From the battlefield to the courtroom (and back)

The interplay between international humanitarian law and international criminal law

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Chapter 1

Introduction

Introduction

International humanitarian law (IHL), initially referred to as the laws of war, and more recently as *jus in bello*[1] or the law of armed conflict,[2] is significantly older than international criminal law (ICL), which emerged out of modern international criminal justice.[3] IHL and ICL are said to "represent two extremes in the making of international law".[4] While IHL is applied during armed conflicts and wars,[5] in a "world of madness and emotion", ICL develops far away from the hostilities, in a "world of order and reason"; namely, in the courtrooms of international institutions, thereby allowing for the benefit of hindsight.[6]

IHL was drafted to be applied on the battlefield, not in a courtroom. Indeed, it was not meant to serve as an "international equivalent of a comprehensive national criminal code".[7] Instead, during armed conflict, IHL aims regulate the conduct of hostilities and to

1 Kolb, who examined the origin of the term, concludes that while the use of Latin gives the misleading appearance of the term "jus in bello" being centuries old, it was "extremely rare" for the term to be used before 1930. The term's "breakthrough" occurred only after the Second World War. Robert Kolb, 'Origin of the twin terms *jus ad bellum/jus in bello*', 79 (1997) *International Review of the Red Cross*, pp 553-555.

2 The introduction of the term "armed conflict", in the 1949 Geneva Conventions, was aimed at ensuring that the application of IHL would be based on a factual assessment and not on a political statement, such as a declaration of war. See, eg, ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) ('ICRC 2016 Commentary'), para. 193.

3 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). It is noted that the trial of Peter Von Hagenbach is often referred to as the first example of an international criminal trial. However, after a failed attempt to set up a tribunal to try the German Emperor Wilhelm II, international criminal justice did not conceive until the International Military Tribunal at Nuremberg was set up after World War II, and ICL as a body of law was only created with establishment of the *ad hoc* tribunals in the 1990ies.

4 Steven R. Ratner, 'Sources of International Humanitarian Law and International Criminal Law: War Crimes and the Limits of the Doctrine of Sources', in Jean d'Aspremont and Samantha Besson (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017), p. 912. Article 38 of the Statute of the International Court of Justice sets out the sources of public international law, which includes both IHL and ICL, but Hilary Charlesworth observes that international law is "generated by a multi-layered process of interactions, instruments, pressures and principles" (Hilary Charlesworth, 'Law-making and Sources', in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012), p. 189). In this regard, Steven Ratner submits that IHL and ICL, "differ [...] from the traditional sources doctrine in 'the priority they accord to different sources and the approaches they take to them'" (Ratner, p. 916, referring to ibid.).

5 See, however, Chapter 3 on the slightly broader material scope of application of IHL.

6 Ratner (n 4), p. 912.

7 William Fenrick, 'International humanitarian law and criminal trials', 7 (2017) *Transnational Law and Contemporary Problems*, p. 26. Moreover, violations of a large number of the IHL rules do not qualify as war crimes, and those rules may better

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. Restrictions are therefore placed on warring parties, but the drafters of IHL have always been mindful of the reality of warfare and left room for the necessities of war.[8] In fact, one has to accept that "war is a brutal business" and that unless all armed conflicts are eradicated, "one must accept that the purpose of the body of law that purports to regulate combat is to limit human suffering, not to eliminate it."[9] Viewing IHL otherwise may result in undermining it and rendering it ineffective.[10]

Whilst it is a body of law, IHL is usually applied in practice by members of the armed forces who are not lawyers,[11] and as such these "preventative rules" require certain simplicity. IHL provisions therefore logically differ from a criminal code and do not include elements of crimes. However, to prosecute and try alleged war criminals, the parties in a criminal trial have to have resort to clear rules proscribing the alleged unlawful conduct. The Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY), for example, was hampered in conducting an in-depth investigation into alleged crimes during the 1999 bombing campaign of the North Atlantic Treaty Organisation (NATO) against Serbia, because – in the prosecution's view – IHL is sometimes "not sufficiently clear".[12] Moreover, for any conviction to be entered, the judges have to assess whether the elements of an alleged crime have been fulfilled.[13] To draw up these elements of crime, either as part of the

be considered as "instruction norms". Rogier 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 Marielle Matthee, Birgit Toebes and Marcel Brus (eds), *Armed Conflict and International Law: In Search of the Human Face* (T.M.C. Asser Press 2013), p. 341. See, similarly, Paola Gaeta, 'The Interplay Between the Geneva Conventions and International Criminal Law', in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015), pp 739-740.

8 The Preamble of the 1907 Hague Convention notes, *inter alia*, about the wording of the provisions of the convention "has been inspired by the desire to diminish the evils of war, as far as military requirements permit". Fifth paragraph of the Preamble of the 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 of 18 October 1907.

9 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 (5 March 2004), p. 2.

10 ibid.

11 Fenrick (n 7), p. 26. Military lawyers will, however, normally be involved in the target selection process. See, for example, Tom Boyle, 'Proportionality in decision making and combat actions', in Mireille Hector and Martine Jellema (eds), *Protecting civilians in 21st-century warfare: target selection, proportionality and precautionary measures in law and practice* (Wolf Legal Productions 2001), pp 32–33.

12 *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia* of 2000, para. 90.

