

# The International Committee of the Red Cross and the International Criminal Court: Turning international humanitarian law into a two-headed snake?

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## Abstract

*The International Committee of the Red Cross and the International Criminal Court are two very different entities that simultaneously apply international humanitarian law but do so after their own perspectives. This article proposes a cautious yet critical approach to some of their divergent interpretations (conflict classification, the difference between direct and active participation in hostilities, intra-party sexual and gender-based violence, and the notion of attack) and examines how the broader legal system copes with these points of divergence. The analysis considers the institutional characteristics of these two organizations and the pluralistic nature of international humanitarian law as well as its dynamic rapport with international criminal law in order to highlight the versatility needed to face the challenges posed by contemporary armed conflicts.*

\* This article was written in a personal capacity and does not necessarily reflect the views of the International Criminal Court.

**Keywords:** international humanitarian law, international criminal law, International Committee of the Red Cross, International Criminal Court, fragmentation.

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## Introduction

Geneva and The Hague are two cities that have been at the centre of international humanitarian law (IHL) since its early stages. Besides giving their names to a couple of treaties, these cities are the seat of two of the most important institutions for the international law of armed conflicts: the International Committee of the Red Cross (ICRC) in Geneva, and the International Criminal Court (ICC) in The Hague. These two entities interpret and apply IHL after their own perspectives. This article analyzes this phenomenon by considering the following question: what are the implications for IHL of its simultaneous application by the ICRC and the ICC? A special emphasis will be put on cases of apparently contradictory legal positions, thus evoking the postmodern anxiety of fragmentation in international law.<sup>1</sup>

In order to understand this state of affairs, this article will first go back to basics and explain the relationship between IHL and international criminal law (ICL). Secondly, it will highlight the intrinsic differences between the ICRC and the ICC. Thirdly, it will analyze some particularly innovative IHL positions adopted by the ICC and compare them to the position of the ICRC, notably in relation to conflict classification, the (not so) subtle difference between “direct” and “active” participation in hostilities, intra-party sexual and gender-based crimes as war crimes, and the notion of attack. Fourthly, it will present some elements for the reading of this situation and its implications for IHL.

## IHL and ICL: A fruitful arranged marriage

IHL and ICL ended up in a situation similar to a marriage in the aftermath of the Second World War. Nonetheless, the former can be traced back to ancient times, and perhaps without it (and a very specific context), the latter would not have consolidated. Even if IHL is rooted in the rules of ancient civilizations and religions, universal codification started with Henry Dunant’s effort to humanize wars, the creation of the ICRC (1863) and the adoption of the First Geneva Convention (1864). IHL continued a gradual development, so that by the outbreak of the Second World War, a vast body of laws and customs of war was already codified and arguably enjoyed customary status.

1 “Fragmentation” here refers to “the splitting up of the law into highly specialized ‘boxes’ that claim relative autonomy from each other and from the general law”. International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 13 April 2006, para. 13, available at: [https://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (all internet references were accessed in September 2021).

Unfortunately, the existence of a specific normative framework was insufficient to prevent the atrocities committed during the Second World War, on and off the battlefield. Hence, in the aftermath, the Allies decided to find a way to prosecute the main perpetrators among the ranks of their counterparties. After fierce discussions, the London Agreement was signed and the International Military Tribunal was established in Nuremberg, followed by the less known International Military Tribunal for the Far East in Tokyo. Notably, this was not the first attempt to establish an international jurisdiction—as early as 1872, Gustave Moynier (co-founder and former president of the ICRC) had unsuccessfully called for the creation of a court to prosecute violations of the 1864 Geneva Convention.<sup>2</sup> In any case, the International Military Tribunals allowed IHL to take a quantum leap and expand its domains from inter-State and municipal rappings (including the grave breaches system) to individuals through the notion of *international* individual criminal responsibility.

Once settled, the most significant challenge for the Nuremberg Tribunal was framing its jurisdiction. Its Charter granted competence over crimes against peace, war crimes and crimes against humanity.<sup>3</sup> Interestingly, out of these, war crimes received the least backlash (despite relying heavily on the customary law argument),<sup>4</sup> whereas the others were strongly scrutinized, this being the first time they were applied.<sup>5</sup> Even for war crimes, the Tribunal had to clarify that despite the fact that the 1907 Hague Regulations did not foresee criminal responsibility, some of their provisions reflected customary law and their violation amounted to criminal offences.<sup>6</sup>

After delivering several judgments and providing international law with some iconic moments and phrases, the Nuremberg Tribunal was dissolved, and with it, ICL went into a long hibernation—though not before creating the cardinal instrument of the Genocide Convention. On the other hand, IHL managed to turn the post-war momentum into the 1949 Geneva Conventions, one of the few international instruments with universal ratification.

As States held to their notion of sovereignty, they did not yet feel comfortable fully enabling international criminal prosecution—hence the adoption of the “grave breaches” formula when negotiating the Geneva Conventions and local or universal prosecution of IHL violations,<sup>7</sup> besides maintaining the State responsibility regime that prevailed at the time.<sup>8</sup> Almost

2 Christopher Keith Hall, “The First Proposal for a Permanent International Criminal Court”, *International Review of the Red Cross*, Vol. 38, No. 322, 1998.

3 Charter of the International Military Tribunal: Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, Art. 6.

4 Michael Bryant, *A World History of War Crimes*, Bloomsbury Academic, London, 2016, p. 177.

5 William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford University Press, Oxford, 2012, p. 73.

6 International Military Tribunal, *United States v. Von Leeb*, in *Law Reports of Trials of War Criminals*, Vol. 12, 1949, pp. 61–62, 86–92.

7 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952 (ICRC Commentary on GC I), p. 370.

8 See Art. 1 common to the four Geneva Conventions.

three decades later, Additional Protocol I (AP I) introduced the International Humanitarian Fact-Finding Commission (a non-judicial body intended to facilitate non-confrontational solutions)<sup>9</sup> and specified that grave breaches shall be regarded as war crimes.<sup>10</sup>

Unfortunately, none of these enforcement mechanisms provided the expected results. Until the 1990s, there was scarce case law specifying IHL details and the law was mainly applied through soft-law processes, like diplomacy and military training, rather than the legal practice of adjudication.<sup>11</sup> During the 1990s, however, the international legal landscape was disrupted by two tragic situations: those of the Balkans and Rwanda. In order to face these atrocities, the international community rapidly mobilized and revived the long-forgotten idea of international criminal justice.

