11-01/11, para. 14; and Transcript of 25 February 2013, pp. 15-18, respectively), yet only crimes against humanity were charged. Similarly, Mr Blé Goudé was only charged with crimes against humanity. Yet, in this case, Pre-Trial Chamber I even confirmed that ‘the situation in western Cote d’Ivoire had degenerated into a non-international armed conflict between pro-Gbagbo and pro-Ouattara forces’. ICC (Pre-Trial Chamber) 11 December 2014, *The Prosecutor v. Blé Goudé*, Decision on the confirmation of charges against Charles Blé Goudé, para. 105.

⁴² Crimes against humanity, as included in Article 7 of the Rome Statute, require that a systematic or widespread attack on a civilian population took place, pursuant to a certain plan or policy. Notably, proving (to the relevant standard for pre-trial proceedings) that the alleged attack against the civilian population was widespread or systematic was challenging for the Prosecution, requiring it to conduct additional investigations and come back to the Pre-Trial Chamber with further evidence. See ICC (Pre-Trial Chamber) 12 June 2014, *The Prosecutor v. Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, ICC-02/11-01/11, paras 9-16.

⁴³ See, in support, A. Cassese, *International Criminal Law* 104 (3rd ed., Oxford: Oxford University Press, 2013); and Sadat, *supra* note 10, p. 201.

⁴⁴ The ICTY and ICTR have consistently held that the presence of combatants amongst the ones attacked does not affect the civilian nature of the ‘civilian population’ for the purposes of crimes against humanity, but the population has to be predominantly civilian. For a crime against humanity, the requirement that the attack is directed against the ‘civilian population’ indicates at the *ad hoc* tribunals that the civilian population has to be the primary object of the attack (see Article 3 of the ICTR Statute). The victims of a crime against humanity need not be civilians in the strict IHL sense, but may include persons *hors de combat* or other persons who would not be afforded the protective status of civilians under IHL. See ICTY (Appeals Chamber) 29 July 2004, *Prosecutor v. Blaškić*, IT-94-14-A, para. 113; ICTY (Appeals Chamber), *Prosecutor v. Martić*, para. 313; ICTY (Trial Chamber) 23 February 2011, *Prosecutor v. Đorđević*, IT-05-89/1-T, para. 1591. In *Mrkšić and Šljivančanin*, the ICTY Appeals Chamber held that 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 (Appeals Chamber) 5 May 2009, *Prosecutor v. Mrkšić and Šljivančanin*, IT-95-13/1-A, paras 42-44.

⁴⁵ See ICC Case Information Sheet, available at <https://www.icc-cpi.int/cdi/gbagbo-goude/Documents/gbagbo-goudeEng.pdf>.

⁴⁶ Combatants or civilians directly participating in hostilities for international armed conflict situations, and fighters or civilians directly participating in hostilities for cases concerning non-international armed conflicts.

attention in scholarship and at the international tribunals,⁴⁷ and it requires further attention – by academics, but mostly by practitioners – to ensure consistency in ICL. Besides clarifying what law it considers to apply,⁴⁸ it will be incumbent on the prosecution to lead evidence on the status of the alleged victims and the knowledge of the attackers at the time of launching the (military) attack.⁴⁹ In a case that only concerns crimes against humanity, there is a risk that the prosecution may not investigate these issues or, even if such information were found during the investigation stage, may not consider it necessary to lead evidence on the status of the alleged victims and the attackers' knowledge thereof. In this regard, it is important to note further that investigating, prosecuting and adjudicating alleged violation of the rules dealing with conduct of hostilities crimes is far more difficult than for crimes that concern violations of so-called Geneva law, committed against protected persons in the power of the alleged perpetrator.⁵⁰ When dealing with alleged military attacks against civilians, such as the shelling of populated areas, the prosecution – for the purposes of war crimes – has to prove that the alleged victims were not combatants or civilians directly participating in hostilities and therefore were, at the time of the attack, protected by IHL. The ICTY has found that in such cases the prosecution 'must show that a reasonable person could not have believed that the individual he or she attacked was a combatant'.⁵¹ It is submitted here that the same standard would apply to alleged crimes against humanity taking place in times of armed conflict. Such cases therefore require the parties and the relevant chambers to take a substantially different, and more difficult, approach than in cases concerning peacetime.