13 As will be discussed in more detail below, the judges at the *ad hoc* tribunals had to develop the elements of crimes themselves for each crime that was first dealt with in a trial (albeit assisted by the parties that made submissions on their views of what the

case law (as was done by chambers of the ICTY) or as part of a separately adopted document (as was done for the International Criminal Court (ICC)), one must consider the underlying prohibition of the alleged conduct. Indeed, substantive international criminal law is not an autonomous body of law that happens to be based on IHL, but is instead an accessory to the latter.[14]

War crimes law should therefore logically be interpreted with a close eye on the law upon which the violations are based.[15] Yet, for reasons that are inherent to the nature of criminal trials (i.e. the aim of the parties to achieve a conviction or an acquittal), pronouncements on the elements of war crimes made in ICL may not actually represent the branch of law that was allegedly violated.[16] Furthermore, while this only counts for the ICC, which was set up by treaty and was given only prospective jurisdiction, legislators – which on the international level are the States – may decide to criminalise certain behaviour in the absence of a prior IHL treaty.[17] In a 2017 decision, for example, the *Ntaganda* Trial Chamber of the ICC, in response to a Defence challenge that the Court had no jurisdiction over war crimes allegedly committed

elements entailed), while the judges, parties, and participants of the cases before the International Criminal Court have resort to a set of elements of crimes that were drafted by a special working group of representatives of , 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.

14 Marco Sassòli, 'Humanitarian Law and International Criminal Law', in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009), pp 111, 117-119.

15 See Gerhard Werle, *Principles of International Criminal Law* (2nd edn, T.M.C. Asser Press 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 (Appeals Chamber), 2 October 1995, para. 81.

16 See, for example, the Prosecution's submissions on appeal in *Prosecutor v. Ntaganda*, in which it argues that for the purposes of the war crime laid down in Article 8(2)(e)(iv) of the Rome Statute of the International Criminal Court, the word "attack" in the phrase "[i]ntentionally directing attacks" against protected objects should not be defined in accordance with Article 49 of Additional Protocol I, but instead given a "special meaning", not in line with IHL: ICC, *Prosecutor v Ntaganda*, Case No. ICC-01/04-02/06, Prosecution Appeal Brief, 7 October 2019, para. 29 and further. Another, notorious, example is the statement of the then Prosecutor of the ICC, Mr Moreno-Ocampo, during the closing statements in the *Lubanga* case. When asked by Judge Odio Benito about the relevance of sexual violence to the case, the Prosecutor responded that the Prosecution "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 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." (ICC, *Prosecutor v Lubanga*, Case No. ICC-01/04-01/06, Transcript of Hearing of 25 August 2011 (ICC-01/04-01/06-T-356-ENG), pp 53-55). Notwithstanding the ongoing debate in IHL about the precise scope of active or direct participation in hostilities, the view express by the Prosecutor is evidently not in line with the meaning of using children under the age of fifteen to (directly) participate in hostilities, as included in Article 77(2) Additional Protocol I and Article 4(3)(c) of Additional Protocol II.

17 The consequences of such legislative action for IHL, and the question whether the adoption of such a war crime would mean that the prohibited conduct then must be seen as having become part of IHL, is discussed in Chapter 8.

against members of the same armed force because such a prohibition did not form part of customary IHL, observed as a preliminary consideration

> that the [Rome] Statute is first and foremost a multilateral treaty which acts as an international criminal code for the parties to it. The crimes included in Articles 6 to 8 of the Statute [i.e. genocide, crimes against humanity, and war crimes] are an expression of the States Parties' desire to criminalise the behaviour concerned. As such, the conduct criminalised as a war crime generally will, but need not necessarily, have been subject to prior criminalisation pursuant to a treaty or customary rule of international law.[18]

The grave breaches regime, a "ground-breaking"[19] introduction made in the 1949 Geneva Conventions, created the duty to investigate allegations of specific violations of IHL and to prosecute, or extradite, the alleged perpetrators, regardless of their nationality.[20] However, the regime adopted was limited in scope, and only related to international armed conflicts;[21] also, a "disappointingly" low number of States enacted the required legislation.[22] Moreover, although the grave breaches regime on paper appears to be "a watertight mechanism",[23] hardly any prosecutions of grave breaches took place prior to the establishment of the ICTY.[24] This part of the IHL enforcement framework thus has to be complemented by other enforcement regimes. Whereas its impact on compliance and enforcement should not be overstated, ICL thus has an important role to play, and may in certain circumstances be the only means to address serious violations of IHL.

While speaking at the ICC, Frits Kalshoven nonetheless considered that IHL had travelled a "colossal distance" to arrive at ICL – something he referred to as a "quantum jump". This notwithstanding, when moving from IHL to ICL, IHL had – in his view – not been "lost

18 ICC, *Prosecutor v Ntaganda*, Case No. ICC-01/04-02/06, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9 (Trial Chamber), 4 January 2017, para. 35.

19 ICRC 2016 Commentary, para. 2888.

20 See Articles 49-50, 50-51, 129-130, and 146-147 of the four 1949 Geneva Conventions, respectively.

21 This remained the same in 1977, as the grave breaches regime was only included in Additional Protocol I, with the same limitations as for the Geneva Conventions (see Article 85 of Additional Protocol I).

22 Yves Sandoz, 'The History of the Grave Breaches Regime', 7 (2009) *Journal of International Criminal Justice*, p. 675; and ICRC 2016 Commentary, paras 2888-2889.