In 1993, the United Nations (UN) Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY),<sup>12</sup> followed by the International Criminal Tribunal for Rwanda (ICTR),<sup>13</sup> commonly known as the *ad hoc* tribunals. Fortunately, at that time, war crimes and genocide were entirely recognized, while crimes against humanity momentarily retained the requirement of a link to an armed conflict.<sup>14</sup> Meanwhile, the ICRC engaged in an extremely ambitious compilation project that materialized into another cornerstone of our legal toolbox: the ICRC Customary Law Study.<sup>15</sup>

Given the subject matter that the ICTY was dealing with, its jurisprudence had a tremendous impact on IHL. *Tadić* is perhaps one of the most relevant cases of the century, even though Duško Tadić was nothing close to being one of the most influential or relevant actors of the conflict. *Tadić* was followed by numerous cases that shocked international legal practitioners and academics with their progressive approach, which some might call judicial activism.

Several of the ICTY's boldest contributions were done through the concept of accelerated formation of customary international law.<sup>16</sup> These included the definition of international armed conflicts (IACs) and non-international armed conflicts (NIACs), the classification criteria, and the existence of war crimes in

9 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 90.

10 *Ibid.*, Art. 85.

11 David Forsythe, *The Humanitarians: The International Committee of the Red Cross*, Cambridge University Press, Cambridge, 2005, p. 243.

12 UNSC Res. 827, 25 May 1993, available at: [https://digitallibrary.un.org/record/166567/files/S\\_RES\\_827%281993%29-EN.pdf](https://digitallibrary.un.org/record/166567/files/S_RES_827%281993%29-EN.pdf).

13 UNSC Res. 955, 8 November 1994, available at: [https://digitallibrary.un.org/record/198038/files/S\\_RES\\_955%281994%29-EN.pdf](https://digitallibrary.un.org/record/198038/files/S_RES_955%281994%29-EN.pdf).

14 This requirement was not included in the ICTR Statute.

15 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>. See also Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict", *International Review of the Red Cross*, Vol. 87, No. 857, 2005.

16 Milena Sterio and Michael P. Scharf (eds), *The Legacy of Ad Hoc Tribunals in International Criminal Law*, Cambridge University Press, Cambridge, 2019, pp. 59–62.

NIACs (through the notion of serious violations of Article 3 common to the four Geneva Conventions),<sup>17</sup> to name a few. This broad judicial discretion was partly attributable to the open-ended phrasing of Article 3 of the ICTY Statute.

However, the international community didn't see *ad hoc* tribunals as a feasible solution for international criminal justice, hence the momentum for a permanent and universal<sup>18</sup> international criminal court that would lean not on customary international law but on treaty law, putting States back in control.<sup>19</sup> Thus, the Statute for the new ICC (later known as the Rome Statute) was equally influenced by and reactive to the *ad hoc* legacy. It included safeguards against judicial activism – i.e., very explicit and extensive definitions of crimes, particularly war crimes, expanded through the *Elements of Crimes*; an exhaustive list of the applicable law;<sup>20</sup> and the imposition of a very strict principle of legality.<sup>21</sup> This was without prejudice to formally accepting some of the *ad hoc* tribunals' innovations, such as war crimes in NIACs and an expansion of sexual and gender-based crimes.<sup>22</sup>

This demonstrates that the relationship between ICL and IHL is complicated, to say the least. A good starting point for examining this relationship could be considering ICL as an IHL enforcement mechanism,<sup>23</sup> though this is quite constraining from an ICL perspective. A second level would be that of development – i.e., ICL treaties as a means of IHL codification, and thus an IHL source. And finally, ICL may offer clarification<sup>24</sup> by law-making or application as many judgments provide helpful interpretation of substantive IHL norms or even concepts. However, the line between clarifying and creating can at times be difficult to discern. Would war crimes in NIACs be enshrined in IHL as they are today had not it been for the ICTY?

## The ICRC and the ICC: The yin and yang of IHL

After portraying the dynamic between IHL and ICL, it is time to contrast the former's two main representatives: the ICRC and the ICC. The sole inflection point of these two institutions seems to be acting in favour of the victims of

17 Actually, on the eve of the ICTY's establishment, the ICRC "underline[d] the fact that according to international humanitarian law as it stands today [1993], the notion of war crimes is limited to situations of international armed conflict." ICRC, "Preliminary Remarks on the Setting-up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia", DDM/JUR/442b, 25 March 1993, para. 4.

18 See M. Sterio and M. P. Scharf (eds), above note 16, p. 313.

19 *Ibid.*, pp. 318–319.

20 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (Rome Statute), Art. 21.

21 *Ibid.*, Art. 22.

22 M. Sterio and M. P. Scharf (eds), above note 16, pp. 313–317.

23 Nils Melzer and Etienne Kuster, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, Geneva, 2019, pp. 31, 295–297.

24 Marco Sassòli, *International Humanitarian Law*, Edward Elgar, Cheltenham, 2019, p. 449.

armed conflict through the application of IHL, but there is more to this than meets the eye.

The ICRC is an “impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance”.<sup>25</sup> Founded in 1863 as a private association of Swiss nationals, it eventually gained a *sui generis* status under international law,<sup>26</sup> and it currently has 20,000 staff members in 100 countries.<sup>27</sup> The ICRC is part of the International Red Cross and Red Crescent Movement (the Movement), the largest humanitarian network in the world, and thus, its work has a twofold mandate: (1) to develop and promote IHL and humanitarian principles as the guardian of IHL,<sup>28</sup> and (2) to deploy field operations in contexts of armed conflict and other situations of violence in order to help victims.<sup>29</sup> These two elements are inextricably linked.<sup>30</sup>

The ICC, on the other hand, is a “permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression”.<sup>31</sup> Established by the Rome Statute in 1998, it has 123 States Parties.<sup>32</sup> Its mission is primarily judicial and there have thus far been thirty cases before the Court. Besides its headquarters in The Hague, it has a liaison office to the UN in New York and country offices in the Democratic Republic of the Congo, Uganda, the Central African Republic, the Ivory Coast, Georgia and Mali.<sup>33</sup>

The interaction between these two institutions started early on, as the ICRC contributed to the creation of the ICC; it took part as an expert in the Rome Conference and provided its inputs for the *Elements of Crimes* and the Rules of Procedure and Evidence.<sup>34</sup> Nonetheless, the ICRC has a well-established position when it comes to international criminal justice: it has no involvement in proceedings whatsoever, due to its strict adherence to the principle of neutrality.<sup>35</sup>

25 Statutes of the International Committee of the Red Cross, 21 December 2017 (entered into force 1 January 2018) (ICRC Statutes), Preamble.

