THE RELATIONSHIP BETWEEN THE LAW OF ARMED CONFLICT AND INTERNATIONAL CRIMINAL LAW: WITH A FOCUS ON THE WAR IN UKRAINE

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I. INTRODUCTION

The war in Ukraine has brought renewed attention to the law of armed conflict (LOAC), also referred to as the laws of war or international humanitarian law, not only due to the many alleged violations of LOAC rules, but also because the conduct of the warring parties shows the relevance of and—in many cases—challenges in applying decades or century-old rules.[1] Provisions that were considered by many to be outdated, or which had rarely been relied on since the second world war. As such, the armed conflict between Russia and Ukraine may act as a catalyst for the updating or extension of the LOAC framework.

New laws are often created in a reactionary fashion and legal developments are generally "one step behind" reality. International law, and more specifically the LOAC, is no different. Something undesirable must happen before states realize, and agree, to conclude or update treaties to address the unwanted battlefield behavior or use of a weapon.[2] The two world wars and the anti-colonial struggles acted as triggers or catalysts for large-scale developments of the LOAC.[3] However, nowadays, armed conflicts, even if large in scale or in terms of political impact, such as the Syrian Civil War, the 2003 Iraq war, or the fight against ISIS, do not result in the adoption of new LOAC rules—at least, not of black-letter provisions.[4] The role of states, which have been hesitant to engage in LOAC treaty

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1. *See, e.g.*, Marten Zwanenburg & Arjen Vermeer, *Ukraine Symposium-Transfers of POWs to Third States*, LIEBER INST. W. POINT: ARTICLES OF WAR (July 19, 2023), https://lieber.westpoint.edu/transfers-pows-third-states/; Jeroen van den Boogaard, *Ukraine Symposium-The Release of Prisoners of War*, LIEBER INST. W. POINT: ARTICLES OF WAR (July 8, 2022), https://lieber.westpoint.edu/release-prisoners-war/.

2. A notable exception—an exception proving the "rule"—was the adoption of a ban on blinding laser weapons, which states in 1995 agreed to annex as Protocol IV to the Certain Conventional Weapons Convention of 1980 before such weapons were available for deployment on the battlefield. *1995 Protocol on Blinding Laser Weapons*, WEAPONS L. ENCYCLOPEDIA, https://www.weaponslaw.org/instruments/1995-protocol-on-blinding-laser-weapons (last updated Aug. 8, 2017). This Protocol "is the first instrument since the 1868 St. Petersburg Declaration to prohibit the employment of a weapon with perceived military utility before its use had led to streams of victims." *Id.*

3. *See* Rogier Bartels, *The Relationship Between International Humanitarian Law and the Notion of State Sovereignty*, 23 J. CONFLICT & SEC. L. 461, 484–86 (2018).

4. The International Committee of the Red Cross (ICRC), which often was the key initiator of new international humanitarian law (IHL) treaties, considered reaffirmation and clarification of LOAC to be important in the early 2000s, but states were not interested. Jean-Philippe Lavoyer, *International Humanitarian Law: Should It Be Reaffirmed, Clarified or Developed?*, 34 ISR. Y.B. ON HUM. RTS. 35, 36 (2004). In 2011, the ICRC identified four areas it believed stronger rules were needed for. *Strengthening Legal Protection for Victims of Armed Conflicts: Draft Resolution & Report*, INT'L COMM. RED CROSS 4–5, 31IC/11/5.1.1 (Oct. 2011), https://www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-strengthening-legal-protection-11-5-1-1-en.pdf. However, in 2015 it accepted that no treaty negotiation processes could be embarked upon as there was "insufficient political support." *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Concluding Report*, INT'L COMM. RED CROSS 3, 32IC/15/19.1 (Oct. 2015), https://rcrcconference.org/app/uploads/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf.

negotiations,[5] in the formation of LOAC has become more limited.[6] Instead of a state-driven process, the contemporary development (and clarification) of LOAC is chiefly done by way of non-governmental bodies, such as international courts and tribunals, as well as expert processes.[7] The role of states has therefore been reduced to either accepting or rejecting the prospective developments.[8] Albeit indirectly through states, because they were set up by them, but subsequently in an independent manner, international criminal courts and tribunals seized of war crimes cases have since the end of the Cold War made a major contribution to the clarification and development of the LOAC.[9]

The war in Ukraine may generate a renewed willingness of the international community to adopt new LOAC treaties or amend existing treaties. Yet, notwithstanding a relatively unified Western coalition as regards the sanctions placed on Russia and military support for Ukraine, more would be required to achieve results in the development of the LOAC. Indeed, in the current political climate, it is unlikely that such results will materialize. At the same time, however, the war in Ukraine has prompted various initiatives for the prosecution of international crimes, and large parts of the international community have been actively supporting such initiatives,[10] as well as financially supporting the International Criminal Court (ICC), which has jurisdiction over the situation in Ukraine following the self-referrals by Ukraine and the referral of the matter since February 28, 2022, by a large group of ICC state Parties,[11] and by contributing personnel or sharing evidence.[12]

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5. Other than, perhaps, the negotiations on Lethal Autonomous Weapons Systems, in the framework of the Certain Conventional Weapons Convention. *See, e.g.*, Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Final Report, ¶ 37(b), U.N. Doc. CCW/MSP/2022/7 (Nov. 24, 2022).

6. *See* Bartels, *supra* note 3.

7. *Id.*

8. *Id.* at 486.

9. *Id.* at 476.

10. *E.g.*, Joint Motion for a Resolution on the Establishment of a Tribunal on the Crime of Aggression Against Ukraine, EUR. PARL. DOC. (2022/3017) (RSP) (Jan. 18, 2023) (showing the willingness of the EU to make developments to LOAC).

11. Between March 1 and April 1, 2022, the ICC received referrals by forty-three states, referring the situation in Ukraine for investigation. Ukraine is not an ICC state party, but it has accepted the court's jurisdiction over alleged crimes under the Rome Statute occurring on its territory (from November 21, 2013, onwards), pursuant to article 12(3) of the Statute. Rome Statute of the Int'l Crim. Ct. art. 12(3), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute]. For an overview of the Ukraine situation, see *Ukraine: Situation in Ukraine*, INT'L CRIM. CT.: OFF. OF THE PROSECUTOR, https://www.icc-cpi.int/situations/ukraine (last visited Sept. 12, 2023).

12. *E.g.*, Ministry of Justice et al., *Press Release: UK Provides Lawyers and Police to Support ICC War Crimes Investigation*, GOV.UK (June 6, 2022), https://www.gov.uk/government/news/uk-provides-lawyers-and-police-to-support-icc-war-crimes-investigation; Trevor Hunnicutt & Idrees Ali, *Biden Orders US to Share Russian War Crimes Evidence with ICC*, REUTERS (July 26, 2023),

Besides significant spending on military aid for Ukraine, states have also given unprecedented funds to the ICC and other projects to investigate alleged LOAC violations in the Russia-Ukraine War and initiated the setting up of an international tribunal for aggression.[13] Whereas the latter institution is supposed to only address Russian violations of the law on the use of force, and in that sense is similar to the post-World War II tribunals that were only prosecuting citizens of the defeated nations and were therefore criticized for constituting "victor's justice," the extensive assistance given to the ICC is somewhat surprising. Even if the reason for states, including those previously hostile to the ICC, such as the United States of America, to provide support to the ICC is the war in Ukraine, it will result in a general strengthening of the ICC framework.

