# "NEITHER CRIMINAL NOR CIVIL": RUSSIAN STATE RESPONSIBILITY FOR CONDUCT OF HOSTILITIES VIOLATIONS IN UKRAINE

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ABSTRACT

*Conduct of hostilities (CoH) war crimes, such as intentionally directing attacks against civilians and civilian infrastructure, are notoriously difficult to prosecute. Due to the complexity of establishing the requisite* mens rea*, exacerbated by the requirement to assess available information* ex ante*, many violations of the CoH rules remain outside of the prosecutable gambit. Broader accountability for violations of CoH rules, such as those pervasive in Russia's invasion of Ukraine, can be achieved either through modifying the fundamental tenets of international criminal law or by enforcing state responsibility. This Article focuses on the latter and does so by building on growing scholarship criticizing the ongoing distortion of the content of underlying CoH rules by standards developed in the context of individual criminal responsibility for war crimes. Prompted by the 2022 U.N. General Assembly Resolution calling for the creation of a mechanism to determine internationally wrongful acts of Russia in Ukraine, this Article examines afresh the scope of state responsibility for violations of CoH rules in an international armed conflict. The analysis starts from a seemingly obvious yet often overlooked premise that the scope of state responsibility (which extends to all IHL transgressions) is much broader than the individual criminal responsibility which remains expressly limited only to selected, intentionally committed violations. Reading Additional Protocol I through the lenses of the Vienna Convention on the Laws of the Treaties and the Articles on State Responsibility, this contribution explicates the practical reverberations of the fact that state responsibility, unlike individual criminal liability, does not hinge on intent. It is submitted that the Rendulic Rule remains limited to criminal proceedings against individuals, and in the realm of state responsibility, the legal starting point in the determination of an internationally wrongful act stemming from the CoH violations is the presumption of civilian status. It is further contended that attacks on civilians and infrastructure normally dedicated to civilian purposes, irrespective of the acting individuals' intent or knowledge, are not in conformity with the principle of distinction, but constitute internationally wrongful acts only if the state cannot substantiate that a reasonable commander, based on the information available to them at the time, would designate the target as a military objective.*

## I. INTRODUCTION

A year into the Russian invasion of Ukraine, efforts to ensure accountability for atrocities committed by the Russian and Russian-backed forces[1] proliferate at the national, regional, and international levels.[2] While most of these efforts focus on prosecuting individuals via the international criminal law (ICL), the November 2022 United Nations General Assembly (U.N. G.A.) Resolution on "Furtherance of Remedy and Reparation for Aggression Against Ukraine" pivots on state responsibility.[3] The two core paragraphs of the Resolution recognize that:

> [T]he *Russian Federation must be held to account* for any violations of international law in or against Ukraine, including its aggression in violation of the Charter of the United Nations, as well as *any violations of international humanitarian law* and international human rights law, and that it must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts. . . .
>
> [T]he need for the establishment, in cooperation with Ukraine, of an *international mechanism for reparation for damage, loss or injury, and arising from the internationally wrongful acts of the Russian Federation* in or against Ukraine.[4]

The U.N. G.A., unlike the United Nations Security Council (U.N. S.C.), is generally considered as not having the power to create judicial or quasi-judicial bodies.[5] Rather, it can merely "recommend measures for the

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1. The requisite level of state control over the non-state armed groups' conduct required for the purposes of attracting state responsibility has been subject to much debate. For an overview, see Stefan Talmon, *The Responsibility of Outside Power for Acts of Secessionists Entities*, 58 INT'L & COMPAR. L.Q. 493, 494 (2009). Given the official integration of the militias from the Luhansk People's Republic and Donetsk People's Republic into the Russian Armed Forces on December 31, 2022, this Article will refer to the "Russian forces." Ministry of Defence (@DefenceHQ), TWITTER (Jan. 6, 2023, 12:58 AM), https://twitter.com/DefenceHQ/status/1611255888358023168?lang=en.