26 Els Debuf, “Tools to Do the Job: The ICRC’s Legal Status, Privileges and Immunities”, *International Review of the Red Cross*, Vol. 97, No. 897/898, 2016.

27 ICRC, *Annual Report: Facts and Figures*, Geneva, 2019. This year the ICRC’s largest operations were in the Syrian Arab Republic, South Sudan, Iraq, Nigeria, Yemen, the Democratic Republic of the Congo, Afghanistan, Ukraine, Somalia and Myanmar.

28 ICRC Statutes, above note 25, Preamble: “The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.”

29 Protection activities include restoring family links, forensics and visits to detainees, while assistance activities include economic security, water and habitat, health and physical rehabilitation.

30 ICRC, *The ICRC: Its Mission and Work*, Geneva, 2009, p. 6.

31 ICC, *Understanding the International Criminal Court*, The Hague, 2019, p. 3.

32 ICC, “The States Parties to the Rome Statute”, available at: <https://tinyurl.com/2b26eybj>.

33 ICC, “Facts and Figures”, available at: <https://www.icc-cpi.int/about>.

34 ICRC, “International Criminal Court: A Reality at Last”, 2002, available at: [www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/59cmvr.htm](http://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/59cmvr.htm).

35 See ICTY, *Prosecutor v. Simic et al.*, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness (Trial Chamber), 27 July 1999, available at: [www.icty.org/x/cases/simic/tdec/en/90727EV59549.htm](http://www.icty.org/x/cases/simic/tdec/en/90727EV59549.htm).

This would seem strange considering that criminal procedures intend to provide justice and reparation for victims (of armed conflict, among others) as a means to alleviate some of their suffering, which echoes the ICRC mandate. But the ICRC is a humanitarian organization above all, and it acts in accordance with the Fundamental Principles of the Movement, including neutrality,<sup>36</sup> which is key for establishing an open dialogue with all parties to a conflict and getting access to those most affected. In the words of Jean Pictet: “One cannot at the same time serve justice and charity. It is necessary to choose. The Red Cross, for a long time, has chosen charity.”<sup>37</sup>

This reasoning was officially embodied in Rule 73(4) of the ICC Rules of Procedure and Evidence referring to privileged communication of ICRC staff, which nonetheless leaves the door for cooperation ajar at its paragraph 6. To no one’s surprise, these provisions have never been applied by the Court, not because they do not work, but because they work perfectly. Thus, the relationship between the ICRC and the ICC is intended to be non-existent when it comes to practical and substantive matters; however, there is some room for cordial theoretical encounters.<sup>38</sup> In short, the two institutions are on good terms but are not meant to cross paths, especially when adjudication is in the middle.

Now, are these entities comparable? Ideally not—but international legal discussions rarely take place within ideal standards. Hence, what follows is an attempt to contrast them as much as possible, mainly through their legal positions, trying to understand them in their context, since only an analysis in light of their differences will provide a fair picture. Unique entities have unique legal readings, after all.

The ICC approaches IHL through the lens of ICL<sup>39</sup> and in terms of the Rome Statute. As mentioned, after all the liberties the *ad hoc* tribunals took, States created a more restraining framework. This setting was expected to reduce to a minimum the phenomenon of judicial activism. Another relevant consideration is that the ICC works mainly through adjudication, meaning that it works from a case-based approach and on a rather limited selection of case law, given the Court’s relatively young age. Importantly, it applies IHL solely for the purpose of prosecuting and judging war crimes. Moreover, the Court deals not only with war crimes, but with crimes against humanity, genocide and aggression, which requires a broad range of expertise.

The ICRC, in contrast, completes a wide variety of legal tasks (such as drafting the Commentaries to the Geneva Conventions and Additional Protocols, providing States with advice on national implementation, classifying conflicts,

36 In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.

37 Jean Pictet, *Le droit humanitaire et la protection des victimes de la guerre*, Sijthoff, Leiden, 1973, p. 81.

38 See, for example, Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, ICRC, Geneva, 2003.

39 See Carsten Stahn, “Between Constructive Engagement, Collusion and Critical Distance: The ICRC and the Development of International Criminal Law”, *Chinese Journal of International Law*, Vol. 15, No. 1, 2016.

and dialoguing with States and non-State armed groups), relying mainly on the Geneva Conventions but on other international instruments as well, as part of its comprehensive effort to alleviate the suffering of victims of armed conflicts. Additionally, since the ICRC has been involved with IHL for more than 150 years and has a worldwide physical presence, its archives and institutional memory enable it to contrast practically any situation with another similar one, either present or past. In practice, the ICRC deals with IHL on a comprehensive basis.

It comes as no surprise that the ICC and the ICRC have divergent legal positions on certain issues; the following section provides a brief analysis of some of these differences.

## Points of divergence

### The art of conflict classification

For IHL to apply, there needs to be an armed conflict, and this can only be determined by classifying a situation as such. This is easier said than done, as classification is a very technical exercise that requires knowledge of the legal criteria and a very accurate reading of the factual situation.

Notably, the ICRC and the ICC classify for different purposes. In order to fulfil its humanitarian mandate in a given situation of violence, the ICRC assesses whether or not the situation should be classified as an armed conflict; this allows it to refer to the applicable rules in its dialogue with those involved in the violence. Within the ICC, on the other hand, classification is necessarily to prove the existence of an armed conflict as a constitutive element of any war crime.<sup>40</sup>

On a technical level, the point of departure between the ICC and the ICRC might start at the applicable law itself. For the ICRC, the legal framework comprises the Geneva Conventions and their Additional Protocols, whereas for the ICC it is the Rome Statute. At first sight, both seem to follow the classic IAC/NIAC dichotomy. The rule of thumb is that whenever there is an armed conflict in which one of the parties is not a State, it will be considered a NIAC regardless of its parties, its duration or its territorial scope;<sup>41</sup> only the applicable legal framework may vary. A NIAC is a NIAC.