In addition, civilian casualties may have been proportionate incidental damage resulting from an attack on legitimate targets and therefore ought not to be taken into account as victims of a crime against humanity,⁵² for a 'legal utopia that criminalizes incidental

⁴⁷ See, e.g. the International Co-Prosecutor of the Extraordinary Chambers in the Courts of Cambodia's 2016 call for *amici curiae* briefs on the possible victim status of members of government forces for the purposes of crimes against humanity; Sadat, *supra* note 10, pp. 197-269; and R. Killean, E. Dowds and A. Kramer, Soldiers as Victims at the ECCC: Exploring the Concept of 'Civilian' in Crimes against Humanity, 30(3) *Leiden Journal of International Law* 685-705 (2017).

⁴⁸ Ultimately, the trial chamber, of course, has to determine what law was applicable to the situation at the time.

⁴⁹ That is, an attack for the purposes of IHL (i.e. 'acts of violence against the adversary, whether in offence or in defence'), as defined in Article 49 of Additional Protocol I of 1977.

⁵⁰ See C. Wuerzner, Mission Impossible? Bringing Charges for the Crime of Attacking Civilians or Civilian Objects before International Criminal Tribunals, 90 *International Review of the Red Cross* 907-930 (2008); and R. Bartels, Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials, 46(2) *Israel Law Review* 279-282 (2013).

⁵¹ ICTY (Trial Chamber) 5 December 2003, *Prosecutor v. Galić*, IT-98-29-T, para. 55.

⁵² An indicator that, in some cases at least, the parties and/or chamber involved are mindful of the relevance of the existence of an armed conflict is the following submission by the ICTY Prosecution in the *Galić* case: 'The Prosecution submits that, in the context of an armed conflict, the determination that an attack is unlawful in light of treaty and customary international law with respect to the principles of distinction and proportionality is critical in determining whether the general requirements of Article 5 [crimes against humanity] have been met/

suffering in war undermines this normative edifice and risks making the law redundant to those confronting the grim reality of warfare'.⁵³

Furthermore, as noted above, cumulative charges and convictions are commonplace in ICL, only requiring the existence of a materially distinct element differentiating the relevant crimes. When considering conduct that forms part of military operations in times of armed conflict, there is therefore a risk that certain conduct qualifies as crimes against humanity although it would be legitimate under IHL. In such cases, the behaviour of warring parties in times of armed conflict is considered criminal when acts that are lawful under IHL formed part of a larger, criminal plan. At the ICTY, for example, in *Popović et al.*, the trial chamber had found the accused, who were all commanders of the Bosnian-Serb army or military police, guilty of the crime against humanity of forcible transfer as an inhumane act with respect to the withdrawal of *Armija Republike Bosne i Hercegovine* (ABiH)⁵⁴ soldiers, who, after defending the town of Žepa, upon the advance of the Bosnian Serb army swam across the nearby Drina river into Serbia. It did so despite the fact that these Bosnian-Muslim soldiers had been ordered by their superiors to retreat.⁵⁵ Notwithstanding the fact that during wartime forcing the enemy to retreat across front lines or state borders is perfectly legal, and is in fact one of the goals of waging war,⁵⁶ the *Popović et al.* Trial Chamber found the

Otherwise, according to the Prosecution, unintended civilian casualties resulting from an attack on legitimate military objectives would amount to a crime against humanity under Article 5 and lawful combat would, in effect, become impossible.' Considering the Prosecution's submissions, the *Galić* Trial Chamber found that 'the body of laws of war plays an important part in the assessment of the legality of the acts committed in the course of an armed conflict and whether the population may be said to have been targeted as such'. Ibid, para. 144. William Fenrick observed, however, that the Trial Chamber followed the Prosecution's suggestion 'without enthusiasm'. W.J. Fenrick, *Crimes in Combat: the Relationship between Crimes against Humanity and War Crimes*, Paper for Guest Lecture Series of the ICC Office of the Prosecutor 12 (5 March 2004), available at <https://www.icc-cpi.int/NR/rdonlyres/E7C759C8-C5A4-4AD3-8AB5-EF6ED68AC1D4/0/Fenrick.pdf>.

⁵³ P. Akhavan, *Reconciling Crimes Against Humanity with the Laws of War: Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence*, 6 *Journal of International Criminal Justice* 36 (2008).

⁵⁴ The Army of the Republic of Bosnia and Herzegovina.