History has shown a red line running through war crimes trials: on the one hand, states are reluctant to enforce the laws of war against their own nationals, while on the other hand, they are keen to set up structures and processes to try nationals of other states.[14] This has been the engine behind the development of the system of international criminal justice.[15] The approach of states to international criminal tribunals and courts makes it possible to distinguish these institutions as "safe courts" and "unsafe courts."[16] International courts such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and its sister tribunal for Rwanda (ICTR), which was expected not to have jurisdiction over nationals or conduct of the states setting up these institutions, were safe because the ruling would not directly affect the aforementioned states.[17] This resulted in rather minimalistic statutes.[18] As explained below, this has allowed the ICTY and ICTR to significantly contribute to the development of the LOAC. Yet, an institution such as the ICC, with its prospective jurisdiction, was considered unsafe and therefore the drafters curtailed the prosecutorial and judicial discretion.[19] The war crimes included in the Rome Statute were strictly and exhaustively defined, and although the ad hoc tribunals had been left to create

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https://www.reuters.com/world/biden-orders-us-share-russian-war-crimes-evidence-with-world-court-nyt-2023-07-26/ (displaying U.S. commitment to ICC investigation).

13. *See* Jennifer Hansler, *US Announces It Supports Creation of Special Tribunal to Prosecute Russia for 'Crime of Aggression' in Ukraine*, CNN POLS., https://www.cnn.com/2023/03/28/politics/us-support-special-tribunal-crime-of-aggression/index.html (last updated Mar. 28, 2023, 1:30 PM).

14. Tim L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALBANY L. REV. 683 (1997).

15. *Id.* at 689.

16. As suggested by Rob Cryer. ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 289 (Cambridge Univ. Press 2005).

17. *Id.*; *see also* Elies van Sliedregt, *One Rule for Them–Selectivity in International Criminal Law*, 34 LEIDEN J. INT'L L. 283, 283–90 (2021).

18. *See* CRYER, *supra* note 16; *see also* van Sliedregt, *supra* note 17, at 285.

19. *E.g.*, Richard Dicker, *The International Criminal Court (ICC) and Double Standards of International Justice*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 3–12 (Carsten Stahn ed., 2015).

their own elements of crimes, those for the ICC were drafted and agreed upon by the states.[20]

Now, the war in Ukraine and the related ICC investigation, with Russia seen as a common enemy, appears to have turned the ICC for many states into a safe court.[21] Even with the "straightjacket" given to it by the drafter, based on what appears to be happening in the war theatre, the ICC will be able to address many issues of the LOAC that to date remain unclear, either because of such matters not previously having been considered by other courts or because the conflict shows the difficulties of applying decades-old treaty rules or customary law contemporary warfare.

Whereas the present Author welcomes the opportunity for the ICC or other (international) criminal institutions to clarify and develop the LOAC in their case law coming out of the war in Ukraine, this Article calls for caution in the retrospective application of LOAC rules to the fighting, and highlights the risks for the development of the LOAC if these after-the-fact assessments are done solely through an (international) criminal law lens.[22] The present contribution therefore starts with an explanation of the clarification and development of the LOAC by international criminal courts and tribunals, including a discussion of criticisms thereof.[23] Using some examples of issues that may come up during international criminal trials related to the war in Ukraine, the Author highlights some of the challenges that international criminal justice, and mainly the ICC, may be faced with, before ending with a discussion of the relationship between the LOAC and ICL, as well as the risk and challenges of dealing with the LOAC in a courtroom setting.[24]

II. CLARIFICATION OF THE LAW OF ARMED CONFLICT THROUGH INTERNATIONAL CRIMINAL LAW

The judgments of the ICTY and ICTR have been described as allowing the laws of war to come of age.[25] Theodor Meron, before becoming a judge at the ICTY, held that the jurisprudence of these ad hoc tribunals helped the LOAC to develop more rapidly between 1991 and 1998 than during the forty-five years after the International Military Tribunal in Nuremberg.[26]

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20. *See* Assembly of States Parties to the Rome Statute of the International Criminal Court, Elements of Crimes, 1st sess., U.N. Doc. ICC-ASP/1/3, U.N. Sales No. E.03.V.2 (2002).

21. This is perhaps best shown by the former stance of the United States, which used to be openly hostile to the court and actively worked to undermine the ICC's work, but now is contributing to its investigations and sharing information. *See, e.g.*, Hunnicutt & Ali, *supra* note 12.

22. *See infra* Part IV (highlighting the risks of LOAC through only a criminal law lens).

23. *See infra* Part II (clarifying LOAC).

24. *See infra* Part III (giving examples of international criminal trial issues in the war in Ukraine).

25. Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT'L L. 462, 463–64 (1998). William Schabas makes a similar observation. WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 42 (Cambridge Univ. Press, 2d ed. 2004).

26. Meron, *supra* note 25.

Indeed, international criminal law has added "flesh to the bare bones of [LOAC] treaty provisions or to skeletal legal concepts" of this body of law.[27] Notable examples of such clarifications include (i) the recognition that a large number of LOAC rules apply also in times of non-international armed conflict, namely as customary international law;[28] (ii) the definition of the notion of "armed conflict" and the elements of the organization and intensity criteria, which must be met for a situation to qualify as a non-international armed conflict;[29] (iii) the clarification of the rule prohibiting terrorizing the civilian population and the fact that such conduct may constitute a war crime;[30] and (iv) what conduct amounts to rape as a war crime.[31]

The impact these ICL judgments have had on the LOAC, as well as international law more broadly, is demonstrated through the references thereto made by states,[32] domestic courts,[33] and United Nations fact-finding bodies.[34] The success of the Rome Conference, which was unexpected at the start of this diplomatic gathering, resulted in the agreement to give the ICC jurisdiction over many war crimes, not only for international armed conflict, but also for non-international armed conflicts.[35] A scholar observed that even

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27. William Fenrick, *The Development of the Law of Armed Conflict Through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 3 J. ARMED CONFLICT L. 197, 197 (1998).

28. Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 119 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

29. *E.g.*, Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶ 175 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008).

30. Prosecutor v. Galić, Case No. IT-98-29-T, Judgement, ¶ 88 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

31. *E.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 507–08 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 172 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 442 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

32. The case law has impacted the negotiation of international treaties. An example is the Convention on Cluster Munitions. *See* Shane Darcy, *Bridging the Gaps in the Laws of Armed Conflict? International Criminal Tribunals and the Development of Humanitarian Law*, *in* INTERNATIONAL LAW AND ARMED CONFLICT: CHALLENGES IN THE 21ST CENTURY 321 (Noëlle N.R. Quénivet & Shilan Shah-Davis eds., 2010); *see also* Yves Sandoz, *The Dynamic but Complex Relationship Between International Penal Law and International Humanitarian Law*, *in* THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF PROFESSOR IGOR BLISHCHENKO 1061 (José Doria et al. eds., 2009).

33. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Prosecutor v. Selliaha, Case No. 09-748802-09, Judgment Pursuant to Arrest (Ct. of Appeal of Hague Apr. 30, 2015) (known as the LTTE case); Hof van Beroep Antwerpen (Belgium), Arrest [Appeal Judgment], January 26, 2016, in the cases 2015/FP/1-7–FD35.98.47-12 (known as the *Sharia4Belgium* case).