On the other hand, Article 8(2) of the Rome Statute encompasses war crimes and provides a confusing definition of NIACs. Both paragraphs (c) and (e) refer to “an armed conflict not of an international character”, yet paragraph (f) clarifies that

[p]aragraph 2(e) applies to armed conflicts not of an international character .... It applies to armed conflicts that take place in the territory of a State when there

40 Every section of Article 8 of the *Elements of Crimes* requires that the conduct must have taken place in the context of, and was associated with, an armed conflict.

41 See ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III), paras 418–536.



is *protracted* armed conflict between governmental authorities and organized armed groups or between such groups [emphasis added].

Most likely, this wording is an attempt to adapt the *Tadić* definition<sup>42</sup> after some debate;<sup>43</sup> nonetheless, it reads “protracted armed *conflict*” instead of “protracted armed *violence*”. It must be noted that according to ICTY jurisprudence, the term “protracted” refers to intensity rather than duration.<sup>44</sup>

The academic debate focuses on whether Article 8(2)(f), by explicitly adding the “protracted” criterion, creates a new (sub)category of NIACs (and thus a third possibility) or simply clarifies the terms of paragraph (e).<sup>45</sup> The former would not be aligned with the ICRC’s position, according to which all sorts of NIACs are encompassed in one single legal category, regardless of the actors involved or the duration, only differentiating in the applicable law (common Article 3 and/or AP II), even if the ICRC employs diverse terms for descriptive purposes.

The ICC has interpreted Article 8(2)(f) in several cases. In the *Lubanga* and *Al Bashir* cases, the Pre-Trial Chamber established that Article 8(2)(f) “focuses on the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time”.<sup>46</sup> This interpretation would be in accordance with the elements of intensity and organization established by the ICTY and employed by the ICRC.<sup>47</sup> In the *Bemba* case, the Pre-Trial Chamber mentioned the possibility of two applicable temporary thresholds but considered that it did not need to analyze this since the period in question (five months) was protracted.<sup>48</sup>

Later, trial chambers appeared to follow the “protracted armed violence” approach.<sup>49</sup> In *Katanga*, there seem to be some references to duration, but the

42 “[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” ICTY, *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70, available at: [www.icty.org/x/cases/tadic/acdec/en/51002.htm](http://www.icty.org/x/cases/tadic/acdec/en/51002.htm).

43 See William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., Oxford University Press, Oxford, 2016, pp. 233–234.

44 ICTY, *Prosecutor v. Ramush Haradinaj et al.*, Judgment (Trial Chamber), 3 April 2008, para. 49, available at: [www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf](http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf).

45 See Silvain Vité, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009, pp. 80–83; Dustin A. Lewis, “The Notion of ‘Protracted Armed Conflict’ in the Rome Statute and the Termination of Armed Conflicts under International Law: An Analysis of Select Issues”, *International Review of the Red Cross*, Vol. 101, No. 912, 2019; ICRC Commentary on GC III, above note 41, para. 478.

46 ICC, *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I), 4 March 2009, para. 60, available at: [www.legal-tools.org/doc/e26cf4/pdf/](http://www.legal-tools.org/doc/e26cf4/pdf/); ICC, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 29 January 2007, para. 233, available at: [www.legal-tools.org/doc/b7ac4f/pdf/](http://www.legal-tools.org/doc/b7ac4f/pdf/).

47 ICRC Commentary on GC III, above note 41, paras 456–471.

48 ICC, *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Pre-Trial Chamber II), 15 June 2009, para. 235, available at: [www.legal-tools.org/doc/07965c/pdf/](http://www.legal-tools.org/doc/07965c/pdf/).

49 See ICC, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (Trial Chamber I), 14 March 2012, para. 536, available at: [www.legal-tools.org/doc/677866/pdf/](http://www.legal-tools.org/doc/677866/pdf/);

conclusion simply states that there was “a protracted armed conflict between organised armed groups” and that the conflict “therefore fully meets the criteria of a non-international armed conflict”.<sup>50</sup> Notably, in *Bemba*, the Trial Chamber addressed the two-threshold possibility; yet, it only acknowledged that the protracted requirement was considered as an element of intensity and decided to follow such jurisprudence.<sup>51</sup> It added that “the intensity and ‘protracted armed conflict’ criteria do not require the violence to be continuous and uninterrupted. Rather ... the essential criterion is that it goes beyond ‘isolated or sporadic acts of violence’”.<sup>52</sup> In any case, it still considered that four and a half months fulfilled the “protracted” criterion.<sup>53</sup>

According to the above, the jurisprudence seems to favour the one-threshold interpretation, meaning that the classical IAC/NIAC dichotomy is safe, for the moment. There remains the issue of classification methodology, which highlights perfectly the factual differences between the ICRC and the ICC. Whereas the ICRC classifies conflicts as they take place, the ICC normally looks back and can assess the facts with a degree of certainty, knowing how things ended up. Still, thanks to its extensive field presence, the ICRC can have direct, live inputs; this is something that the ICC is striving to achieve, but it is far from feasible for the Court. To begin with, it would be impossible for the Office of the Prosecutor to be present in every ongoing armed conflict, let alone from the start of the conflict.

Nonetheless, this state of affairs does not have any real impact on the law. Hence, as far as classification goes, the legal framework remains unified thanks to the judicial interpretation of the term “protracted armed conflict”.

## Active versus direct participation in hostilities

The crime of using children under the age of 15 to participate actively in hostilities foreseen in Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute has been fundamental to the jurisprudence of the ICC, as Lubanga, Katanga, Ntaganda and Ongwen have all been convicted for it. This crime is especially relevant for the present discussion because the Court resorted to the notion of “active” in contrast to “direct” participation in hostilities.