23 ICRC 2016 Commentary, para. 2888.

24 Knut Dörmann and Robin Geiss, 'The Implementation of Grave Breaches into Domestic Legal Orders' 7 (2009) *Journal of International Criminal Justice*, p. 704, referring to a "remarkably modest corpus of domestic jurisprudence governing these offences", while the ICRC 2016 Commentary only identifies one instance of a national prosecution for (alleged) grave breaches: a Danish case of 1994 (ibid).

somewhere on the road".[25] Indeed, the *ad hoc* tribunals, and as such modern ICL, are founded on a basis of IHL. To be sure, the full names of the ICTY and International Criminal Tribunal for Rwanda (ICTR) show this very clearly.[26] It is clear, however, that IHL is referred to in a broad or wide sense[27] in the statutes of the *ad hoc* tribunals. The term "serious violations of international humanitarian law" is therefore meant to also include acts of genocide and crimes against humanity. In the present research, the term "international humanitarian law" is used in the narrow sense; namely, as referring to the rules governing the parties to an armed conflict (i.e., the laws of war, laws of armed conflict, or *jus in bello*).[28]

ICL, as an independent body of law, has developed greatly since the 1990s and has, through the numerous judgments of the international tribunals and courts, e.g. ICTY and the ICTR, contributed to the implementation of IHL in general, and to the development and clarification of the substance of IHL.[29] Chapter 2 discusses these developments in more detail.

25 Kalshoven continued: "Far from it, IHL is still very much with [ICL]": Frits Kalshoven, 'From International Humanitarian Law to International Criminal Law', 3 (2004) *Chinese Journal of International Law*, pp 151-153.

26 The full name of the ICTY and the ICTR are, respectively, 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"; and 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)). In addition, the United Nations Secretary-General's report to the Security Council on the establishment of the ICTY also clarified that the Tribunal was to apply "rules of international humanitarian law which are beyond any doubt part of customary law" (Report of the Secretary-General, 'Report pursuant to Article 2 of Security Council Resolution 808' (1993) U.N. Doc. S/25704, para. 34). Although the Special Court for Sierra Leone (Special Court) in its name does not specifically refer to IHL, the first article of its Statute clearly states that the Special Court's mandate is to adjudicate serious violations of this body of law: "The Special Court shall [...] 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" (Article 1(1) of the 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).

27 In 1966, Pictet described IHL "in the wide sense" as "compromising two branches: the law of war and human rights": Jean Pictet, *The Principles of International Humanitarian Law* (ICRC 1966), p. 10.

28 It does not, therefore, include the law of genocide or crimes against humanity. Be that as it may, as highlighted in chapter 6, acts constituting the latter two crimes, when committed in times of armed conflict, will often also constitute war crimes.

29 See generally, in reverse chronological order: Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (Cambridge University Press 2014); Ousman Njikam, *The Contribution of the Special Court for Sierra Leone to the Development of International Humanitarian Law* (Duncker & Humblot 2013); Shane Darcy, 'Bridging the Gaps in the Laws of Armed Conflict? International Criminal Tribunals and the Development of Humanitarian Law', in Noëlle Quénivet and Shilan Shah-Davis (eds), *International Law and Armed Conflict: Challenges in the 21st Century* (T.M.C Asser Press 2010); Robert

Viewing IHL through the lens of ICL also entails risks, however. Not all 'clarifications' by such courts and tribunals have simplified, or indeed 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 or her enemy in order to kill the enemy or make him or her retreat, as long as in doing so, no excessive incidental damage is caused to civilian objects, or use is made of forbidden means or methods of warfare. However, as with the example discussed in Chapter 6, this soldier could be found guilty of having committed a crime against humanity of deportation, if the enemy retreats as intended. This is a confusing situation for the soldier in the field, indeed.

Besides some doubtful 'clarifications', on occasion actual errors in the application of IHL are made. An infamous such example is the ICTY *Blaškić* Trial Chamber's erroneous approach to the principle of military necessity, one of IHL's fundamental principles, in relation to the protection of civilians, when it stated that "[t]argeting civilians or civilian property is an offence when not justified by military necessity".[30] Another trial chamber of the ICTY later explained that this was a misstatement of IHL,[31] and the Appeals Chamber in the *Blaškić* case deemed it necessary "to rectify" the Trial Chamber's statement, and "underscore[d] that there is an absolute prohibition on the targeting of civilians in customary international law".[32]

In addition to the foregoing, it has been observed that the concept of non-international armed conflict as created by the ICTY Appeals Chamber, is "distinctly broader in scope

Heinsch, *Die Weiterentwicklung des Humanitären Völkenrechts durch die Strafgerichtshöfe für das ehemalige Jugoslawien und Ruanda* (BWV Verlag 2007); Aliston Danner, 'When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War' 59 (2006) *Vanderbilt Law Review*, pp 1-68; Larissa van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Martinus Nijhoff Publishers 2005); Claus Kress, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice', 30 (2000) *Israel Yearbook on Human Rights*, pp 103–178; Leslie Green, 'The International Judicial Process and the Law of Armed Conflict' 47 (1999) *Chitty's Law Journal and Family Law Review*, pp 1–36; Christopher Greenwood, 'The Development of International Humanitarian law by the International Criminal Tribunal for the former Yugoslavia', 2 (1998) *Max Planck Yearbook of United Nations Law*, pp 97–140; Theodor Meron, 'The Hague Tribunal: Working to Clarify International Humanitarian Law', 13 (1998) *American University International Law Review*, pp 1511–1517; Theodor Meron, 'War Crimes Law Comes of Age' 92 (1998) *The American Journal of International Law*, pp 462–468; William Fenrick, 'The Development of the Law of Armed Conflict Through the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia', 3 (1998) *Journal of Armed Conflict Law*, pp 197-232.

30 ICTY, *Prosecutor v Blaškić*, Case No. IT-95-14-T, Judgment (Trial Chamber), 3 March 2000, para. 180. The *Kordić* Trial Chamber subsequently used a different, but similarly ambiguous and problematic wording when it held 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 Kordić and Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001, para. 328).