34. For example, see Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka (Mar. 31, 2011), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/POC%20Rep%20on%20Account%20in%20Sri%20Lanka.pdf, *mentioned as an example in* Steven R. Ratner, *Sources of International Humanitarian Law and International Criminal Law: War/Crimes and the Limits of the Doctrine of Sources*, *in* THE OXFORD HANDBOOK OF THE SOURCES OF INTERNATIONAL LAW 922 (Jean d'Aspremont & Samantha Besson eds., 2017).

35. *E.g.*, GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 361 (2d ed. 2009); EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 139 (Cambridge Univ. Press 2008); Thomas Graditzky, *War Crime Issues Before the Rome Diplomatic Conference on the Establishment of the International Criminal Court*, 5 U.C. DAVIS J. INT'L L. & POL'Y 199, 201 (1999).

if the Rome Statute did not seek to modify the existing LOAC treaties, the inclusion of the war crimes listed in article 8(2)(e) of the Rome Statute[36] lead to "an implicit extension of the scope of the 1977 Additional Protocol II"[37] because the relevant war crimes may be committed as part of fighting between armed groups, and it is no longer required that the government forces are a party to the conflict and that one side exercises control over territory, as was the case for application of Additional Protocol II.[38] Nonetheless, the influence of the international criminal tribunals and courts on the development and clarification of IHL is perhaps best shown by the extensive references to the their case law in the authoritative study by the International Committee of the Red Cross (ICRC) on customary international humanitarian law.[39]

There can be no doubt that in dealing with alleged serious LOAC violations, in the "hushed and calm setting"[40] of courthouses in, *inter alia*, The Hague and Arusha, international criminal tribunals and courts, such as the ICTY and ICTR,[41] have significantly contributed to the development and clarification of the LOAC.[42] Be that as it may, when applying the LOAC rules

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36. Article 8(2)(e) criminalizes "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law" and largely repeats the war crimes included in article 8(2)(b), which is applicable to international armed conflicts. Rome Statute, *supra* note 11, art. 8(2)(e).

37. Eric David, *The Contribution of International Tribunals to the Development of International Criminal Law*, *in* JUSTICE FOR CRIMES AGAINST HUMANITY 357–58 (Mark Lattimer & Philippe Sands eds., 2003).

38. See article 1 of Additional Protocol II, which sets out the material scope of application of this protocol. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

39. 1 INT'L COMM. RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW STUDY (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); *see also* Robert Cryer, *Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, 11 J. CONFLICT & SEC. L. 239, 239–63 (2006) (discussing the impact of the study). Darcy, *supra* note 32.

40. Ratner, *supra* note 34, at 912–13.

41. At a later stage, and to a somewhat lesser extent, other institutions dealing with situations of armed conflict, such as the Special Court for Sierra Leone (SCSL) and ICC have also contributed to the development and clarification of the LOAC. *See* SHANE DARCY, JUDGES, LAW AND WAR: THE JUDICIAL DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW 8 (2014). The ICC, whose work is still ongoing, therefore may continue to develop the LOAC. Moreover, although outside the scope of the present Article, the International Court of Justice also played a role in the clarification of the LOAC.

42. *See* OUSMAN NJIKAM, THE CONTRIBUTION OF THE SPECIAL COURT FOR SIERRA LEONE TO THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW (2013); Robert 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 VAND. L. REV. 1, 28 (2006); LARISSA VAN DEN HERIK, THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW (2005); Leslie Green, *The International Judicial Process and the Law of Armed Conflict*, 47 CHITTY'S L.J. & FAM. L. REV. 1, 26 (1999); Christopher Greenwood, *The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia*, 2 MAX PLANCK Y.B. UN L. 97, 97–140 (1998); Theodor Meron, *The Hague Tribunal: Working to Clarify International*

for the purposes of criminal trials, and in the process of clarifying ambiguous or vague rules, these courts and tribunals might not always have struck the right balance between the two diametrically opposed impulses that the LOAC is based on: military necessity and humanitarian considerations.

Besides some doubtful "clarifications," on occasion, actual errors on the content of LOAC provisions are made[43] in retrospectively prosecuting and adjudicating alleged violations of the LOAC. In doing so, the tribunals and courts may have stretched the LOAC application beyond its intended and desired scope.[44] Viewing the LOAC through a criminal law prism or through an ICL lens entails risks. As a result, not all "clarifications" have actually simplified or developed the LOAC.[45] Certain pronouncements may be understandable from a criminal law perspective, but if LOAC rules discussed in such judgments would be applied in that same manner on the battlefield instead of in the courtroom, it may actually lead to confusion amongst members of the armed forces.[46] Since the LOAC and ICL have different purposes and objectives, [47] those involved in either of these two legal fields tend to approach legal questions from different perspectives. In this regard, one must be mindful that "[w]hile the perspective, retributive or protective,

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Humanitarian Law, 13 AM. U. INT'L L. REV. 1511, 1511–17 (1998); Meron, *supra* note 25, at 462–68; Fenrick, *supra* note 27, at 197–232.

43. An infamous 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." Prosecutor v. Blaškić, Case No. ICTY-95-14-T, Trial Judgment, ¶ 180 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000). Another trial chamber of the ICTY later clarified that this was a misstatement of the relevant LOAC rules. Prosecutor v. Galić, Case No. IT-98-29-T, Trial Judgment, ¶¶ 42–45 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003). When seized of the appeal in the *Blaškić* case, the ICTY Appeals Chamber deemed it necessary "to rectify" the Trial Chamber's statement, and to "underscore that there is an absolute prohibition on the targeting of civilians in customary international law." Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment (Appeal Chamber), ¶ 109 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

44. *E.g.*, ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 122 (2010).

45. Marco Sassòli, *Humanitarian Law and International Criminal Law*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 111, 117–19 (Antonio Cassese ed., 2009).

46. *See* Geoffrey S. Corn, *Ensuring Experience Remains the Life of the Law: Incorporating Military Realities into the Process of War Crimes Accountability*, *in* 1 THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 189, 195–97 (Giuliana Ziccardi Capaldo ed., 2014).

47. The LOAC aims to regulate warfare and thereby mitigate the suffering resulting from the fighting. *E.g.*, FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 2 (2011); DIETER FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 11 (Oxford Univ. Press, 2d ed. 2008). The prosecution and adjudication of alleged war crimes under ICL seeks to counter the impunity of those having violated the LOAC rules in such a manner as to give rise to individual criminal responsibility. *E.g.*, ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 1 (2d ed. 2010). On the relationship between the different objectives between the LOAC and ICL, see Corn, *supra* note 46, at 189–95; 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* ARMED CONFLICT AND INTERNATIONAL LAW: IN SEARCH OF THE HUMAN FACE 345–49 (Marielle Matthee et al. eds., 2013).

shapes the scope of the attendant answer, there is an unavoidable duality" because both fields share many terms and legal concepts.[48] The meaning of a certain term may lead to different answers when considered as part of the LOAC or ICL. The findings on the scope of international criminal justice, including those on the scope of armed conflict, are important for ICL because the existence of an armed conflict is required for atrocities to qualify as war crimes. However, in turn, findings on the scope of armed conflict are also important for the application of the LOAC itself. Not only because of the reliance on international case law by those writing about LOAC, but especially because states and other relevant actors may try to find support in international case law when arguing the existence of an armed conflict or lack thereof.