⁵⁵ The evidence presented before the Trial Chamber, in the form of a report by the ABiH general army staff, showed that the retreat was ordered and planned. According to the aforementioned report, 'there were about 1260 soldiers and 250 able-bodied civilians in Zepa, 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] Gorazde. Around 1000 soldiers are still in the mountains around Zepa and are waiting for favourable conditions for retreating'. See ICTY (Trial Chamber) 10 June 2010, *Prosecutor v. Popovic et al.*, IT-05-88-T, para. 736.

⁵⁶ 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 prisoner of war (POW), 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: ICTY (Appeals Chamber) 22 March 2006, *Prosecutor v. Stakić*, IT-97-24-A, para. 284 and *Mrkšić and Šljivančanin Appeals Judgement*, *supra* note 44, para. 458). For a more detailed analysis, see R. Bartels, 'Discrepancies between international humanitarian law on the battlefield and in the courtroom: The Challenges of Applying International Humanitarian Law During International Criminal Trials', in: M. Matthee,

accused guilty of the crime against humanity of committing the inhumane act of forcible transfer.⁵⁷

Although the circumstances of this case concerning Srebrenica may have shown that indeed the Bosnian Serb armed forces would have killed the ABiH fighters, had they fallen in their hands, it is difficult to understand the Trial Chamber's finding from an IHL perspective. If it would have been permitted under IHL for the Army of Republika Srpska (VRS)⁵⁸ to attack and kill members of the ABiH while the latter were defending Žepa, or even when they were fleeing across the river,⁵⁹ how then could a crime have been committed if these persons were not shot and survived their retreat?⁶⁰

One of the accused, Mr Miletić, appealed his conviction for forcible transfer of ABiH soldiers, submitting that 'the acts against these men were not a part of the attack on the civilian population and cannot constitute a crime against humanity'.⁶¹ The Prosecution agreed that Miletić should be acquitted on this point and submitted that the forcing of 'combatants from the Žepa enclave' had been lawful under IHL.⁶² The Appeals Chamber reversed the conviction for this count on appeal. However, the reason given for doing so was somewhat ambiguous. On the one hand, the Appeals Chamber was 'cognisant of the fact that Miletić was convicted for forcible transfer as a crime against humanity, not as a war crime' and explicitly noted that 'forcible displacement of enemy soldiers is not prohibited under international humanitarian law'.⁶³ On the other hand, however, it also recalled 'that there is no requirement nor is it an element of a crime against humanity that the victims of the

B. Toebes and M. Brus (eds), *Armed Conflict and International Law: In Search of the Human Face* 339-378 (The Hague: TMC Asser Press, 2013).

⁵⁷ *Popović et al.* Trial Judgment, para. 956. The Trial Chamber found: '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. 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.'

⁵⁸ *Vojska Republike Srpske*.

⁵⁹ Fleeing combatants remain legitimate military targets as long as they have not surrendered or otherwise rendered *hors de combat*.

⁶⁰ See Bartels, *supra* note 56, p. 368; and D. Guilfoyle, *International Criminal Law* 245 (Oxford: Oxford University Press, 2016).

⁶¹ *Popović et al.* Appeal Judgment, para. 768.

⁶² *Ibid.*, para. 769.

⁶³ *Ibid.*, para. 774, referring to the commentary on Rule 129 of the ICRC's study on customary IHL (J-M. Henckaerts and L. Doswald-Beck, *Study on Customary International Humanitarian Law: Volume 1* (Cambridge: Cambridge University Press, 2005); an updated version is available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>).

underlying crime be civilians or predominantly civilians, provided the acts form part of a widespread or systematic attack directed against a civilian population’;⁶⁴ and continued by considering that ‘[i]n the case of the men who crossed the Drina River, it is unclear from the Trial Chamber’s findings whether these men included any civilians at all’.⁶⁵ Because a week had passed since the departure of the civilian population from Žepa before the alleged victims of forcible transfer swam across the river, the Appeals Chamber found that the requirement for crimes against humanity that ‘the commission of an act which, by its nature or consequences, is objectively part of the attack’, namely that it was directed against a *civilian* population, was lacking.⁶⁶ For that reason, it found that the Trial Chamber had erred. So, even though the Appeals Chamber reversed the conviction for this count on appeal, and correctly noted the difference between crimes against humanity and war crimes, it did not clearly answer the question what happens where a certain conduct is lawful under IHL but potentially qualifies as a crime against humanity because all the elements of the relevant crime are met.⁶⁷