The ICRC shared its particular understanding in its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Interpretive Guidance).<sup>54</sup> Firstly, it clarified that even if the

ICC, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute (Trial Chamber II), 7 March 2014, para. 1158, available at: [www.legal-tools.org/doc/f74b4f/pdf/](http://www.legal-tools.org/doc/f74b4f/pdf/).

50 ICC, *Katanga*, above note 49, para. 1218.

51 ICC, *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute (Trial Chamber III), 21 March 2016, para. 149, available at: [www.legal-tools.org/doc/edb0cf/pdf/](http://www.legal-tools.org/doc/edb0cf/pdf/).

52 *Ibid.*, para. 140.

53 *Ibid.*, para. 663.

54 ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, 2009 (Interpretive Guidance), available at: [www.icrc.org/en/doc/assets/](http://www.icrc.org/en/doc/assets/)

terms “active”<sup>55</sup> and “direct”<sup>56</sup> are employed throughout common Article 3 and the Additional Protocols, they are synonyms and are thus interchangeable.<sup>57</sup> It even considered this to be so for the Rome Statute.<sup>58</sup> Secondly, it provided the criteria of threshold of harm, direct causation and belligerent nexus as constitutive elements of direct participation in hostilities.<sup>59</sup>

The ICC does not share this approach. Beginning in *Lubanga*, the Pre-Trial Chamber established that

“[a]ctive participation” in hostilities means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points.<sup>60</sup>

Accordingly, it determined that

articles 8(2)(b)(xxvi) and 8(2)(e)(vii) apply if children are used to guard military objectives, such as the military quarters of the various units of the parties to the conflict, or to safeguard the physical safety of military commanders (in particular, where children are used as bodyguards).<sup>61</sup>

The Pre-Trial Chamber relied heavily on the ICRC’s Commentary on AP I, specifically on Article 77(2), for its analysis. The discrepancy between the ICRC and the ICC may be easily explained by looking at the dates – this decision was adopted in 2007, whereas the Interpretive Guidance was issued in 2009.

Nonetheless, in the subsequent trial judgment the ICC did not take into account the Interpretive Guidance, even if it was raised by the defence.<sup>62</sup> Instead, following the Pre-Trial Chamber and the Special Court for Sierra Leone, the Trial Chamber determined that “active” was broader than “direct”,<sup>63</sup> specifying that “(a)ll of these activities, which cover either direct or indirect participation, have

<files/other/icrc-002-0990.pdf>. In producing the Interpretive Guidance, the ICRC did not endeavour to change binding rules of customary or treaty IHL, but to reflect its institutional position as to how existing IHL should be interpreted.

55 Art. 3 common to the four Geneva Conventions.

56 AP I, Arts 43(2), 51(3), 67(1)(e); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 13(3).

57 Interpretive Guidance, above note 54, p. 43.

58 “[I]t may appear that the Preparatory Committee for the Establishment of an International Criminal Court (ICC) implied a distinction between the terms ‘active’ and ‘direct’ in the context of the recruitment of children when it explained that: ‘The words “using” and “participate” have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat’. Strictly speaking, however, the Committee made a distinction between ‘combat’ and ‘military activities linked to combat’, not between ‘active’ and ‘direct’ participation.” *Ibid.*, fn. 84.

59 *Ibid.*, pp. 46–64.

60 ICC, *Lubanga*, above note 46, para. 261.

61 *Ibid.*, para. 263.

62 ICC, *Lubanga*, above note 49, para. 585.

63 *Ibid.*, para. 627.

an underlying common feature: the child concerned is, at the very least, a potential target”.<sup>64</sup> Curiously, it did not employ the words “potential collateral damage”, instead using “potential target”; this could have opened the door for considering that active participation in hostilities implies targetability.

The Appeals Chamber took things further by explicitly declaring that the term “active participation” in Article 8 of the Rome Statute does not need to be given the same interpretation as common Article 3, because despite their similar terminology, they have different purposes:

The latter provision establishes, *inter alia*, under which conditions an individual loses protection as a civilian because he or she takes direct part in hostilities. On the other hand, article 8(2)(e)(vii) of the Statute seeks to protect individuals under the age of fifteen years from being used to ‘participate actively in armed hostilities’ and the concomitant risks to their lives and well-being.<sup>65</sup>

Moreover, the Appeals Chamber considered that the Trial Chamber had erred in its criterion of potential target, but was correct in including a wide range of activities considered in the potential target’s link to combat.<sup>66</sup> The *Ntaganda* and *Ongwen* trial judgments follow this latter interpretation.<sup>67</sup>

Hence, for the matter of active versus direct participation in hostilities, there seem to be some discrepancies between the ICRC and the ICC; these could have been more significant if not for the Appeals Chamber’s decision to abandon the target criterion. In any case, the standard set by the Court is notably lower than the one adopted by the ICRC, which is relevant for prosecution and judgment purposes but concerning for actual military operations and the conduct of hostilities. Despite IHL’s tendency towards categorization and dichotomies, perhaps both standards can be applied simultaneously without major legal implications. Of course, this is not ideal, but it is feasible.

### *Extension du domaine de la lutte: Intra-party sexual and gender-based violence*

Sexual and gender-based violence (SGBV) has been at the centre of ICL since the establishment of the *ad hoc* tribunals. International criminal tribunals have torn down one wall after another when it comes to SGBV.

64 *Ibid.*, para. 628. See also ICC, *Katanga*, above note 49, paras 1040–1046.

65 ICC, *Prosecutor v. Lubanga*, Case No. 01/04-01/06 A 5, Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against His Conviction (Appeals Chamber), 1 December 2014, para. 324, available at: [www.legal-tools.org/doc/585c75/pdf](http://www.legal-tools.org/doc/585c75/pdf).

66 *Ibid.*, para. 340.

67 ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Judgment (Trial Chamber VI), 8 July 2019, paras 1108–1109, available at: [www.legal-tools.org/doc/80578a/pdf](http://www.legal-tools.org/doc/80578a/pdf); ICC, *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, Judgment (Trial Chamber IX), 4 February 2021, para. 2770, available at: [www.legal-tools.org/doc/kv27ul/pdf](http://www.legal-tools.org/doc/kv27ul/pdf).