Following a general welcoming of the expansion of most of the LOAC rules to non-international armed conflicts, international criminal courts and tribunals have, in recent years, also been criticized for expanding the scope of their jurisdiction beyond their mandate.[49] The way in which the ICTY pronounced on command responsibility for commanders of non-state actors in, for example, *Hadžihasanović and Kubura*,[50] and the tribunal's treatment of perfidy, led to scholars criticising the unrealistic portrayal of the situation on the ground in times of armed conflict.[51] ICTY judgments on military operations were not only widely debated by academics, but also by practitioners. The supposed use by the Trial Chamber in *Gotovina* of the so-called "200-metre rule" to assess whether civilian objects were attacked,[52] for example, drew criticism from numerous military lawyers as well as government officials from, *inter alia*, the United States and Israel.[53]

The judges of the international criminal courts and tribunals have analysed and applied the LOAC through the specific lens of ICL and its goals, such as the interests of victims and achieving justice and equity, sometimes overlooking state interests and practice.[54] This process has been referred to

48. Chris Jenks, *Law as Shield, Law as Sword: The ICC's* Lubanga *Decision, Child Soldiers and the Perverse Mutualism of Direct Participation in Hostilities*, 3 U. MIA. NAT'L SEC. & ARMED CONFLICT L. REV. 108, 109 (2013).

49. *See* Rogier Bartels, *A Fine Line Between Protection and Humanisation: The Interplay Between the Scope of Application of International Humanitarian Law and Jurisdiction over Alleged War Crimes Under International Criminal Law*, 20 Y.B. INT'L HUMANITARIAN L. 37, 37–74, and the sources cited therein.

50. Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (July 16, 2003); GUÉNAËL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 22 (2009); Christopher Greenwood, *Command Responsibility and the Hadžihasanović Decision*, 2 J. INT'L CRIM. JUST. 601, 601 (2004).

51. Greenwood, *supra* note 50, at 129.

52. Prosecutor v. Gotovina, Case No. T-06-90-T, Judgment, ¶ 1898 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

53. For a discussion of such criticism, see Roy Ariav, *Hardly the Tadić of Targeting: Missed Opportunities in the ICTY's Gotovina Judgments*, 48 ISR. L. REV. 329 (2015).

54. Carsten Stahn, *Between 'Constructive Engagement', 'Collusion' and 'Critical Distance': The International Committee of the Red Cross and the Development of International Criminal Law*, *in*

as the "humanization of warfare" and the LOAC by international criminal courts.[55] However, what may seem as a humanizing move, especially when viewing the law through the impunity and victim rights lens, may in practice not result in a (more) humane outcome.

Indeed, even though states used to be unwilling to recognize that a non-international armed conflict existed (on their territory), nowadays, the permissive function of the LOAC is increasingly called upon to enable the targeting and detention of alleged enemies.[56] Namely, when an armed conflict exists, it does not only trigger the protective LOAC rules, but it also enables states to take more forceful action, such as the use of lethal force against combatants, "fighters," and those directly participating in hostilities. The situations in which lethal force may be used against persons could therefore be expanded, or the existence of an (alleged) armed conflict could be relied on to justify continuous detention of alleged members of armed groups.[57] The updated ICRC commentary on the 1949 Geneva Conventions, therefore, rightly cautions that existence of a non-international armed conflict must "be neither lightly asserted nor denied" and that "it is important that the rules applicable in armed conflicts apply only in the situations for which they were created."[58]

III. ISSUES RELATED TO THE WAR IN UKRAINE

Given the scale of the war in Ukraine, the amount of strikes, and the great variety of alleged violations of the LOAC (mostly by Russia, but also by Ukraine), many different aspects could be discussed in this Section. A very large amount of LOAC rules may be scrutinised, including the rarely

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HUMANIZING THE LAWS OF WAR: THE RED CROSS AND THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW 201, 201 (Robin Geiss et al. eds., 2017); DARCY, *supra* note 41, at 193.

55. *See* Stahn, *supra* note 54.

56. *See, e.g.*, Dustin A. Lewis et al., *Indefinite War: Unsettled International Law on the End of Armed Conflict*, HARV. L. SCH. PROGRAM ON INT'L L. & ARMED CONFLICT 1, 78–95 (2017), https://dash.harvard.edu/bitstream/handle/1/30455582/Indefinite%20War%20-%20February%202017_3.pdf; Max Brookman-Byrne, *Drone Use 'Outside Areas of Active Hostilities': An Examination of the Legal Paradigms Governing US Covert Remote Strikes*, 64 NETH. INT'L L. REV. 3, 3–41 (2017); Oona Hathaway et al., *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT'L L. 123,123–77 (2013).

57. The United States, for example, contends that an armed conflict continues to exist against Al-Qaeda and "associated forces" and that, therefore, the power to detain (under the 2001 Authorization for the Use of Military Force) several persons captured during or in relation to the said conflict, such as Mr. Al-Alwi, persists. For the aforementioned case, and a discussion of other similar cases, see Brief for Experts on International Law and Foreign Relations Law as Amici Curae Supporting Appellant, Al-Alwi v. Trump, 901 F.3d 294 (D.C. Cir. 2018) (No. 17-5067).

58. INT'L COMM. RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION ¶¶ 289–90 (Cambridge Univ. Press, 2d ed. 2016).

used provisions on naval blockades, the protection of nuclear facilities, and responsibilities of protecting powers for prisoners-of-war.[59]

The specific circumstances of the conflict, which includes break-away regions in Eastern Ukraine where Russia has granted Russian nationality to Ukrainian citizens, for example, means that questions of how ICL should deal with protective status on the basis of nationality is again very relevant. Given that the Fourth Geneva Convention of 1949 awards protection to civilians who are nationals of the opposing party to an international armed conflict, this status of persons in Luhansk, Donetsk, as well as in the Crimea, may be unclear. The ICTY grabbled with this issue and came up with the notion of "allegiance to a party to the conflict" rather than nationality.[60] This was criticized by scholars as creating confusion for the application of the Fourth Convention in conflicts other than the one in the former Yugoslavia.[61]

The vast variety of buildings, structures, and persons attacked raises many questions about the application of the proportionality rule,[62] the treatment of duel-status objects,[63] the legality of sieges and restrictions of humanitarian assistance,[64] and whether indiscriminate attacks may fall under the war crime of intentionally directing attacks against civilian objects.[65] As these issues have so far only received scant attention in ICL, there is much room for the ICC to clarify and develop the law underlying the related war crimes. To limit the scope of the present discussion, this Article will only address two specific issues: (1) the level of control that must be exercised over armed groups for the armed conflict to qualify as international as opposed to non-international (and as a result, have a different set of rules and war crimes applicable), and (2) the notion of attack as part of the war crimes of "intentionally directing attacks" against certain protected persons or objects.[66] These topics are not chosen based on their relative or absolute importance for the war in Ukraine or for the frequency in terms of alleged violations, but because they allow the Author to highlight certain aspects of the interplay between the LOAC and ICL, and the associated consequences

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59. The large number of contributions on a vast range of topics for the ongoing online symposium on Ukraine-Russia for the Lieber Institute of the US Military Academy at West Point gives an idea of the number of LOAC issues that may be debated. *Articles of War*, LIEBER INST. W. POINT: ARTICLES OF WAR, https://lieber.westpoint.edu/articles-of-war/ (last visited Sept. 12, 2023).

60. Prosecutor v. Tadic, ¶ 166 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

61. Sassòli, *supra* note 45, at 111–20; Marco Sassòli & Laura M. Olsen, *The Judgment of the ICTY Appeals Chamber on the Merits in the* Tadic *Case*, 82 INT'L REV. RED CROSS 733, 733–69 (2000).