Moreover, this example shows that a focus on the alleged criminality of certain acts, combined with the (understandable) desire to counter impunity, risks creating international case law that can be interpreted as demanding stricter battlefield behaviour than do current IHL treaty and customary rules. Although a line of reasoning may be understandable in the factual circumstances of a given case, when abstracted it may upset the balance between military necessity and the humanitarian considerations on which IHL is based. It was aptly observed by the then Senior Adviser on Law of War Matters at the ICTY that ICL ‘do[es] not contribute to the viability of IHL by indulging in creative reclassification so that an act which is regarded from one perspective as lawful can be regarded as unlawful because we changed the label’.⁶⁸ In addition to considerations related to IHL, it is submitted here that the principle of legality and rights of the accused demand a strict application of the principle of *lex specialis*, at least for the purposes of (international) criminal trials.

⁶⁴ Ibid, para. 773.

⁶⁵ Ibid.

⁶⁶ Ibid, para. 774.

⁶⁷ Interestingly, the International Court of Justice, in the *Croatia v. Serbia* case on genocide, was similarly ambiguous when it stated that ‘[t]here can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another. Thus it cannot be excluded in principle that an act carried out during an armed conflict and lawful under international humanitarian law can at the same time constitute a violation by the State in question of some other international obligation incumbent upon it. However, it is not the task of the Court in the context of the counter-claim to rule on the relationship between international humanitarian law and the Genocide Convention.’ ICJ 3 February 2015, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment on the Merits, para. 474.

⁶⁸ Fenrick, *supra* note 52, p. 11.

E. CONCLUDING REMARKS

The above discussion has shown that crimes against humanity law and war crimes law, and the criminal proceedings dealing with them, ought to take account of the different underlying branches of public international law, respectively IHRL and IHL, not only because of the principle of legality but also to preserve the different functioning of these branches. While divorcing, or separating, the former from the latter⁶⁹ is warranted in their application by international criminal courts and tribunals, it is equally important to charge certain conduct with the most appropriate type of crime,⁷⁰ to avoid distortion of the underlying law. Caution is warranted when conduct originally meant to fall within a certain type of crime is brought under the umbrella of another crime merely for jurisdictional or evidentiary considerations. Charging someone with crimes against humanity enables the prosecution of certain behaviour that would otherwise go unpunished owing to gaps in the protection afforded by IHL. However, war crimes law is similarly used to combat impunity and war crime charges are brought for conduct that does not easily fit under the framework of IHL. Stretching war crime provisions to address any unwanted behaviour in times of armed conflict can have negative consequences for the corresponding prohibition and/or protection under IHL and should therefore be avoided as much as possible. Indeed, '[t]he temptation to dilute the laws of war through reclassification of conduct as crimes against humanity should be resisted because it does not necessarily result in increased protection for civilians in times of armed conflict. The laws of war are the result of a venerable tradition of reconciling considerations of humanity with military necessity',⁷¹ as 'utopian jurisprudence that disregards the imperatives of humanitarian law in the name of progress will only dissipate what remains of chivalry and professional pride among the world's armed forces'.⁷² In addition, fair labelling requires

⁶⁹ As suggested by Leila Sadat: Sadat, *supra* note 10, p. 200.

⁷⁰ Naturally, it is not merely a matter of charging. The relevant chamber is not bound by the choice of crimes by the prosecution and should only enter convictions for the appropriate type of crime(s).

⁷¹ Akhavan, *supra* note 53, p. 36.

⁷² *Ibid.*, p. 37. Akhavan correctly recalls in this regard that IHL is 'the result of a venerable tradition of reconciling considerations of humanity with military necessity' and is 'considered as a realistic code of conduct for military commanders acting in good faith and inclined to sparing non-combatants to the extent possible from the inevitable horrors of war'.

charging a prohibited form of conduct in a manner that best matches the alleged criminal behaviour.⁷³

Given the nature of the cases dealt with on the international level, and the characteristics of contemporary armed conflicts, it seems inevitable that war crimes will be used for situations that IHL was not originally meant to cover. In international criminal justice, IHL is used in some situations where the contextual elements of crimes against humanity (or genocide) may not (easily) be met but where the fact that fighting of a certain intensity is taking place allows atrocities to be prosecuted as war crimes, as the relevant conduct will generally be contrary to IHL. Yet, the rules of IHL prohibiting certain behaviour were not drafted and agreed upon with the inter-ethnic and merciless fighting in mind that it is nowadays – retrospectively – being applied to in an attempt to hold alleged perpetrators of atrocities committed during such fighting criminally liable. As soon as conflicts take on an ethnic dimension, it appears that IHL cannot take on its preventative function and consequently is not, or hardly, able to regulate the fighting. Indeed, when the very aim of the fighting concerned goes against the rationale of IHL, namely when the objective of the parties, or one of them, is not to overcome the enemy militarily⁷⁴ but to attack a people for who they are, or to ethnically cleanse a city or area, IHL cannot serve its preventative regulating purpose.