Initially, rape and other forms of indecent assault were only briefly mentioned in Geneva Convention IV (GC IV)<sup>68</sup> and AP I;<sup>69</sup> they were not included as grave breaches. AP II does consider them as outrages upon personal dignity, and thus as prohibited acts.<sup>70</sup> Even though in 1992 the ICRC had declared that the phrase common to the Geneva Conventions and their Additional Protocols, “wilfully causing great suffering or serious injury to body or health”, obviously covered not only rape but also any other attack on a woman’s dignity,<sup>71</sup> these acts were not included explicitly in the ICTY Statute. If not for the disruptive effect of the ICTY’s *Tadić* decisions, rape and other forms of SGBV would perhaps have remained under a sort of war crime *non liquet* for much longer. Not only did the interlocutory appeal on jurisdiction pave the way for the prosecution of war crimes in NIACs, but Duško Tadić was convicted for sexual violence against men.<sup>72</sup>

This momentum was captured in the Rome Statute, which categorizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence as war crimes in both types of armed conflicts.<sup>73</sup> This is very significant as it codifies such acts as *independent* crimes, not as implicit forms of torture or inhuman acts. Perhaps the issue of SGBV is one of the few where ICL has a technical advantage over IHL, as the former has greatly developed the latter in this regard.

So far, the ICC has addressed this type of war crime in the cases of *Bemba*, *Katanga* (both acquitted for those charges), *Ntaganda* and *Ongwen*. The most groundbreaking case has been *Ntaganda*, where the Court endorsed the notion of intra-party SGBV. This was a daring statement, since the traditional system of grave breaches under the Geneva Conventions is intended to encompass protected persons (i.e., civilians and persons *hors de combat*).<sup>74</sup> Even if the notion of war crime has expanded to include violations if they endanger protected

68 “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 27.

69 “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.” AP I, Art. 76(1).

70 AP II, Art. 4(2)(e).

71 ICRC, *Aide-Memoire*, Geneva, 1992.

72 See ICTY, *Prosecutor v Tadić*, Case No. IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, available at: [www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdfv](http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdfv).

73 Rome Statute, Arts 8(2)(b)(xvii), 8(2)(e)(vi). Notably, in 1997 the ICRC proposed that the war crimes of rape and enforced prostitution, as serious violations of IHL applicable in international and non-international armed conflicts, be subject to the jurisdiction of the ICC. ICRC, *Working Paper on War Crimes Submitted to the Preparatory Committee for the Establishment of an International Criminal Court*, New York, 14 February 1997.

74 See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Art. 50; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 51; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 150; GC IV, Art. 147; AP I, Arts 11, 85.

persons or objects or if they breach important values,<sup>75</sup> the criterion of protected persons remained essential for the war crimes conversation. For instance, even if the ICTY adopted a broad approach to the concept,<sup>76</sup> it remained a relevant component of the Tribunal's legal analysis.

Basically, the prevailing position has been that IHL binds “members of armed forces and armed groups vis-à-vis their opponents”,<sup>77</sup> as “the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces”.<sup>78</sup> Accordingly, “crimes committed by combatants of one party to the conflict against members of their own armed force do not constitute war crimes”.<sup>79</sup> Under this reasoning, intra-party violence is a matter of human rights or domestic law – a sound logic for States, but not for non-State armed groups.<sup>80</sup>

Notably, as early as 1952, the ICRC had already said that “when faced with suffering no distinction should be drawn between brothers-in-arms, the enemy and allies”.<sup>81</sup> The ICC started to consider the idea of intra-party SGBV in the *Lubanga* case. In her separate and dissenting opinion, Judge Odio Benito considered that the objective of Article 8(2)(e)(vii) was to protect children from *any* aggressor:

Children are protected from child recruitment not only because they can be at risk for being a potential target to the “enemy” but also because they will be at risk from their “own” armed group who has recruited them and will subject these children to brutal trainings, torture and ill-treatment, sexual violence and other activities and living conditions that are incompatible and in violation to these children's fundamental rights. The risk for children who are enlisted, conscripted or used by an armed group inevitably also *comes from within the same armed group*.<sup>82</sup>

Still, this idea was not fully endorsed until the *Ntaganda* case, even if each chamber addressed it in its own manner. In *Ntaganda*, the Pre-Trial Chamber started by stating that child soldiers could not be considered to be actively participating in hostilities while being subject to rape and/or sexual violence, hence they were persons who did not take part in hostilities and were therefore protected under

75 See ICRC Customary Law Study, above note 15, Rule 156.

76 When interpreting Article 4 of GC IV, the ICTY relied on allegiance and diplomatic protection rather than nationality, making it possible for victim and perpetrator to have the same nationality. ICTY, *Tadić*, above note 42, paras 168–169.

77 Eve La Haye, *War Crimes in Internal Armed Conflicts*, Cambridge University Press, Cambridge, 2008, p. 119.

78 Special Court for Sierra Leone, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, Judgment (Trial Chamber), 2 March 2009, paras 1451–1457.

79 Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2013, p. 523.

80 Marco Longobardo, “The Criminalisation of Intra-Party Offences in Light of Some Recent ICC Decisions on Children in Armed Conflict”, *International Criminal Law Review*, Vol. 19, No. 4, 2019, p. 613.

81 ICRC Commentary on GC I, above note 7, p. 55.

82 ICC, *Lubanga*, above note 49, Separate and Dissenting Opinion of Judge Odio Benito, para. 19 (emphasis added).

AP II Article 4.<sup>83</sup> This could have implications for the notion of direct participation in hostilities, but leaves the protected persons logic untouched. Still, it dismissed the continued nature of some crimes; for instance, a person could be subject to sexual slavery and also directly participate in hostilities at some point.<sup>84</sup>

When the defence challenged the jurisdiction, the Trial Chamber specified that the existence of a crime under customary law is irrelevant for the Court since the crimes under its jurisdiction are listed in the Rome Statute. It clarified that Article 8(2)(e)(vi) “does not specify who can be victims of the war crimes listed therein, and that the corresponding Elements of Crimes refer only to ‘person’ and ‘persons’”,<sup>85</sup> and that whereas certain crimes require a certain type of victim, this is not the case for rape and sexual slavery.