31 ICTY, *Prosecutor v Galić*, Case No. IT-98-29-T, Judgment (Trial Chamber), 5 December 2003, paras 42-45.

32 ICTY, *Prosecutor v Blaškić*, Case No. IT-95-14-A, Judgment (Appeal Chamber), 29 July 2004, para. 109.

than that considered by the drafters of the Geneva Conventions".[33] Given the jurisdictional requirement for an armed conflict to have been in existence at the relevant time, tribunals and courts, in trying to ensure that they were able to retrospectively prosecute and adjudicate alleged violations of IHL, may have stretched the application of this underlying body of law beyond its intended and desired scope.[34]

In dealing with alleged serious violations of IHL, international criminal tribunals and courts, in their "hushed and calm setting",[35] have significantly contributed to the development and clarification of IHL. However, in addition to occasional errors, such as that discussed above, their case law may have a broader effect on IHL as such, and on the interplay between these two legal fields. By applying IHL for the purposes of criminal trials, these courts and tribunals might not always have struck the right balance between the two diametrically opposed impulses – namely, military necessity and humanitarian considerations – on which IHL is based. Since IHL and ICL have different rationales and objectives,[36] those involved in either of these fields approach legal issues from a different perspective. As a result, while certain rulings may be understandable from a criminal law perspective, if they impact on IHL (and thus have to be applied on the battlefield), they may actually lead to confusion and to a blurring of the generally clear basic rules of IHL.

As a body of law that takes into account military and humanitarian considerations, and which was drafted to be applied on the battlefield and not retrospectively, in the courtroom, IHL is not always easily applied in a criminal law framework. Challenges in this regard range from IHL's use of vague concepts, such as military advantage or excessive incidental damage, to the difficulty to establish intent in case of targeting decisions. Indeed, it has been questioned whether prosecuting intentional violations of the rules governing the conduct of hostilities is a "mission impossible".[37] Moreover, two core aspects of these bodies of law (the presumption of protection under IHL and the presumption of innocence under ICL) lead to reverse outcomes and create tension when applied together in the context of an

33 Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010), p. 122.

34 This issue is discussed in Chapter 3.

35 Ratner (n 4), pp 912–913.

36 IHL aims to regulate warfare and thereby to mitigate the suffering resulting therefrom (eg, Dieter Fleck, *The Handbook of International Humanitarian Law* (2nd ed., Oxford University Press 2008), p. 11; and Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (Cambridge University Press 2011), p. 2), while the war crimes part of ICL 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 (eg, Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (2nd ed., Cambridge University Press 2010), p. 1; Werle (n 15), pp 29-36). The interplay between the different objectives is discussed more in detail in Chapter 4.

37 Carolin Wuerzner, 'Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals', 90 (2008) *International Review of the Red Cross*, pp 907-930.

assessment of guilt for alleged war crimes or crimes against humanity. In addition, ICL and its institutional and procedural legal framework create certain challenges.
The present study will analyse the interplay between these two branches of public international law and highlight the challenges in "bringing" IHL from the battlefield to the courtroom – and back.

1.2 Structure and methods of research

This study focusses on the application of IHL after the fact: the use of, and reliance on, IHL for the purposes of international criminal proceedings concerning battlefield conduct, and alleged violations of IHL applicable to the actions of the fighting parties.

1.2.1. *Research question and Methodology*

Noting that the interrelationship between international human rights law and IHL had received significant attention in scholarship, Cryer observed that the interrelationship of IHL and ICL has not been the subject of a similar level of "investigation". In referring to the article that is incorporated in the present research as Chapter 4,[38] he observed that "[o]nly very recently has there been any systematic study of the interplay between these two closely related areas of law".[39] Although many authors have written about the development of IHL by international criminal courts and tribunals, the interplay between the two has indeed received less attention, and a comprehensive critical assessment is arguably still lacking.[40]

Nearly one hundred years ago, it was suggested that one need not "enumerate exactly what may now be considered war crimes or violations of the laws of war", because "[t]he list will change from time to time, by the addition of new offences and the omission of those now so considered".[41] Yet, nowadays one can indeed 'no longer [...] be so lackadaisical", and

38 Although included as Chapter 4, the research for that chapter was chronologically the first research conducted for the present study.

39 Robert Cryer, 'The relationship of international humanitarian law and war crimes: international criminal tribunals and their statutes', in Caroline Harvey, James Summers, and Nigel D. White, *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe* (Cambridge University Press 2014), pp 117-118.

40 In the aforementioned observation, however, Cryer omitted to refer to his own research that – as can be seen from the numerous references to his work in the present study – does address many aspects of the relationship between IHL and ICL.

41 Elbridge Colby, 'War Crimes', 23 (1924-1925) *Michigan Law Review*, p. 482. For the purposes of the present study, it is interesting to note that Colby was not keen on the prospect of having some form of ICL. When commenting on the 1922 proposal by the International Law Association to create an international criminal court to try war criminals, he wrote: "War crimes will persist. But the laws of war must also persist. International prosecutions will shatter the stability of those

"a more in-depth analysis of the question is needed".[42] The present research aims to conduct such a more in-depth analysis by looking into the legal, practical, and evidentiary challenges to prosecute and adjudicate alleged violations of IHL, and international human rights law,[43] in times of armed conflict, before international courts and tribunals. It does so on the basis of the following main research question:

> *How is international humanitarian law applied during international criminal trials; what challenges arise during the said application; how does this retrospective application impact on IHL itself; and how can ICL be improved to reduce the challenges and/or undesirable impact on IHL?*