2. For an overview of the variety of ongoing initiatives, including the referrals to the International Criminal Court (ICC) (a commission of inquiry established by the U.N. Human Rights Council), refer to the international investigation under the Organization for Security and Co-operation in Europe and—most recently—the International Centre for the Prosecution of the Crime of Aggression. The multiplicity of accountability initiatives led to the establishment of two separate coordination groups, the Group of Friends of Accountability and the Dialogue Group on Accountability for Ukraine. *See High-Level Launch Meeting of the Group of Friends of Accountability Following the Aggression Against Ukraine*, INT'L PEACE INST. (Mar. 25, 2022), https://www.ipinst.org/2022/03/high-level-launch-meeting-of-group-of-friends-of-accountability-for-ukraine; *Minister Hoekstra Launches "Dialogue Group on Accountability for Ukraine" in Ukraine*, GOV'T OF NETH. (Mar. 3, 2023), https://www.government.nl/latest/news/2023/03/03/minister-hoekstra-launches-dialogue-group-on-accountability-for-ukraine.

3. G.A. Res. A/ES-11/L.6, 7 (Nov. 7, 2022).

4. *Id.* ¶¶ 2–3 (emphasis added).

5. Note, however, that the U.N. G.A. does have the authority to create judicial bodies for the so-called "housekeeping" purposes. On the possibility of reinterpreting the "Uniting for Peace" Resolution

peaceful adjustment of any situation which it deems likely to impair the general welfare or friendly relations among nations . . . ."[6] Should, however, the international community heed the U.N. G.A. call and establish the aforementioned mechanism (the Mechanism),[7] it will have an exceedingly rare mandate to determine state responsibility for violations of international humanitarian law (IHL).[8]

While mindful of the vast range of the IHL transgressions ostensibly committed by the Russian forces in Ukraine, this contribution zooms in on those that would be particularly difficult to prosecute effectively at the International Criminal Court (ICC),[9] and for which the Mechanism is therefore likely to be the only source of redress, namely for the conduct of hostilities (CoH) violations.[10] As such, the Mechanism and the hostilities in Ukraine are used as a platform for a reflection on the *ratione materiae* scope of state responsibility for violations of CoH rules in an international armed

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to encompass establishment of judicial bodies in general, see Olivier Corten & Vaios Koutroulis, *Tribunal for the Crime of Aggression Against Ukraine—A Legal Assessment*, EU. PARL. 1, 14–16 (Dec. 2022), https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf.

6. U.N. Charter art. 14.

7. As of mid-2023, the process is gaining momentum with the establishment of the first component of the Mechanism, the register of damage, by the Council of Europe in the Resolution CM/Res(2023)3. For more on the quest towards establishing the Mechanism, see Chiara Giorgetti & Patrick Pearsall, *A Significant New Step in the Creation of an International Compensation Mechanism for Ukraine*, JUST SEC. (July 27, 2023), https://www.justsecurity.org/87395/significant-step-in-creation-of-international-compensation-mechanism-for-ukraine/.

8. As opposed to for example the U.N. Claims Commission, which was established to determine Iraq's liability rather than responsibility and given a mandate to "process claims and pay compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait in 1990-1991," irrespective of their legality under IHL. U.N. COMP. COMM'N, https://uncc.ch/home (last visited Sept. 19, 2023); S.C. Res. 687, ¶ 16 (Apr. 3, 1991). Or, the U.N. Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory, also given a mandate "[t]o serve as a record, in documentary form, of the damage caused to all natural and legal persons concerned as a result of the construction of the [W]all by Israel . . . in the Occupied Palestinian Territory, including in and around East Jerusalem" regardless of their legality under IHL. G.A. Res. A/RES/ES-10/17, ¶ 3(a) (Dec. 15, 2006).

9. As of mid-2023, the ICC appears to be the most likely forum to adjudicate war crimes and crimes against humanity perpetrated by the Russian forces in Ukraine, with the to-be-created Special Tribunal for Ukraine jurisdiction most likely limited to the crime of aggression. *See Ukraine: International Centre for the Prosecution of Russian's Crime of Aggression Against Ukraine Starts Operations Today*, EUR. COMM'N (July 3, 2023), https://neighbourhood-enlargement.ec.europa.eu/news/ukraine-international-centre-prosecution-russias-crime-aggression-against-ukraine-starts-operations-2023-07-03_en.