This position was reinforced in a second decision, in which the Trial Chamber made a distinction between the crimes contained in Article 8(2) of the Rome Statute, based on the Geneva Conventions, and the other serious violations, and noted that while the *chapeaux* of paragraphs (2)(a) and (2)(c) contain reference to specific victim status criteria, the *chapeaux* of paragraphs (2)(b) and (2)(e) do not.<sup>86</sup> When assessing the current state of IHL, it further referred to the Martens Clause and alleged that the rationale of IHL is to mitigate the suffering resulted from armed conflict,<sup>87</sup> besides the fact that even if IHL allows the use of force through the conduct of hostilities, it is “never a justification to engage in sexual violence against any person, irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law”.<sup>88</sup>

The decision invokes the *jus cogens* status of the prohibition of (sexual) slavery and (rape as an underlying act of) torture, making such provisions applicable at all times and against all persons.<sup>89</sup> Consequently, the Trial Chamber concluded that

members of the same armed force are not *per se* excluded as potential victims of the war crimes of rape and sexual slavery, as listed in Article 8(2)(b)(xxii) and (e)(vi); whether as a result of the way these crimes have been incorporated in the Statute, or on the basis of the framework of IHL, or international law more generally.<sup>90</sup>

83 ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Pre-Trial Chamber II), 9 June 2014, paras 76–80, available at: [www.legal-tools.org/doc/5686c6/](http://www.legal-tools.org/doc/5686c6/).

84 M. Longobardo, above note 80, pp. 622–623.

85 ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision on the Defence’s Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9 (Trial Chamber VI), 9 October 2015, para. 25, available at: [www.legal-tools.org/doc/9eb4ec/pdf](http://www.legal-tools.org/doc/9eb4ec/pdf).

86 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 VI), 4 January 2017, para. 40, available at: [www.legal-tools.org/doc/2de239/pdf](http://www.legal-tools.org/doc/2de239/pdf).

87 *Ibid.*, paras 47–48.

88 *Ibid.*, para. 49.

89 *Ibid.*, para. 51.

90 *Ibid.*, para. 54.

The issue was confirmed by the Appeals Chamber, which endorsed the paragraph differentiation of Article 8(2)(a) and (c) versus (b) and (e).<sup>91</sup> It even concluded that IHL “does not contain a general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same armed group”.<sup>92</sup> Eventually, Bosco Ntaganda was convicted for rape and sexual slavery of child soldiers as a war crime.<sup>93</sup> The conviction was confirmed by the Appeals Chamber.<sup>94</sup>

Notably, the ICRC has endorsed the intra-party possibility without second thoughts since the early stages of the *Ntaganda* case. In the ICRC’s 2016 Commentary on GC I, it quoted the decision on the confirmation of charges to support its argument that the “armed forces of a Party to the conflict benefit from the application of common Article 3 by their own Party”.<sup>95</sup> In the 2020 Commentary on GC III, it quoted the 2017 *Ntaganda* appeals judgment.<sup>96</sup> On this occasion, not only were the positions of the ICC and ICRC aligned, but the ICC jurisprudence provided a solid base for the ICRC to propose its interpretation.

### Attack under attack?

The notion of attack is straightforward. Under AP I Article 49, “attacks” mean acts of violence against the adversary, whether in offence or in defence. The 1987 Commentary on the Additional Protocols states that “the meaning given here is not exactly the same as the usual meaning of the word”<sup>97</sup> and that “attack” means “combat action”.<sup>98</sup> Yet, when it comes to the application of Article 8(2)(e) (iv) of the Rome Statute regarding attacks against hospitals or buildings dedicated to religion, the ICC has interpreted this notion in an ambivalent manner.

In *Al Mahdi*, a very notorious case involving the destruction of a UNESCO World Heritage Site in the context of a NIAC in Mali, the ICC Trial Chamber made a daring statement and expanded the concept of “attack” in the following terms:

[T]he element of ‘direct[ing] an attack’ encompasses any acts of violence against protected objects and will not make a distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group. The Statute makes no such distinction. This

91 ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06 OA5, Judgment on the Appeal of Mr Ntaganda Against the “Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9” (Appeals Chamber), 15 June 2017, para. 48, available at: <https://www.legal-tools.org/doc/a3ec20/pdf>.

92 *Ibid.*, para. 63.

93 ICC, *Ntaganda*, above note 67, para. 1199.

94 See ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06 A A2, Judgment on the Appeals of Mr Bosco Ntaganda and the Prosecutor against the Decision of Trial Chamber VI of 8 July 2019 Entitled “Judgment” (Appeals Chamber), 30 March 2021, available at: <https://www.legal-tools.org/doc/zy5pmd/pdf>.

95 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*, 2nd ed., Geneva, 2016, paras 547–549.

96 ICRC Commentary on GC III, above note 41, paras 581–583.

97 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 1879.

98 *Ibid.*, para. 1880.



reflects the special status of religious, cultural, historical and similar objects, and the Chamber should not change this status by making distinctions not found in the language of the Statute. Indeed, international humanitarian law protects cultural objects as such from crimes committed both in battle and out of it.<sup>99</sup>

Subsequently, when dealing with assaults on a hospital and a church, the *Ntaganda* trial judgment returned to a traditional approach and declared that the notion of “attack” was to be understood in terms of AP I Article 49(1),<sup>100</sup> linking it to the conduct of hostilities and excluding acts of pillage. The prosecutor’s appeal was met with rejection by four out of the five judges. Still, every single judge issued an opinion on the matter, leaving the issue unresolved.

Two judges found that “attack” as defined in Article 8(2)(e)(iv) of the Rome Statute means “combat action”, and that the Trial Chamber did not err.<sup>101</sup> The other three adopted a broad interpretation, dissociating attacks from the conduct of hostilities. The judges provided a variety of arguments: framing all actions taken during a *ratissage* operation within the term “attack” regardless of the weapons employed (i.e., heavy weapons for attack and machetes for *ratissage*),<sup>102</sup> applying the ordinary meaning of the term, equating it to “attacks directed” against the civilian population under crimes against humanity, making the law assessable for “the average soldier”,<sup>103</sup> and interpreting the term in light of the object and purpose of the provision (protection of certain objects) and the Rome Statute more broadly (putting an end to impunity).<sup>104</sup>

Accordingly, the stance on the notion of attack is ambivalent and perhaps undetermined under the practice of the ICC. It represents one of the most evident divergences between the ICRC and the ICC, especially considering the relevance of the notion of attack under IHL, as this is a core concept not only for war crimes but for the conduct of hostilities and IHL in general. Future cases will tell.