In answering this question, the pronouncements of international criminal courts and tribunals on the material scope of application of IHL is first considered. After all, for any violations of IHL to be prosecuted as war crimes before these institutions, IHL must have been applicable. In the other chapters, the focus is on battlefield conduct or parts of IHL where the relationship between the core IHL principles of humanity and military necessity is particularly apparent. In other words, on alleged violations of IHL applicable to the conduct of hostilities or methods of warfare, rather than on easier to prove violations of the core protective rules of IHL (i.e. the so-called 'Geneva Law'), such as murder or other prohibited conduct against protected persons.[44]

For each of the four "capita selecta" (see below), the topic and its relevance for both IHL and ICL is introduced in an introductory section, followed by an overview of the relevant rules of IHL. This is done by analysing the treaty rules and customary law, and as a subsidiary source, scholarship.[45] Although "judicial decisions" are placed on the same level as the

laws and offend laws and offend state dignity more than will dependence on national responsibility." Elbridge Colby, 'War Crimes and Their Punishment', (1924) *Minnesota Law Review*, pp 45-46.

42 Cryer (n 39), p. 118.

43 As explained below, the present research, in principle, only considers IHL, but violations of IHL are often also human rights violations. In addition, human rights violations are often, and at times mistakingly, prosecuted as war crimes along side crimes against humanity, or sometimes only as war crimes (see Chapter 6).

44 As highlighted by *Tadić*, trials concerning alleged violations of IHL committed against protected persons may still raise pertinent IHL questions, such as the nationality requirement: see Marco Sassòli and Laura Olsen, 'The judgment of the ICTY Appeals Chamber on the merits in the *Tadic* case', 82 (2000) *International Review of the Red Cross*, pp 733-769.

45 See Article 38 of the Statute of the International Court of Justice. Although Article 38 in principle only proscribes the sources of law for the International Court of Justice, it is commonly accepted that its list sets out the sources of public international law more generally (see, e.g., James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012), p. 20; David Kennedy, 'The Sources of International Law', 2 (1987) *American University International Law Review*, p. 2; and Robert Jennings, 'What is International Law and How Do We Tell It When We See It?', 37 (1981) *Schweizerisches Jahrbuch für Internationales* Recht, pp 60-61). As both IHL and ICL emanate from the same sources as general public international law (see, e.g., Jann Kleffner, 'Sources of the law of armed conflict', in Rain Liivoja and Tim McCormack

writing of "the most highly qualified publicists of the various nations" (i.e., as subsidiary means for the determination of rules of law"), the case law of international courts and tribunals is generally treated in scholarship as being of significantly higher importance. It can be questioned, however, whether international criminal rulings are deserving of being treated as such, unless States have indicated their agreement with the rulings. In any case, given the purpose of the present study to analyse the interplay between IHL and ICL, case law from the international criminal courts and tribunals is not – without more – relied on when setting out the IHL framework, but only in specific circumstances. These circumstances include case law that has been recognised by States as representing contemporary IHL and rulings that are undeniably grounded in IHL and show an appreciation of the underlying IHL framework.

After a discussion of the relevant IHL framework, the application of the IHL concept(s) concerned, or the relevant IHL rules by the *ad hoc* tribunals (mainly the ICTY) is analysed and the potential contribution to the clarification or development of IHL on this topic is considered. The topic is then analysed with regard to the ICC framework by looking at the relevant provisions of the Rome Statute and other ICC texts, as well as any relevant case law. If any challenges from a legal or practical perspective have been identified, proposals are made to address these challenges, including textual proposals for amendments to the ICC's legal framework.

The introductory section of each of the four *capita selecta* sets out a further explanation of the methodology used for the relevant chapter.

1.2.2 *Contribution*

This study aims to contribute to the topical debate on the matter. It further seeks to offer a balanced approach to the systematic relationship between IHL and ICL, and to provide insight in the way IHL is applied during international criminal trials, thereby further the understanding of the challenges faced by those working in the field of ICL. Ultimately, it aims to improve the pronouncements of international courts and tribunals on IHL issues, but also foster the understanding of those working in IHL how to value and treat international decisions and judgments. When mistakes or challenges are identified, solutions are provided, to the extent possible, to avoid or mitigate them.

To further the ability of international criminal justice to address serious violations of IHL, which at this stage, at least with regard to jurisdiction over potential war crimes, is mostly through the ICC, concrete proposals are made to modify or amend the provisions

(eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) pp 71-88; Dapo Akande, 'Sources of International Criminal Law', in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009), pp 41-53; Margaret McAullife deGuzman, 'Article 21: Applicable Law', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck, Hart, and Nomos 2008), pp 701-702; and Ratner (n 4)), the same type of sources and hierarchy between them guides the research for the present study.

of the Rome Statute, or the ICC's Elements of Crimes. Even if much of the enforcement of IHL may be done in the future by way of domestic proceedings, and notwithstanding that domestic proceedings face, at least in part, different challenges, as many States have created legislation implementing the Rome Statute, modifications or amendments to the Rome Statute would, in turn, generate changes or additions to domestic criminal law.

1.2.3 *Scope of the research*

The present study mainly considers substantive ICL. International criminal procedural aspects are only discussed if they specifically impact on the four topics analysed herein. This is the case, for example, regarding the approach of international courts and tribunals to cumulative charges and convictions, as discussed in Chapter 6, and the (in)ability to subpoena evidence, discussed in Chapters 4 and 7.