10. On the difficulties of prosecuting CoH crimes, see Carolin Wuerzner, *Mission Impossible? Bringing Charges for the Crime of Attacking Civilians or Civilian Objects Before International Criminal Tribunals*, 90 INT'L REV. RED CROSS 907, 928 (2008); 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. 271, 279–82 (2013). While as of mid-2023, the unsealed arrest warrants are limited to the war crime of unlawful deportation of population, the ICC has signaled that future charges in the situation in Ukraine might include the charges of intentionally directing attacks against the civilian population. *See* Marlise Simons, *International Court to Open War Crimes Cases Against Russia, Officials Say*, N.Y. TIMES (Mar. 13, 2023), https://www.nytimes.com/2023/03/13/world/europe/icc-war-crimes-russia-ukraine.html.

conflict (IAC).[11] The goal is to draw attention to its peculiar nature, famously described by Crawford as "neither criminal nor civil,"[12] and offer preliminary thoughts on the practical consequences it might have for ensuring accountability for harm resulting from violations of the CoH rules. For reasons of scope and methodological clarity, the analysis is constrained to the blackletter treaty rules of Additional Protocol I (AP I) to the Geneva Conventions,[13] a choice facilitated by the fact that both Russia and Ukraine are parties thereto.

This Article is composed of four parts and proceeds as follows. Part II explores how IHL imposes obligations on both individuals and states, sketches the normative consequences of the duality of the applicable responsibility regimes, and briefly outlines the fundaments of the regime of state responsibility, as authoritatively codified in the Articles on the Responsibility of States for Internationally Wrongful Acts (ARS).[14] Against this backdrop, Part III peruses the CoH rules as set forth in Part IV of AP I in concert with articles 85(3) and 91 thereof through the lenses of the Vienna Convention on the Laws of Treaties (VCLT)[15] in order to demonstrate the vastly different scopes of individual and state responsibility under IHL and conceptualize the latter.[16] Part IV concludes with a brief reflection as to why the legal consequences of an internationally wrongful act of a state are particularly acute to provide reparation for the injury caused by violations of CoH rules, often characterized by a large-scale destruction of property and infrastructure.[17]

To set expectations right at the outset, a few clarifications are needed before proceeding. First and foremost, it is crucial to stress that this Article does not attempt to reinterpret either the *actus reus* or *mens rea* elements of war crimes. To the contrary, its purpose is to accentuate how the elements of internationally wrongful acts stemming from violations of CoH rules differ

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11. *Rationae persone* aspects of the issue have already been subject to ample scholarly reflection. *See* Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84 INT'L REV. RED CROSS 401, 402 (2002), https://www.icrc.org/en/doc/assets/files/other/401_434_sassoli.pdf; Kubo Mačák, *Strengthening the Rule of Law in Time of War: An IHL Perspective on the Present and Future of the Articles on State Responsibility*, EJIL: TALK! (Aug. 6, 2021), https://www.ejiltalk.org/strengthening-the-rule-of-law-in-time-of-war-an-ihl-perspective-on-the-present-and-future-of-the-articles-on-state-responsibility/.

12. James Crawford (Special Rapporteur), First Rep. on State Resp., ¶ 54(d), U.N. Doc. A/CN.4/490 (Aug. 12, 1998) ("There is little or no disagreement with the proposition that 'the law of international responsibility is neither civil nor criminal, and that it is purely and simply international.'").

13. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S 3 [hereinafter AP I]. Both Ukraine and Russia are parties to the AP I. *Id.*

14. *See* Rep. of the Int'l Law Comm'n, U.N. Doc. A/56/10, at 24–25 (2001) [hereinafter ARS Commentary].

15. Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

16. *See infra* Part III (explaining how states seek to avoid responsibility for wrongful acts).