62. *E.g.*, JEROEN VAN DEN BOOGAARD, PROPORTIONALITY IN INTERNATIONAL HUMANITARIAN LAW: REFOCUSING THE BALANCE IN PRACTICE (Cambridge Univ. Press 2023).

63. Rogier Bartels, *Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials*, 46 ISR. L. REV. 305, 305–06 (2013).

64. *E.g.*, Tom Dannenbaum, *Siege Starvation: A War Crime of Societal Torture*, 22 CHI. J. INT. L. 368, 368–42 (2022).

65. Geoffrey Henderson, *Civilians as the Object of Direct Attack–A Matter of Principle and Evidence*, *in* PROCEEDINGS OF THE BRUGES COLLOQUIUM: THE ADDITIONAL PROTOCOLS AT 40: ACHIEVEMENTS AND CHALLENGES 115, 115–21 (2018).

66. *See infra* Sections III.A–B (discussing issues related to the ongoing war in Ukraine).

for the fair trial rights of those suspected of war crimes, as well as the importance of clear and workable rules for members of the armed forces.

A. Level of Control Over Armed Groups and Resulting Applicable Rules

The classification of armed conflicts remains one of the contemporary legal challenges facing those working on LOAC matters,[67] as the application of the LOAC is dependent on the existence of an international or non-international armed conflict.[68] For those working in ICL, it is also an important issue because war crimes are defined as "serious violations of IHL" and consequently, can only be committed when this body of law applies. In other words, during one of these types of conflict.[69] Indeed, notwithstanding that distinction between international and non-international armed conflicts is often considered to be out-dated,[70] in the current legal framework, the distinction remains relevant today; both on the battlefield[71] and after the fact, that is, during international criminal trials. The Rome Statute rigidly preserved the division between the two types of conflict,[72] albeit not without criticism.[73] Many domestic criminal codes, as a result of legislation implementing the Rome Statute, have separate provisions for war crimes

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67. *See, e.g.*, *Strengthening Legal Protection for Victims of Armed Conflicts: Draft Resolution & Report*, *supra* note 4, at 8–13.

68. It should be noted that certain LOAC provisions already apply in peacetime or continue to apply after the armed conflict has ended. *See, e.g.*, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 47, 49, 53, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea arts. 44–45, 48, 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 5, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

69. As noted in the previous footnote, certain LOAC provisions, and thereby the protection afforded by these provisions, continues to apply after the relevant armed conflict has ended. Consequently, after an international armed conflict has ended, war crimes can still be committed against prisoners of war, for example, who were detained during the conflict and not yet released and repatriated at the time of the criminal conduct.

70. *See, e.g.*, Emily Crawford, *Unequal Before the Law: The Case for the Elimination of the Distinction Between International and Non-International Armed Conflict*, 20 LEIDEN J. INT'L L. 441, 441–65 (2007).

71. *See* Robert McLaughlin, *Legal-Policy Considerations and Conflict Characterization at the Threshold Between Law Enforcement and Non-International Armed Conflict*, 13 MELB. J. INT'L L. 1, 1–4 (2012); *see also* Mike Schmitt, *Classification in Future Conflict*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICT 455, 455–77 (Elizabeth Wilmshurst ed., Oxford Univ. Press 2012).

72. Article 8(2)(a) and (b) of the Rome Statute lists war crimes committed during international armed conflicts, whilst 8(2)(c) and (e) apply only to violations committed in non-international armed conflicts. Rome Statute, *supra* note 11, art. 8(2)(c), (e).

73. *E.g.*, Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144, 150 (1999); Deidre Willmott, *Removing the Distinction Between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court*, 5 MELB. J. INT'L L. 196, 196–219 (2004).

committed during international armed conflicts and for those that occurred during non-international armed conflicts.

From February 24, 2022, onwards, there can be no doubt that Ukraine and Russia have been engaged in an international armed conflict. However, even though since the initial invasion there also was an international armed conflict between these two states due to the occupation of the Crimea, the status of the fighting in Eastern Ukraine was less clear. There, the fighting was between the Ukrainian armed forces and groups that may or may not have been under Russian control.[74] Since support is generally given in a covert manner, the situation in this part of Ukraine was ambiguous for a number of years.[75] A Dutch court recently found that the situation in Eastern Ukraine in 2014 qualified as an international armed conflict as a result of overall control by Russia over the armed groups fighting the Ukrainian government.[76]

The ICTY Appeals Chamber, in one of its earliest judgments (i.e., on the merits in *Tadić*), determined that a non-international armed conflict may become international: (1) if another state intervenes through its troops, or (2) if some of the parties act on behalf of that state.[77] Internationalization by way of the second form would occur when an outside state has "overall control" over an armed group participating in a *prima facie* non-international armed conflict.[78] The ICTY case law shows that overall control requires a significantly lower level of control than so-called "effective control",[79] which was the standard applied some years earlier by the International Court of Justice, albeit dealing with state responsibility rather than individual criminal responsibility.[80] By setting this lower standard, which was subsequently applied in many ICTY cases, the number of situations that qualify as international armed conflicts was clearly expanded.[81] The ICC, without providing explanation, embraced the "overall control standard" introduced by the ICTY as being the "correct approach."[82]

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74. On the situation in Eastern Ukraine, see Robert Heinsch, *Conflict Classification in Ukraine: The Return of the "Proxy War"?*, 91 INT'L L. STUD. 323, 354–55 (2015).

75. *See id.* at 323–60.

76. See District Court of The Hague, Judgment (Leonid Volodymyrovych Kharcenko), ECLI:NL:RBDHA:2022:12218 (Nov. 17, 2022), or one of the judgments against the other suspects.

77. Prosecutor v. Tadić, Case No. IT-94-1, Judgment of the Appeals Chamber, ¶ 84 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

78. *Id.* ¶¶ 84, 120–31,145.

79. On the comparison between the two standards, see Antonio Cassese, *The* Nicaragua *and* Tadić *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT'L L. 653, 653–63 (2007), and MALCOLM SHAW, INTERNATIONAL LAW 704–05 (Cambridge Univ. Press, 5th ed. 2003).

80. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶¶ 105–15 (June 27).

81. *See* Bartels, *supra* note 49, at 51–53; *see also* SHAW, *supra* note 79, at 1071–72.

82. For example, see the following ICC judgments: Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶ 541 (Mar. 14, 2012); Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, ¶ 1178 (Mar. 7, 2014); and Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Judgment, ¶ 130 (Mar. 21, 2016). However,

However, in one of its other early judgments, namely in the *Aleksovski* case, the Appeals Chamber of the ICTY discussed whether it ought to apply the "effective control" or "overall control" test.[83] It reasoned that:

> [T]he standard established by the "overall control" test is not as rigorous as those tests. To the extent that it provides for greater protection of civilian victims of armed conflicts, this different and less rigorous standard is wholly consistent with the fundamental purpose of Geneva Convention IV, which is to ensure "protection of civilians to the maximum extent possible."[84]

Although the plight of victims of armed conflict is an important reason for the prosecution of atrocities, international criminal cases are criminal trials, during which the criminal law principle of *in dubio pro reo* requires that in case of doubt as to what the evidence establishes, a determination shall favor the accused.[85] The principle of *favor rei* similarly requires that criminal law provisions must be interpreted in favor of the accused. Arguably, in light of these principles, international courts and tribunals should be more restrictive in their determinations that a certain type of armed conflict existed, or that the elements of a war crime are met. That the overall control test ought to be applied instead of the effective control test, which is harder to prove and thus provides the accused with more protection, is therefore not straightforward.