## The two-headed snake?

When it comes to comparing the ICRC and the ICC, it is possible to say that their work constitutes alternative but complementary approaches to preventing IHL violations. Whilst the ultimate goals are similar, the approaches are completely different. The ICC prosecutes and judges, whereas the ICRC promotes respect for IHL through confidential dialogue and persuasion. Accordingly, in practice, these

99 ICC, *Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15, Judgment and Sentence (Trial Chamber VIII), 27 September 2016, para. 15, available at: [www.legal-tools.org/doc/042397/pdf](http://www.legal-tools.org/doc/042397/pdf).

100 ICC, *Ntaganda*, above note 67, para. 916.

101 See ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Separate Opinion of Judge Howard Morrison and Judge Piotr Hofmański on the Prosecutor’s Appeal, 30 March 2021, available at: [www.legal-tools.org/doc/jkrk4e/pdf](http://www.legal-tools.org/doc/jkrk4e/pdf).

102 See ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Separate Opinion of Judge Solomy Balungi Bossa on the Prosecutor’s Appeal, 30 March 2021, available at: [www.legal-tools.org/doc/59vx1f/](http://www.legal-tools.org/doc/59vx1f/).

103 See ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Partly Concurring Opinion of Judge Chile Eboe-Osuji, 30 March 2021, available at: [www.legal-tools.org/doc/eqtq7g/](http://www.legal-tools.org/doc/eqtq7g/).

104 See ICC, *Ntaganda*, above note 94, Dissenting Opinion of Judge Ibáñez Carranza, paras 1165–1168.

institutions have no reason whatsoever to collide, as their paths are not meant to cross and even their legal frameworks mark clear boundaries.

Nonetheless, from a theoretical perspective, the simultaneous application of IHL by these two institutions is indeed fragmenting the law – this fragmentation is less than expected, but it is still present. This divergence started with the adoption of the Rome Statute, but when seen from another perspective, what happened in 1998 was not fragmentation but *development* (the Rome Statute is considered to codify and/or create IHL norms). Perhaps this is the key concept of the dynamics between the two; growth can be a painful process and is rarely linear.

What we are witnessing nowadays is simply a diluted version of what IHL experienced more than twenty-five years ago with the creation of the *ad hoc* tribunals and their jurisprudence. Yet, this disruption framed the essential norms of IHL today. Evidently, the ICC phenomenon could not be considered to be as radical considering the institutional restraints adopted by States; yet, contrary to its predecessors, the ICC is here to stay.

Law-making fragmentation can be followed by law-application fragmentation.<sup>105</sup> Hence, jurisprudence constitutes the second phase. Nevertheless, the ICC tends to avoid such occurrences by considering its rulings as part of the larger legal system. In the words of the Appeals Chamber:

[T]he expression “the established framework of international law” in the chapeaux of article 8(2)(b) and (2)(e) as well as in the Introduction to the Elements of Crimes for article 8 of the Statute, when read together with article 21 of the Statute, requires the former to be interpreted in a manner that is “consistent with international law, and international humanitarian law in particular”. Thus, the specific reference to the “established framework of international law” within article 8(2)(b) and (e) of the Statute permits recourse to customary and conventional international law regardless of whether any lacuna exists, to ensure an interpretation of article 8 of the Statute that is fully consistent with, in particular, international humanitarian law.<sup>106</sup>

Nonetheless, on rare occasions the ICC has gone against the generally accepted state of IHL (and perhaps ICRC positions) under the argument that the Rome Statute is a “self-contained” regime; it appears more likely to do so when dealing with cases that involve very sensitive topics such as child soldiers or cultural heritage. However, these divergences might not be altogether negative as such fragmentation incidents can carry beneficial competitive pressure, promote productive experimentation and creativity, allow for mistake correction, reduce the risk of failure of one single institution, and lead to improved performance.<sup>107</sup> Notably,

105 See Anne Peters, “The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization”, *International Journal of Constitutional Law*, Vol. 15, No. 3, 2017, p. 676.

106 ICC, *Ntaganda*, above note 91, para. 53 (emphasis added).

107 A. Peters, above note 105, p. 681.

this process may even occur within the ICC, considering the checks and balances system created by the plurality of chambers and judges.

Therefore, the ICRC and ICC are indeed a two-headed snake, though this is an interim conclusion. If we zoom out a bit more and see the whole picture, we realize that IHL is not just a two-headed snake but actually the Medusa! The ICRC and ICC are just two stakeholders in the IHL universe, meaning that this body of law is additionally applied by a plurality of actors such as States (every single one of them), other international courts (the International Court of Justice, the regional human rights courts and the mixed international tribunals), international organizations, and according to some, even non-State armed groups. This state of affairs makes IHL an extremely diverse, decentralized and rich body of law wherein every actor contributes to its creation, application and development in their own fashion.

## **Conclusion**

The analysis provided in this article illustrates that the ICRC and ICC agree in certain aspects (such as the IAC/NIAC dichotomy and the concept of intra-party SGBV) but disagree in others (direct/active participation in hostilities and the notion of attack). This is a perfect reflection of the broader picture.

When it comes to IHL and ICL, it is possible to say that the latter enforces, clarifies and develops the former in certain aspects. As for the ICRC and ICC, it is worth noting that they are two completely different entities whose inflection points are found in their work in favour of people affected by armed conflicts and the application of IHL.

This setting implies the possibility of the two institutions having divergent legal positions – yet this is a triviality. First, even if both apply IHL, they do so from different perspectives and, moreover, through different mechanisms. Second, these legal discrepancies are cumbersome in the short term but beneficial in the long term. Third, these institutions are challenging the State-centred approach of international law and playing a leading role in the international arena. Fourth, in their own peculiar ways, they are humanizing the conversation by shifting the focus from States to individuals (either victims or perpetrators).

Most importantly, contemporary armed conflicts are constantly evolving, and in order to keep up with such raw realities, so should IHL – whether at ICRC Headquarters in Geneva or a courtroom in The Hague.