17. *See infra* Part IV (explaining the difficulties in obtaining reparations for CoH violations).

from the elements of the so-called conduct crimes under the Rome Statute[18] and to elucidate what that practically means, especially from a procedural standpoint. Furthermore, this Article does not intend to resurrect the controversial concept of "international crimes of states,"[19] ultimately abandoned by the International Law Commission (ILC) after being debated for over two decades.[20] Nor does the following analysis engage in the already voluminous discussion on whether ICL or state responsibility is better suited to account for harm resulting from conduct incongruous with IHL;[21] it simply proceeds from the premise that the two regimes are complimentary, concurrent, and without prejudice to one another.[22]

Finally, while admittedly prompted by the U.N. G.A. call to establish the Mechanism, this contribution does not aspire to comprehensively examine the latter's purported jurisdiction. As mentioned above, the Mechanism is to have the power to determine internationally wrongful acts of Russia, resulting from "its aggression in violation of the Charter of the United Nations, as well as any violations of international humanitarian law and international human rights law."[23] Lurking behind all its decisions will therefore be paragraph 70 of the 2018 General Comment No. 36 where the Human Rights Committee (HRC) opined that "[s]tate[] parties engaged in acts of aggression as defined in international law, resulting in deprivation of

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18. Rome Statute of the Int'l Crim. Ct. art. 8(2)(b), July 17, 1998, 2187 U.N.T.S. 90.

19. For a thorough analysis of the concept, see Marina Spinedi, *International Crimes of State: The Legislative History*, *in* INTERNATIONAL CRIMES OF STATES: A CRITICAL ANALYSIS OF THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 5, 7 (Joseph H. Weiler et al. eds., 1989).

20. Interestingly, while the purported criminalization of state responsibility resulting from the distinction between international delicts and international crimes was highly contentious, widespread violation of IHL rules was virtually an unanimously accepted example of state crimes. For a reflection thereon, see Luigi Condorelli & Laurence Boisson De Chazournes, *Quelques Remarques à Propos de L'obligation des États de "Respecter et Faire Respecter" le Droit International Humani-taire en Toutes Circonstances*, *in* STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARION LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 33–34 (C. Swinarski ed., 1984).

21. Some suggest that individualization of guilt facilitates reconciliation and is more just than forms of collective responsibility to which state responsibility conceptually belongs. Marco Sassòli, *Humanitarian Law and International Criminal Law*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 113 (Antonio Cassese ed., 2009). Others counter this narrative by pointing out that criminal responsibility of individuals overlooks the systemic dimension of serious IHL violations. Frédéric Mégret, *International Criminal Justice: A Critical Research Agenda*, *in* CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION 28–30 (Christine EJ Schwöbel ed., 1st ed. 2014).

22. Responsibility of States for Internationally Wrongful Acts art. 58, U.N. Doc. A/56/49 (Dec. 12, 2001) [hereinafter ARS] (reiterating that state responsibility is "without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a [s]tate"); Rome Statute of the Int'l Crim. Ct., *supra* note 18, art. 25(4) ("No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of [s]tates under international law."). The "duality of responsibility" was acknowledged as a "constant feature of international law" in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. v Serb.), Judgment, 2007 I.C.J. 116, ¶ 173 (July 11).

23. G.A. Res. A/ES-11/L.6, ¶ 2 (Mar. 2, 2023).

life, violate *ipso facto* article 6 of the Covenant."[24] Whether or not, according to the HRC, such *ipso facto* illegality extends also to killings not prohibited by IHL remains ambiguous,[25] but the staunch criticisms paragraph 70 has received from a number of states appears to preclude the claim that it reflects customary law.[26] It is therefore highly unlikely that any UN-backed (quasi) judicial body, irrespective of its position on the relationship between IHL and international human rights law adopted,[27] would sweepingly hold that all killings in an IAC ensuing from aggression violate IHL.[28] Importantly, even if it did, it would not make the following inquiry moot, as the Mechanism would still have to determine the internationally wrongful acts stemming from unlawful attacks against the civilian objects and objects with special protection.[29] One way or another, the Mechanism would undoubtedly help develop many fields of international law, but perhaps its greatest contribution could be in the field of state responsibility arising from violations of the CoH rules, warranting the focus of the present analysis.[30]

## II. ACCOUNTABILITY FOR IHL VIOLATIONS: THE TWO AVENUES

As is widely known, some IHL violations can give rise to two distinct forms of international responsibility: the responsibility of the state party to the conflict and the international criminal responsibility of individuals.[31] Yet, despite the fact that unlawful conduct in warfare according the "normative architecture" of IHL implicates mainly the responsibility of the state parties

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24. U.N. Hum. Rts. Comm., Gen. Comment No. 36, ¶ 70 U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) [hereinafter G.C. 36] (emphasis added).