B. The Notion of Attack in the Law of Armed Conflict Versus International Criminal Law

Immediately after the Kakhovka hydroelectric dam in Southern Ukraine was breached on June 6, 2023, and the area downstream was flooded, the

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Judge Van den Wyngaert, in her dissent to the *Katanga* trial judgment, considered in her dissenting opinion that the question of overall versus effective control "is far from settled." *Katanga*, Case No. ICC-01/04-01/07-3436-Anxl, Minority Opinion of Judge Wyngaert, ¶ 276. With respect to this issue and conflict classification, she noted that "the facts of this case are particularly complex on this point" and "the evidence not sufficient to arrive at any conclusions beyond reasonable doubt." *Id.* A scholar, who critically assessed the Trial Chamber's approach to classifying the armed conflict, expressed his surprise about the Trial Chamber's lack of reasoning, because "[o]ne could have expected the [Trial Chamber] to at least consider the ICJ's opinion [in the *Genocide* case] before blindly following the *Tadic* precedent. . . . Irrespective of what answer the [Trial Chamber] would have given, considering that all cited authorities predate the ICJ's *Genocide* judgment, one would have expected the [Trial Chamber] to show a minimum degree of awareness of this debate." Thomas R. Liefländer, *The Lubanga Judgment of the ICC: More than Just the First Step?*, 1 CAMBRIDGE J. INT'L & COMPAR. L. 195, 196 (2012).

83. Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeal Judgment, ¶¶ 122–46 (Int'l Crim. Trib. for the Former Yugoslavia Mar 24, 2000).

84. *Id.* ¶¶ 145–46.

85. For example, see Rome Statute, *supra* note 11, art. 66. For an application to ICL, see Prosecutor v. Limaj, Case No. IT-03-66-A, Judgment, ¶ 21 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007).

media and Western leaders reported the event as constituting a war crime,[86] and calls were made for the ICC to investigate the matter as a possible war crime.[87] At present, it is still unknown whether the dam collapsed due to a weakened structure as a result of neglect or whether it was blown up, and, if so, who was responsible. However, it is essential to know who was in control of the dam in order to apply the correct LOAC rules, and as a corollary—if the dam was intentionally blown up —investigate and charge the appropriate war crime.

It is prohibited to attack civilian objects that are not under one's own control pursuant to article 52 of Additional Protocol I, a rule that is part of customary international law.[88] And in case of dams, as per article 56 of the same, an attack may—under certain conditions—be prohibited even if the dam would constitute a military objective.[89] These provisions apply during the conduct of hostilities,[90] and if violated, are to be prosecuted as specific war crimes that relate to intentionally directed attacks.[91] If the dam was under the control of the party causing it to collapse by way of an explosion, such conduct would still be prohibited under the LOAC, but based on different provisions, namely those prohibiting destruction of enemy property during occupation[92] or when otherwise under that party's control,[93] provided the destruction is not absolutely or imperatively demanded by military necessity. The associated war crime for destruction of enemy property not justified by military necessity is a different one than those mentioned before.[94]

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86. *E.g.*, Nicolas Camut et al., *Western Leaders Accuse Russia of War Crime Over Dam Destruction*, POLITICO (June 6 2023, 5:59 PM), https://www.politico.eu/article/western-leaders-russia-war-crime-nova-kakhovka-ukraine-dam/.

87. *E.g.*, Alexander Gillespie, *Why Blowing Up Ukraine's Nova Kakhovka Dam Is a War Crime*, AL JAZEERA (June 8, 2023), https://www.aljazeera.com/opinions/2023/6/8/blowing-up-ukraines-nova-kakhovka-dam-is-a-war-crime (indicating that "[i]t would be a very small step for the ICC to now start investigating the destruction of the dam as another potential war crime").

88. *See* 1 INT'L COMM. OF THE RED CROSS, *supra* note 39, at 25 (presenting Rule 7 of the ICRC's customary international humanitarian law study and the state practice referred to therein).

89. Additional Protocol I, *supra*, note 68, art. 56.

90. This follows from the definition of "attack" as given in article 49 of Additional Protocol I, and the fact that the forementioned provision, as well as articles 52 and 56, are part of Part IV entitled "General protection against effects of hostilities" of Additional Protocol I).

91. Under the Rome Statute, such conduct could be prosecuted under article 8(2)(b)(ii) if the dam was not a military objective or under article 8(2)(b)(iv) if it did constitute a military objective at the time of the attack, but it must have been clear to the attacker that the collapse of the dam would cause clearly excessive incidental damage to civilians or widespread, long-term and severe damage to the environment, as compared to the concrete and direct military advantage anticipated from taking out the dam. *See* Rome Statute, *supra* note 11.

92. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 53, 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

93. Hague Regulations art. 23(g), Oct. 18, 1907, U.S.T.S. 539.

94. In the Rome Statute, the relevant war crime for international armed conflicts is article 8(2)(b)(xiii): "Destroying . . . the enemy's property unless such destruction . . . be imperatively demanded by the necessities of war." Rome Statute, *supra* note 11, art. 8(2)(b)(xiii).

Yet, the difference between conduct of hostilities war crimes and those committed against objects or persons under the control of the relevant party to the conflict has been dealt with in a problematic manner by international criminal courts and tribunals. At the ICTY, the *Prlić et al.* Trial Chamber conducted an assessment of the attack on the Old Bridge of Mostar.[95] By majority, it found the accused guilty of the war crime of extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly.[96] On appeal, the ICTY Appeals Chamber, by majority, reversed the conviction for the crime of wanton destruction of property not warranted by military necessity.[97] The majority concluded that since the Trial Chamber had found that the Old Bridge qualified as a military objective, its destruction was necessarily justified by military necessity because it offered a definite military advantage.[98] Judge Pocar appended a strongly worded dissenting opinion,[99] arguing that the majority erroneously conflated the notion of a military target with that of military necessity.[100] According to Judge Pocar, "the Majority's silence on the disproportionate nature of the attack on the Old Bridge of Mostar is both misleading and legally incorrect; a disproportionate attack is per se unlawful and therefore cannot be justified by military necessity."[101]

The Appeals Chamber's majority and Judge Pocar appear to approach the attack on the bridge from two different angles, as a result of the manner the Prosecution charged this incident. The firing on the bridge had been done from a distance, while hostilities were ongoing, and when the HVO was not in control of the area where the bridge was located.[102] In other words, the attack on the bridge was part of the conduct of hostilities. The prosecution should therefore, as it did in a number of other cases before the ICTY, have charged the conduct as an unlawful attack (such as an attack on a civilian object or an indiscriminate attack, for example, as a result of a violation of the proportionality principle). Instead, it charged "extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly" and "wanton destruction not justified by military necessity" under

95. Prosecutor v. Prlić et al., Case No. IT-04-74-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013).

96. *Id.* ¶¶ 1264–66.

97. Prosecutor v. Prlić et al., Case No. IT-04-74-A, Judgment, ¶ 411 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017). The Appeals Chamber's reasoning on this "crucial issue" has been referred to as "curiously short and lacking in clarity." Maurice Cotter, *Military Necessity, Proportionality and Dual-Use Objects at the ICTY: A Close Reading of the* Prlić et al. *Proceedings on the Destruction of the Old Bridge of Mostar*, 23 J. CONFLICT & SEC. L. 283, 291 (2018).