This study focusses on *international* criminal law. Many of the aspects highlighted in the study, and the recommendations made, are also relevant and useful for domestic prosecutors and judges dealing with war crime cases, or cases that intentionally or unintentionally concern IHL (for example, because the alleged conduct, whilst not charged as a war crime, does constitute a violation of IHL,[46] or because IHL could provide a justification for the conduct which would remove the culpability if IHL is the only or determinative legal framework considered).[47] However, domestic practice and case law is only used to illustrate certain particular issues and no comprehensive analysis of national practice has been made.

Limitations

This present study does not aim to comprehensively discuss all instances where IHL has been applied during international criminal trials, or even to address all instances where it has been applied in a problematic manner. As set out in the next section, the research focusses on IHL applicable on the battlefield, i.e. the rules governing the conduct of hostilities and regulating methods of warfare, by considering four specific issues that are used to illustrate four aspects of the application of IHL by international courts and tribunals. Although a specific method of warfare (starvation) is analysed in detail, the study does not separately focus on means of warfare. This is in part because limitations have to be set to the scope of the research and prohibited means of warfare and ICL would in itself be a full doctoral study, but mostly because the means of warfare are subject to specific treaties and included

46 As is the case in Belgium, for example, where so-called foreign fighters who were members of organised armed groups engaged in armed conflicts, but whose alleged conduct was found not to have taken place during an armed conflict. See, eg, Rogier Bartels, 'When Do Terrorist Organisations Qualify as Parties to an Armed Conflict under International Humanitarian Law', 56 (2017-2018) *Military Law and Law of War Review*, pp 476-483.

47 See the concluding remarks of Chapter 6.

in separate war crimes.[48] If the use of a certain weapon or ammunition is a war crime, the question to be answered at trial will be *whether* the weapon was (intentionally) used; not *how* the weapon was used. Since the prohibited weapons provisions in Article 8(e) of the Rome Statute were amended and extended several times,[49] the limitations of cases dealing with the alleged use of such weapons would mostly depend on whether the amendments in question were ratified by the relevant State Party. In other words, the focus of the trial would be on the application of the specific war crime provision. Importantly, while the major challenge in determining whether a violation of the rules applicable to the conduct of hostilities or a method of warfare took place (i.e., the difficulty prove and to assess the *ex ante* knowledge of the alleged perpetrators), a war crime of using prohibited weapons may be proven on the basis of the result; that is, by proving that poison gas was used in a certain location, irrespective of the military reason for doing so or against whom the weapon was employed. Looking into means of warfare and ICL therefore constitutes a different kind of study than that conducted herein.

As noted above the *ad hoc* tribunals, and mainly the ICTY, have contributed greatly to the development of IHL. Other institutions dealing with situations of armed conflict, such as the Special Court for Sierra Leone (SCSL) and the International Criminal Court have also contributed to the development and clarification of IHL, albeit at a later stage, and arguably less "significantly". It has been observed that the contributions by ICTR and the SCSL have often been "in the shadow of the ICTY's work".[50] Whilst correct, of note is that the number of relevant cases (i.e., cases concerning war crimes or questions of IHL) at the ICTY, in part due to the overall number of cases, is the highest. The present study therefore mainly focusses on the ICTY, and the ICC, given its role as the only permanent international criminal institution. Other international courts and tribunals are analysed where relevant, but to a lesser extent, mainly due to the need to set some limitations in order for the present task to be manageable. The ICTR and SCSL's practice are therefore analysed and discussed only in specific instances, while the more limited case law of the Extraordinary Chambers in the Courts of Cambodia (ECCC) is merely used to illustrate some salient issues, and is not separately considered.

For its part, the International Court of Justice's role in the development of IHL ought to be acknowledged, even though its is outside the scope of the present study.[51] Similarly, the present research does not address the manner in which human rights bodies or courts, such

48 eg, Article 8(2)(b)(xvii), (xviii), and (xix) of the Rome Statute, listing as a war crime in times of international armed conflict the use of poison or poisoned weapons, gas, and expanding bullets, respectively.

49 See Chapter 7.

50 Darcy 2014 (n 30), p. 8.

51 See, eg, Claus Kress, 'The International Court of Justice and the Law of Armed Conflicts', in Christian J. Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2013), chapter 12; Gentian Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles* (Intersentia 2008).

as the European Court of Human Rights or the Inter-American Court of Human Rights, have dealt with IHL in their respective case law. As explained above, the present study focusses on the application of IHL in *international* criminal trials. Whilst certain international human rights bodies may be seised of IHL-related questions as a result of alleged violations of the right to fair trial during domestic criminal cases, the case law of human rights courts is beyond the scope of the present study. In the same vein, other than briefly addressing the impact of the *lex specialis* debate on the distinction and overlap between war crimes and crimes against humanity (Chapter 6), the broader question of the relationship between international human rights law and IHL does not form part of the present research. International human rights law is thus only considered in so far as the prosecution and adjudication of violations of IHL impacts on the legality principle and fair trial rights, or as regards the delineation of war crimes and crimes against humanity. The Special Tribunal for Lebanon, although being an international criminal tribunal, is not considered in this study, as it concerns alleged crimes committed outside a situation of armed conflict; and as such, they do not fall within the scope of IHL.[52]