25. The HRC asserted that "[u]se of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary," which some commentators interpret, when read in concert with paragraph seventy, as suggesting that all killings in aggressive war—even those in line with IHL—should be classified as arbitrary deprivation of life. *Id.* ¶ 64, 70. For a detailed analysis, see Eliav Lieblich, *The Humanizations of Jus ad Bellum: Prospects and Perils*, 32 EUR. J. INT'L L. 579, 587–88 (2021). Similarly, see Frédéric Mégret, *What Is the Specific Evil of Aggression?*, *in* THE CRIME OF AGGRESSION: A COMMENTARY 1398, 1445 (C. Kreß & S. Barriga eds., 2016) and TOM DANNENBAUM, THE CRIME OF AGGRESSION, HUMANITY, AND THE SOLDIER 79–93 (2018).

26. For a nuanced analysis of this point, see Lieblich, *supra* note 25, at 588.

27. For the HRC's take on the issue and a succinct overview of existing approaches, see *id.* at 588–89.

28. Note that the U.N. Special Rapporteur Agnès Callamard applied the G.C. 36 reasoning to determine that the killing of General Soleimani "was an arbitrary killing for which the US [was] responsible" but refrained from taking a position on whether the strike could be seen as triggering an IAC and hence the application of IHL. Agnès Callamard (Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions), *Use of Armed Drones for Targeted Killings*, ¶ 81 U.N. Doc. A/HRC/44/38, annex (Aug. 15, 2020).

29. *See infra* Part III (detailing protections given to civilian objects during wartime).

30. *See infra* Part IV (stressing the challenges of prosecuting CoH violations as crimes).

31. Other entities which can be bound by IHL, such as organized armed groups and international organizations, and the related questions of their accountability are beyond the scope of this paper.

to the conflict,[32] modern "applied IHL"[33] has developed predominantly, if not exclusively, in the individual responsibility realm.[34] With a comprehensive examination of the manifold reasons therefore remaining beyond the scope of this Article, it suffices to highlight the overarching trend that fueled it, namely, states' propensity to create international judicial bodies with jurisdiction over individuals accompanied by a steadfast reluctance to submit themselves to any jurisdiction.[35] Such a tendency goes all the way back to the 1949 Geneva Conventions,[36] which unlike other treaties adopted around the same time, such as the 1948 Genocide Convention,[37] do not include a clause providing the International Court of Justice (ICJ) with jurisdiction over the disputes concerning the "implementation or application" of their respective provisions.[38] States are neither inclined to provide the ICJ with ad hoc jurisdiction over their *in bello* obligations,[39] nor to set up arbitration tribunals with a power to do so.

One of the rare instances of the latter, the Eritrea-Ethiopia Claims Commission (EECC),[40] demonstrates well how significantly "[t]he specific

32. Paola Gaeta & Abhimanyu George Jain, *Individualisation of IHL Rules Through Criminal Responsibility for War Crimes and Some (Un)intended Consequences*, *in* THE INDIVIDUALISATION OF WAR 1 (Dapo Akande et al. eds., 2019).

33. The terms "normative architecture" and "applied IHL" are loosely based on Michel N. Schmitt, *Normative Architecture and Applied International Humanitarian Law*, 104 INT'L REV. RED CROSS 2097 (Nov. 2022), https://international-review.icrc.org/sites/default/files/reviews-pdf/2022-11/normative-architecture-and-applied-ihl-920.pdf.

34. *See* Gaeta & Jain, *supra* note 32; Gabriella Blum, *The Individualization of War: From War to Policing in the Regulation of Armed Conflicts*, *in* LAW AND WAR 67 (Austin Sarat et al. eds., 2014).

35. Note that the various U.N.-mandated investigative mechanisms also collect and analyze evidence of atrocities for the purposes of criminal proceedings against individuals, and do not have the power to assess state responsibility. *See, e.g.*, G.A. Res. A/RES/71/248, ¶ 4 (Jan. 11, 2017) (specifying the mandate of "the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011").

36. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

37. Convention on the Prevention and Punishment of the Crime of Genocide, art. 9, Dec. 9, 1948, 78 U.N.T.S. 277.

38. On the limited role of ICJ in development of IHL, see Christopher Greenwood, *The International Court of Justice and the Development of International Humanitarian Law*, 104 INT'L REV. RED CROSS 1840 (Nov. 2022), https://international-review.icrc.org/sites/default/files/reviews-pdf/2022-11/the-international-court-of-justice-and-the-development-of-ihl-920.pdf.

39. The Statute of the International Court of Justice Article 36(2), including the so-called "Optional Clause," provides the Court with jurisdiction over contentious cases in situations when both parties make the requisite declarations under it. Statute of the International Court of Justice art. 36(2), Apr. 18, 1946, 59 Stat. 1055, 33 U.N.T.S 933. This was the jurisdictional basis of the only case in which the Court adjudicated alleged violations of conduct of hostilities rules. *See* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 6, ¶ 1 (Feb. 3, 2006).

40. Algiers Agreement, Eri.-Eth, art. 5, Dec. 12, 2000 [hereinafter EECC Statute].

requirements of criminal law in the field of war crimes have already had the effect of distorting the content of the underlying relevant rules of IHL."[41] Despite being granted the broad mandate to decide all claims "by one Government against the other" resulting from "violations of [IHL],"[42] the EECC self-curtailed its jurisdiction to "serious violations of the law by the [p]arties, which are usually illegal acts or omissions that were frequent or pervasive and consequently affected significant numbers of victims."[43] The much criticized transposition of ICL standards for war crimes and crimes against humanity into the state responsibility realm was quite simply, as Sassòli succinctly summarized, "conceptually wrong."[44]

Much ink has been spilled over the various consequences of the progressive criminalization of violations of IHL rules by the international criminal courts and tribunals.[45] Perhaps the most problematic of them is the fact that the criminalization of IHL, coupled with the virtually nonexistent system for enforcing state responsibility for IHL transgressions, seems to have created a (fallacious) normative dichotomy pursuant to which a given conduct on the battlefield either classifies as a war crime or as lawful.[46] This is off the mark. As Gaeta and Jain delineated:

> [U]nder relevant IHL treaties, state responsibility provides the *primary* consequence in case of transgressions, while the individual criminal responsibility for war crimes *supplements the former* and is only mandatory for the so-called grave breaches.[47]

Given the scarcity of the relevant practice, it is worth reiterating that irrespective of severely lacking enforcement fora, the responsibility of state

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41. Gaeta & Jain, *supra* note 32, at 13.

42. EECC Statute, *supra* note 40, art. 5(1).

43. *Id.*; Partial Award: Prisoners of War-Ethiopia's Claim 4 (Eri. v. Eth.), 26 Eri.-Eth. Claims Comm'n 73, 91–92, ¶ 54 (2003).

44. Marco Sassòli, *Some Critical Comments on the Approach of the Eritrea-Ethiopia Claims Commission Towards the Treatment of Protected Persons in International Humanitarian Law*, *in* THE 1998–2000 ERITREA-ETHIOPIA WAR AND ITS AFTERMATH IN INTERNATIONAL LEGAL PERSPECTIVE 409–24 (Andrea de Guttry et al. eds., 2021).

45. *See* Gabriela Blum, *The Shadow of Success: How International Criminal Law Has Come to Shape the Battlefield*, 100 INT'L L. STUD. 133, 175 (2023); Gaeta & Jain, *supra* note 32, at 5; 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. OF INT'L HUMANITARIAN L. 37, 61 (2019); Geoffrey S. Corn, *Regulating Hostilities in Non-International Armed Conflicts: Thoughts on Bridging the Divide Between the Tadić Aspiration and Conflict Realities*, 91 INT'L L. STUD. 281, 292 (2015).

46. Blum, *supra* note 45, at 136 ("Quietly, lawyers, courts, and commentators sometimes seem to accept, if only tacitly, that criminal wrong-doing dominates the field, that it is not only supreme but effectively exhausts the category of impermissible conduct in war."); Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT'L L. 331, 346 (2009) ("[T]he attention focused by international criminal law on individual criminal liability has the unintended consequence of reducing attention to the rest of the laws of war–the corpus of the laws of war not devoted to liability at all, let alone criminal liability for individuals.").