In these situations, it appears to be relatively uncontested that IHL may be used to punish in retrospect. With regard to the genocide in Rwanda, for example, the killing and raping that formed part of the genocide did not relate to the conduct of hostilities or the need for the civilian population to be protected against the effects of warfare.⁷⁵ The many deaths and rapes did not serve any military goal and thus could not be justified by an attempt to achieve a military advantage.⁷⁶ Consequently, charging war crimes to prosecute alleged

⁷³ See H.M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-based Crimes at the International Criminal Tribunals* (Oxford: Oxford University Press 2014).

⁷⁴ At the basis of IHL is the rationale that the parties to an armed conflict have an interest in using force discriminately and only direct it at those persons and objects the neutralisation of which would result in military advantage, i.e. combatants (or fighters) and military objects. Where the belligerents' aim is to achieve a military victory, directing force at civilians would be of no use, as civilians do not take a part in the fighting and do not form military opposition. IHL assumes that the warring parties have an interest in using their finite resources to subdue the opponent's armed forces and not to squander their resources on attacks against civilians or civilian objects.

⁷⁵ The fighting of the *Front patriotique rwandais* against the government's armed forces, controlled by the Hutu, did constitute a (non-international) armed conflict and thus appropriate fell under IHL and was suitable to be regulated by it. However, this fighting was not dealt with by the ICTR.

⁷⁶ In this regard, the *Ntaganda* Trial Chamber of the ICC held in early 2017 that rape and sexual slavery are prohibited conduct at all times, against any person, recalling that rape or sexual slavery 'would never bring any accepted military advantage, nor can there ever be a [military] necessity to engage in such conduct'. *Ntaganda* Decision on Jurisdiction, *supra* note 4, para. 48.

génocidaires was merely a safety net to ensure conviction of the alleged perpetrators, even though only genocide and crimes against humanity charges and convictions would have been more correct. However, the present author does not advocate that the war crime provisions not be used for such circumstances, especially if not doing so would risk impunity, but rather that care should be taken in judicial pronouncements on such crimes. For it must be remembered that judicial findings in a specific case only relate to one or a few persons, but that the judgments of international courts and tribunals may have a significant influence on the development of, *inter alia*, IHL. International criminal law is called upon to address horrendous atrocities committed in times when IHL failed to achieve its aim of mitigating suffering in war while permitting the warring parties to achieve their military goals, but one must not forget that for every such case, there are also situations where IHL does work – precisely because of the realism built into this law. Importantly, as a scholar noted with respect to the first judgment of the ICC (in *Lubanga*), with respect to the broader definition of participation in hostilities applied in order to afford wider ICL protection to children associated with armed forces, the effect may be that ‘[t]he attendant methodological compromises and contradictions increased one defendant’s liability’, yet ‘eroded’ that protection under IHL ‘in the process’.⁷⁷

One must therefore be mindful that the conceptual differences between the branches of public international law discussed in the present contribution, IHRL, IHL and ICL, which in part address the same situations (namely, the undesirable behaviour of individuals in times of armed conflict) and share the same terminology, can lead to developments and explanations of terms and concepts in one of the branches that are not necessarily compatible with the rationale of or concepts in the other branches.⁷⁸ Due to the fragmentation of international law, one should therefore be mindful not to mix the various branches of law. The protection afforded by IHRL and IHL, as well as the rights of the accused under ICL, demand careful scrutiny.

⁷⁷ C. Jenks, *Law as Shield, Law as Sword: The ICC’s Lubanga Decision, Child Soldiers and the Perverse Mutualism of Direct Participation in Hostilities*, 3 *University of Miami National Security and Armed Conflict Law Review* 124 (2013).

⁷⁸ See Darryl Robinson’s observation quoted above in note 6; see similarly Akhavan, *supra* note 53, p. 36.