Any research concerning court cases, including international ones, can only take into account the case law at the moment of drafting. The ICTY is practically finished, but at the time of drafting the relevant part of this research, it was possible that the appeal in *Mladić*[53] could provide relevant clarification for application of the proportionality rule in relation to unlawful attack charges.[54] However, as discussed in Chapter 7, the International Residual Mechanism for Criminal Tribunals (IRMCT) Appeals Chamber in refrained from providing such clarification in both the *Karadžić* and the *Mladić* appeal judgments. Apart from the retrial of Mr Stanišić and Mr Simatović,[55] the ICTY, now through its successor, the IRMCT, has nearly completed its primary work.[56] Yet, case law is, obviously, constantly in flux. Although the cases on the international level last long, and are, at least at present, not very numerous, at least not compared to domestic criminal law, relevant new decisions do come out on a regular basis. Equally of note is that the academic debate generally moves faster than new treaty developments or State practice.[57] Chapters 3, 4, 5, and 6 are based on articles that were written and published as peer-reviewed journal articles at different times. Each capita selecta is therefore up-to-date until the moment of finalisation of the respective article. Chapter 4

52 The jurisdiction of the Special Tribunal for Lebanon is limited to "persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons" (Article 1 of the Statute of the Special Tribunal for Lebanon), which is described in the Preamble of the Statute as a "terrorist crime".

53 IRMCT, *Prosecutor v Mladić*, Case No. MICT-13-56-A.

54 The IRMCT Appeals Chamber in *Mladić* may nonetheless refrain from providing such clarification, as it recently did in *Karadžić* (see the discussion of the *Karadžić* case in Chapter 7).

55 IRMCT, *Prosecutor v Stanišić and Mr Simatović*, Case No. MICT-15-96-T.

56 It will remain seized of matters in relation to, inter alia, detention and early release.

57 See, however, Chapter 7 on the developments as regards the crime of starvation.

considers the case law up to and including 2013, while the research for Chapter 5 includes all relevant case law until mid-2015. For its part, Chapter 6 is up-to-date until early 2018. Chapter 3, which was the last of the articles to be finalised, is updated until the end of 2019. In order to account for any relevant development after these dates, the author has added a chapter to highlight any relevant change or update, as explained in the next section.

1.2.4 *Outline*

Introductory part

This thesis consists of three parts. **Part I** (Introductory considerations) sets out the research methodology in the present first chapter. The second introductory chapter address the clarification of international humanitarian law (IHL) by international criminal courts and tribunals, and gives an overview of the critiques of, and general challenges in, applying IHL during international trials. It is on the basis of these challenges that the four topics of Part II have been chosen. For war crimes to be committed, IHL must be applicable. The scope of application of IHL is therefore the first topic that is analysed,[58] followed by an example of the difficulty to retrospectively address alleged violations of the IHL rules on the conduct of hostilities. The third topic is the very contemporary aspect of denial of humanitarian access and starvation, analysed as an example of a prohibited method of warfare, and the fourth "selected topic" is the interplay between crimes against humanity and IHL in a situation of armed conflict, and the relationship between these two different types of crimes. These "selected topics" are set out more in detail next.

58 The following example, albeit one derived from domestic law, shows the importance of correctly identifying the scope of application of IHL during criminal trials. In a case concerning a person who was alleged to have participated in the placing of an improvised explosive devise in Iraq on 30 October 2003, i.e. at a time that the United States was without doubt occupying those parts of Iraq under its effective control (which included the area where the IED had been placed), the Supreme Court of the Netherlands confirmed this finding of the District Court of Rotterdam: "[…] If an international armed conflict would have been in existence at the relevant time, the court views that such a situation ended with the occupation of Iraq. The court finds support for its conclusion in the text, taken as a whole, of the preamble and main body of Resolution 1483 and by the fact that the President of the USA, on 1 May 2003, officially declared that 'combat operations' had ceased. […]" (Supreme Court of the Netherlands [Hoge Raad], LJN: AY3440, 00602/06 U, 5 September 2006).

Overview of the Capita Selecta

Part II consists of four sections, which address aspects of scope of application of IHL, the law on the conduct of hostilities and methods of warfare, and the effect the complex relationship between international human rights law and IHL has on its application for the purposes of international criminal law. All four sections have specific regard to international criminal case law, and the legal framework of the relevant judicial bodies.

The first chapter of Part II (Chapter 3) discusses how international criminal courts and tribunals have pronounced on the scope of application of their respective war crimes provisions, and thereby classified armed conflicts as international or non-international in nature; or, on occasion, ignored the distinction between the two types of armed conflict and merely considered that a generic concept of "armed conflict" existed at the relevant time. The analysis shows a common approach to avoid classification of a situation as either international or non-international, as well as a tendency to classify situations as non-international armed conflicts, without considering whether the situation concerned may instead (or at the same time) qualify as an international armed conflict. It is explained that treating non-international armed conflict as a residual regime is both legally incorrect; both under IHL and ICL. It is undesirable for the clarity of IHL, and impacts on the rights of the accused under ICL. Mindful of the structure of the Rome Statute, which strictly separates between the two different forms of armed conflict, the author proposes an approach that fits within the ICC legal framework, but is able to cover the situation on the ground without negatively effecting the rights of the accused, or risking any (unintended) consequential impact on IHL and its scope of application.

The second chapter of Part II (Chapter 4) focuses on Hague Law, and more specifically on the principle of proportionality as a targeting rule. It starts with an explanation of the general challenges of dealing with violations of international humanitarian law, and especially the rules related to the conduct of hostilities, during war crime trials. The international case law dealing with targeting decisions is analysed, specifically the manner in which the IHL rules on distinction and proportionality have been used and understood by the ICTY. It includes an in-depth discussion of the *Gotovina* case, including a proposal how targeting decisions may be (better) assessed if the evidence mostly relates to the outcome of the attack (i.e. is *post factum*) rather than the planning and actual launching of it. The second part evaluates some conduct of hostilities war crimes included in the Rome Statute, and discusses the legal and practical difficulties the ICC would face in cases dealing, *inter alia*, with violations of the principle of proportionality as a result of the underlying provisions included in Additional Protocol I, the Court's legal framework, and its operational features. This section ends with a proposal how to address the challenges at the ICC, including an amendment to the Rome Statute.