98. *Id.*

99. Judge Pocar "fundamentally dissent[ed] from the Majority." Prosecutor v. Prlić et al., Case No. IT-04-74-A, Pocar Dissenting Opinion, ¶ 24 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017).

100. Prosecutor v. Prlić et al., Case No. IT-04-74-T, Judgment ¶ 9.

101. *Id.*

102. *Prlić et al.*, Case No. IT-04-74-T, Judgment, ¶¶ 1364-66.

articles 2(d) and 3(b) of the ICTY Statute, respectively.[103] This requires the destroyed property at the time of destruction to have been "protected under the provisions of the relevant Geneva Convention";[104] i.e., to have been under the control of the relevant party to the conflict. The majority of the Appeals Chamber thus did not consider the destruction of the Old Bridge as having resulted from actions taken during the conduct of hostilities. Yet, any actual attack pursuant to article 49 of Additional Protocol I, which the firing by the HVO's tanks and artillery on the Old Bridge evidently was, on a military objective must comply with the requirement to take precautions to minimize collateral damage and abide by the proportionality rule.[105] As Judge Pocar also noted in his dissent,[106] the attack on the Old Bridge can thus have been disproportionate, and therefore unlawful, even if the bridge was a legitimate military target.

At the ICC, the question what amounts to an "attack" and the difference between war crimes related to intentionally directed attacks against persons or objects and destruction of objects led to extensive litigation.[107] In *Ntaganda*, and thereafter also in the *Ongwen* case, the prosecution alleged that acts of murder, pillage, and rape are underlying conduct of the war crime of intentionally directing attacks against the civilian population.[108] In *Ongwen*, it even averred that "enslavement" constituted underlying conduct of article 8(2)(e)(i), while the exercise of the rights of ownership or a similar deprivation of liberty is one of the elements of the crime against humanity of enslavement,[109] and any enslaved civilian must therefore by definition have been in the power of the perpetrator at the relevant time.

In the *Ntaganda* trial judgment, Trial Chamber VI noted that the war crimes of intentionally directing an attack at civilians or at protected buildings could only be committed as part of the conduct of hostilities.[110] During the appeal proceedings in *Ntaganda*, the Prosecution acknowledged that the term "attack" as used in these war crimes is "confined to the conduct of hostilities."[111] As part of the sentencing proceedings, the Prosecution

103. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 2(d), 3(b), Sept. 2009, https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

104. *Id.* art. 2.

105. Additional Protocol I, *supra* note 68, art. 57.

106. Prosecutor v. Prlić et al., Case No. IT-04-74-A, Pocar Dissenting Opinion, ¶ 24 (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013).

107. *See, e.g.*, Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Appeal Judgment, ¶¶ 1148–69 (Mar. 30, 2021).

108. *See Ntaganda*, Case No. ICC-01/04-02/06, Public redacted version of "Prosecution's Closing Brief", 20 April 2018, ICC-01/04-02/06-2277-Conf-Anx1-Corr (November 7, 2018); *Ongwen*, Case No. ICC-02/04-01/15, Prosecution's Pre-Trial Brief, ¶¶ 216–17.

109. Rome Statute, *supra* note 11, art. 7(1)(c); *see also id.* art. 7(1)(g) (crime against humanity of sexual slavery); *id.* art. 8(2)(b)(xxii) (war crime of sexual slavery in times of international armed conflict); *id.* art. 8(2)(e)(vi) (war crime of sexual slavery in times of non-international armed conflict).

110. *Ntaganda*, Case No. ICC-01/04-02/06, Judgment, ¶ 997.

111. Prosecutor v. Ntaganda, Case No. ICC-01-04-02/06, Prosecution Appeal Brief, ¶ 120 (Oct. 7, 2019).

submitted that "it is clear that the statutory prohibition on intentionally directing attacks against civilians is separate and distinct from the prohibition of the wilful killing or murder of a person."[112] It continued to set out that "[t]hese crimes are distinguished (among other requirements) by the question whether the perpetrator's interaction with the victim occurs in the conduct of hostilities, or whether the victim is in the hands (or power of) the perpetrator at the material time."[113] Nevertheless, the prosecution subsequently appears to have forgotten about these submissions and charged accused belonging to the Anti-Balaka armed group in the Central African Republic with the war crime of intentionally directing attacks against civilians, arguing in support that this was shown by murders, pillage, destruction of property, and rapes.[114]

The reason for the litigation about the meaning of "attack" as used in the war crimes of the Rome Statute and under LOAC follows from the fact that the prosecution charged an accused in the *Mali* situation, Mr. Al Mahdi, who pled guilty to having destroyed the mausoleums in Timbuktu, with the war crime of intentionally directing attacks against cultural property.[115] However, as Mr. Al Mahdi's armed group fully controlled Timbuktu at the relevant time and no fighting was taking place anymore in or near this city, he should have been charged with the war crime of destruction of property.[116]

The ICC Appeals Chamber, when asked to address the scope of the term attack and duration of "conduct of hostilities," gave an inconclusive answer, but a clear four to one majority considered that destruction of property was the more appropriate charge in such a situation.[117] Yet, the Office of the Prosecutor of the ICC has—as noted above—subsequently, again incorrectly, charged conduct that amounts to so-called "Geneva Law" violation (i.e., violations of the LOAC rules related to persons in the power of the alleged violator, mostly contained in the 1949 Geneva Conventions) as violations of the so-called "Hague Law" (i.e., violations of the LOAC rules governing the conduct of hostilities, as laid down in the 1907 Hague Regulations and

112. Prosecutor v. Ntaganda, Case No. ICC-01-04-02/06-2509, Prosecution Response to "Sentencing Appeal Brief", ¶ 65 (Apr. 14, 2020); *see id.* ¶¶ 58–64.

113. *Id.* ¶ 65. Further contradicting its submissions earlier in the case, the Prosecution continued: "Accordingly, at such point as the victim does fall into the hands of the perpetrator in this sense, the intentional infliction of violence against them is properly captured (in non-international armed conflict) by the various crimes under article 8(2)(c) of the Statute and not article 8(2)(e)(i)." *Id.*

114. *See, e.g.*, Prosecution v. Mokom, Case No. ICC-01/14-01/22, Annex A to the Prosecution's Submission of the Document Containing the Charges, ¶¶ 26, 37 (Mar. 9, 2023).

115. Mr. Al Mahdi was charged with the war crime included in article 8(2)(e)(iv).

116. *See* Rome Statute, *supra* note 11, art. 8(2)(e)(xii); William Schabas, *Al Mahdi Has Been Convicted of a Crime He Did Not Commit*, 49 CASE W. RSRV. J. INT'L L. 75, 75–102 (2017); *see also* MARCO SASSÒLI, INTERNATIONAL HUMANITARIAN LAW: RULES, CONTROVERSIES, AND SOLUTIONS TO PROBLEMS ARISING IN WARFARE 567–68 (2019) (explaining that "[a]lthough less fashionable and specific, such destruction should have been prosecuted as 'destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict' and not as 'intentionally directing attacks against buildings dedicated to religion, . . . art, . . . historic monuments, . . . provided they are not military objectives").

117. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Appeal Judgment (Mar. 30, 2021).

subsequently in Additional Protocol I).[118] Moreover, it has indicated that, "while respectful of the judicial opinions which have been rendered," it effectively will ignore the findings of the *Ntaganda* Trial Chamber and majority of judges of the Appeals Chamber, and will continue to push for its broad understanding of the term attack.[119]

As part of the proceedings before the Appeals Chamber, a former military lawyer, acting as an *amicus curiae*, explained the dangers of expanding LOAC concepts merely for the purposes of an ICL trial, noting that doing so has "deleterious consequences for the conduct of ground operations".[120] Another former military lawyer stated that "misapplication of standards to those military commanders who are charged with the important business of distinguishing between civilian objects and military objectives and protecting civilian objects under their dominion or control."[121] Indeed, the prosecution's approach to also treat the conduct referred to above as an attack under LOAC potentially renders aspects of warfare subject to targeting rules and protocols states had not intended to govern such operations. As noted by two Westpoint law professors, this "would place an extraordinary burden on military operations and not reflect battlefield realities."[122]

IV. POTENTIAL IMPACT BEYOND THE WAR IN UKRAINE

Even if any rulings on LOAC matters would formally only relate to the specific case at hand, ICL rulings are often taken on board by states and their armed forces as shown by the numerous references to ICL case law in military manuals.[123] States clearly take the rulings of international criminal courts and tribunals seriously and use them as part of the legal guidance and instruction of their armed forces. And logically so, because members of their armed forces may be prosecuted for violations of the LOAC, and for ICC

118. *Mokom*, Case No. ICC-01/14-01/22, Annex A to the Prosecution's Submission of the Document Containing the Charges, ¶¶ 26, 37.

119. *See* INT'L CRIM. CT., OFF. OF THE PROSECUTOR, POLICY ON CULTURAL HERITAGE ¶ 45 (June 2021), https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf.

120. Prosecutor v. Ntaganda, Case No. ICC-01-04-02/06, Observations of Professor Michael A. Newton on the Merits of the Legal Questions Presented by the Appeals Chamber in the Case of the Prosecutor v. Bosco Ntaganda, ¶ 2 (Sept. 17, 2020).

121. Dick Jackson, *Motive and Control in Defining Attacks*, LIEBER INST. W. POINT: ARTICLES OF WAR (Nov. 11, 2020), https://lieber.westpoint.edu/motive-control-attacks/.

122. Shane Reeves & Sean Watts, *Military Considerations and the Ntaganda "Attack" Question*, LIEBER INST. W. POINT: ARTICLES OF WAR (Nov. 24, 2020), https://lieber.westpoint.edu/military-considerations-ntaganda-attack/.

123. For example, two recently published manuals, DANISH MINISTRY OF DEFENCE & DEFENCE COMMAND DENMARK, MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCED IN INTERNATIONAL OPERATIONS (Peter Bartram & Jes Rynkeby Knudsen eds., 2016) and 4 NEW ZEALAND DEFENCE FORCE, MANUAL OF ARMED FORCES LAW: LAW OF ARMED CONFLICT (2d ed. 2017) contain, respectively, 152 and 45 references to ICTY case law.

state parties, the system of complementarity requires states to (attempt to) prosecute any wrongdoing themselves.

Given the importance ICL rulings are given, there is a significant risk that findings that unduly expand or restrict the meaning or scope of LOAC concepts obscure, rather than clarify, LOAC, including on important aspect of the regulation of the conduct of hostilities, such as what constitutes an attack. As a result, confusion may ensue for those who apply the LOAC rules in military practice.[124] Military operators, for example, may refrain from undertaking otherwise lawful actions, because they fear criminal prosecution. The applicable legal framework must be clear to enable military operators to undertake the "full spectrum of military operations in the heat of battle without the uncertainty of criminal consequences."[125] An unrealistic reinterpretation of the legal framework would put not only combatants, but also civilians at risk.[126]

Moreover, if the LOAC as applied by international criminal tribunals drifts away from the LOAC that is considered acceptable by states and their armed forces, this will lead to fragmentation. Not between different branches of international law, as discussed by the International Law Commission,[127] but fragmentation within one branch: the LOAC. If states continue to rely on the LOAC as it was agreed upon for (and laid down in) the major LOAC treaties, yet international criminal courts and tribunals continue to develop their version of the LOAC in a stricter manner, one that upsets the delicate balance between humanitarian and military considerations, the two versions will become disjointed.[128]

In light of the weight given to anything related to the war in Ukraine, and the pressure that will be placed on the prosecutors and judges to come with results, rulings coming out of this conflict may exacerbate the independent development of the two IHL versions. However, when the gap that arises between the two becomes too large, at some point, states and arms bearers will start ignoring the ICL pronouncements on the LOAC; or, at least,

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124. *See also* Agnieszka Jachec-Neale, *The Unintended Consequences of International Court Decisions*, LIBER INST. W. POINT: ARTICLES OF WAR (Nov. 19, 2020), https://lieber.westpoint.edu/unintended-consequences-international-courts-decisions/.

125. *Id.*

126. *Id.*

127. Rep. of the Study Grp. of the Int'l L. Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2012).

128. In relation to the ICC litigation on the meaning of "attack" discussed above, then U.S. Department of Defense lawyer Chris Jenks noted, for example, that "an expanded definition of attack will attenuate the meaning of the term in article 8 of the Rome Statute from the pragmatic and longstanding view of [LOAC] as reflected in state practice, [LOAC] treaties, military manuals, and operational experience. This would ultimately have the negative effect of diluting the regulatory clarity of the law." Chris Jenks, *Motive Matters: The Meaning of Attack Under IHL & the Rome Statute*, OPINIOJURIS (Oct. 26, 2020), https://opiniojuris.org/2020/10/26/motive-matters-the-meaning-of-attack-under-ihl-the-rome-statute/.

ignore the ICL-version of the LOAC for the purposes of their own application of the LOAC rules.

V. CONCLUDING REMARKS

Notwithstanding the importance of the international case law for the development of the LOAC, one has to be mindful of (unintended) effects international criminal law may have on this body of international law.[129] Those analyzing LOAC rules during criminal trials, i.e., *after the fact*, should therefore not negatively affect the protection afforded by the LOAC on the ground, i.e., *during* armed conflicts.[130] Yet, international criminal law judgments may result in interpretations that do not necessarily provide for better protection of individuals.[131]

ICL practitioners must be mindful that well-intentioned attempts to apply the protective and prohibitive LOAC rules to a broader set of scenarios, may result in permissive LOAC rules to be relied on and used in unintended situations.[132] Furthermore, those working in international criminal justice must be mindful of the rationale of the LOAC, but those applying these provisions in practice (namely during military operations) must also bear in mind that international criminal law serves a different purpose.[133] Indeed, not every pronouncement by an international criminal court or tribunal on a LOAC matter is meant to impact the law as applied on the battlefield and it is not (necessarily) meant to create a new standard for armed forces.[134]

129. *See supra* Part IV (discussing the impacts and effects outside the war on Ukraine).

130. *See supra* notes 82–83 and accompanying text (noting court decisions analyzing armed conflict laws and rules in criminal trials).

131. *See supra* Section III.A (discussing the judgments from international criminal law).

132. *See also* Jonathan Horowitz, *Laws of War: Humanitarian Stallion or Trojan Horse?*, JUST SEC. (Nov. 3, 2016), https://www.justsecurity.org/34128/laws-war-humanitarian-stallion-trojan-horse/.

133. *See supra* Section III.B (examining international criminal laws and their purpose).

134. *See supra* Part II (discussing the international criminal laws and the impact of the judgments).