The third section of Part II (Chapter 5) deals with a specific prohibited method of warfare that has received renewed attention due to its frequent occurrence contemporary armed conflicts. Highlighting the situation in the recent armed conflicts in Syria and Yemen, it

addresses starvation, looks into the challenges in prosecuting the denial of humanitarian access during international armed conflicts, and examines the options to prosecute such denial in times of non-international armed conflict as other war crimes, crimes against humanity, and genocide before the ICC. The research shows that these options would not suffice. As a result, this section discusses the need to add to the ICC Statute the starvation of the civilian population, including through impeding humanitarian access, as a war crime for non-international armed conflicts.[59] In the final part, specific language for such an amendment is proposed, aimed at overcoming the problems flowing from the language currently included in the Rome Statute for the war crime when committed during international armed conflict.

The fourth chapter of Part II (Chapter 6) analyses how the relationship between war crimes and crimes against humanity. As long as there is a nexus with the armed conflict, the same behaviour, such as the directing of an attack at civilians, may qualify as a war crime, a crime against humanity and/or genocide, depending on the circumstances and the fulfilment of the mental and subjective elements. Yet, while a violation of IHL is as a war crime, it does not necessarily qualify as a crime against humanity. Conversely, a large scale violation of international human rights law (IHRL) may amount to a crime against humanity, but not automatically constitute a violation of IHL and thus a war crime; for example, because no armed conflict existed at the relevant time. International law is a human-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 the development of protective rules. As the situation and context shape the attendant response, there is an unavoidable duality. A certain term may lead to different definitions or meanings when considered as part of either IHL or IHRL, and thereby affect the elements of war crimes and crimes against humanity. Questions about the defences against the alleged unlawful conduct may also be answered differently. Chapter 6 therefore looks at the interplay between the IHL and IHRL; not in general, but only as it emerges in trials that concerns both war crimes and crimes against humanity charges, or could have concerned both types of charges because the situation related, at least in part, to an armed conflict. It stresses the need to treat war crimes and crimes against humanity as two separate regimes and be mindful of the differences between the underlying bodies of law.

Mindful that some time has passed since the research was conducted for three of the four chapters,[60] the final chapter of Part II (Chapter 7), highlights some developments in the field of IHL and ICL since the completion of the articles on which these chapters (Chapters 4, 5, and 6) are based.

59 The recent adoption of the Swiss amendment adding, for those State Parties that ratify the amendment, the war crime of starvation in time of non-international armed conflicts, is discussed in Chapter 7.

60 See above at 1.2.3.

Conclusions

Part III consists of two chapters. The first chapter explains, based on the research contained in the four sections of part II (i.e., the Capita Selecta), how the interplay between IHL and ICL works in practice; both in terms of the application of IHL during international trials, and the positive or negative impact international rulings have on the development of IHL. The second chapter gives recommendations for the improvement of the legal framework, and puts forth specific proposals for amendments to the Rome Statute where the research has shown that such amendments are needed; and recommendations for those working in the fields of both IHL and ICL on how to treat IHL and how to value international judgments and decisions on IHL matters, respectively. It ends with a call for a different approach to IHL, which would in turn result in a different approach in ICL; an approach that, in the view of the author, better serves the rationale and purpose of both these fields of law.

1.3 Disclaimers

While critical of certain findings by international criminal courts and tribunals, and the potential negative effects these findings could have on IHL and the protection it affords, the present research also acknowledges the important work done by international criminal justice institutions. As part of this research, the author merely wishes to provide constructive criticism, identify challenges in the application of IHL during international criminal trials, and contribute to the challenging work of such tribunals and courts. Some of the critique may appear harsh, or unrealistically strict in its demands to faithfully apply the underlying legal framework: IHL. In doing so, it may appear not to take into account the practical and institutional challenges faced by those working in the field of ICL. However, the author, whose professional experience includes the drafting of decisions and judgments at the ICTY and the ICC, which are extensively discussed in this thesis, is mindful of the limitations of international criminal justice. Legal opinions may differ and errors can be made. Having said that, academic review of the work of the international criminal institutions is meant to be critical and must occasionally focus on matters that may have seemed trivial or irrelevant to the parties or a Chamber dealing with a case, yet are worth highlighting and being considered from an academic perspective. Moreover, matters that may seem of scant importance for the purposes of a criminal trial, may be very relevant from a battlefield perspective.

As regards the ICTY and ICC, the author has mainly focussed on cases that he did not himself work on, although depending on the topic, to ensure a comprehensive discussion, it was on occasion necessary to discuss cases that the author was directly involved with. In these instances, the author has tried to highlight the views of others and reflect the academic debate on the relevant aspects of these cases, without taking an express position thereon.

A further disclaimer is warranted with regard to the information contained in this research. While the author has ensured that no confidential information is mentioned anywhere, some of

the facts relied on are not readily available to persons who do not work at the relevant institution, or is based on information that is public and known to the author but not stated in any documents that can be referred to. As regards the former, references to the relevant document have been included, although the author is mindful that not everyone may be in a position to access these documents.[61] With respect to the second one, as the information (e.g., a fact discussed in Part III, that the ICC Office of the Prosecutor in recent years has received training about the use and impact of heavy weapons and the law related to military operations) is based on the author's personal knowledge of the institutions so discussed, the reference merely states so.

61 They are on file with the author and may be provided.