47. *See* Gaeta & Jain, *supra* note 32, at 2 (emphasis added).

parties to an armed conflict encompasses *all* violations of IHL "committed by persons forming part of its armed forces."[48] "[T]he general conditions under international law for the [s]tate to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom"[49] are regulated by the so called "secondary rules" of international law, authoritatively codified by the ILC in the ARS. The ARS is built on the basic principle that "[e]very internationally wrongful act of a [s]tate entails the international responsibility of that [s]tate."[50] This requires three elements to be met:

> i) a given conduct must be attributable to the state under international law,[51]
> ii) it must constitute a breach of an international obligation incumbent upon that state,[52]
> iii) the wrongfulness of the conduct cannot be precluded by any of the recognized circumstances.[53]

Importantly, ARS—unlike the Rome Statute—lays down no general rule regarding the mental state of the individuals acting in the name of state, "[e]stablishing these is a matter for the interpretation and application of the primary rules engaged in the given case."[54] To wit, whether any further elements—like fault, intent or knowledge—are required for state responsibility to arise depends exclusively on the content of the primary rule, i.e., IHL rules on CoH in the case at hand.[55] As the ARS Commentary underlines, "[i]n the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a [s]tate that matters, independently of any intention."[56] This key difference between the Rome

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48. AP I, *supra* note 13, art. 91; Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 3, Oct. 18, 1907.

49. ARS Commentary, *supra* note 14, ¶ 1, at 31.

50. ARS, *supra* note 22, art. 1.

51. Under articles 4 and 7 of the ARS, all actions and omissions by a state's organs (of which armed forces are a textbook example) undertaken in their official capacity are attributable to that state, even if they exceeded their authority or contravened instructions.

52. *Id.* art. 2.

53. *Id.* arts. 20–26.

54. ARS Commentary, *supra* note 14, ¶ 3, at 34.

55. For a general examination of the role of broadly conceived fault in international responsibility, see Andrea Gattini, *Smoking/No Smoking: Some Remarks on the Current Place of the Fault in the Draft Articles on State Responsibility*, 10 EUR. J. INT'L L. 397, 397 (1999).

56. ARS Commentary, *supra* note 14, ¶ 10, at 36; *see* JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 61–62 (CAMBRIDGE UNIV. PRESS 2013) ("Once more, it should be stressed, [s]tate responsibility is predicated on a principle of 'objective' liability, in the sense that once the breach of an obligation owed under a primary rule of international law is established, this is prima facie sufficient to engage the secondary consequences of responsibility. Unless otherwise provided, no delinquency, culpab[ility] or mens rea need be proved . . . . And this conclusion is desirable as a matter of policy, since the 'intention' underlying [s]tate conduct is a notoriously difficult idea, quite apart from questions of proof.").

Statute and state responsibility is worth keeping in mind during the examination of the AP I rules conducted in the following Part.

## III. DECIPHERING THE CONTENT OF THE COH RULES THROUGH THE PRISM OF STATE RESPONSIBILITY

Despite the growing academic scholarship on the scale of the ICL encroachment on the content of IHL, one key issue has not yet garnered sufficient attention[57] and that is whether the CoH proscriptions, as addressed to states and for the purposes of state responsibility, include a requisite mental element, and if so, what exactly is it. To cast some light on this complex problem, this Part starts with identifying the reasons for the confusion,[58] continues with casting some light on the issue using the methods of treaty interpretation,[59] and closes with flushing out the differences between the scope of obligations as incumbent on states and the conduct which constitutes CoH war crimes.[60]

### *A. The Confusion*

It is common, albeit incorrect as explained below, to look at the CoH rules as a single cluster of norms and assume that they all hinge on some mental element, even if it is rarely spelled out clearly.[61] There are two possible reasons behind such an oversight. The first constitutes yet another example of the ICL overshadowing IHL and relates to the so called "Rendulic Rule," pursuant to which the legality of the combat decisions should be assessed based on the information available at the time, not in hindsight.[62] While the principle aptly captures the battlefield reality, many seem to have forgotten that it was limited to individual criminal responsibility.[63] In fact,

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57. Among the few that hinted at the problem is Gabriella Blum. *See* Blum, *supra* note 45, at 136 ("In contrast to the oft-vague prescriptions of IHL, addressed to [s]tates and lacking any mens rea definitions, ICL offenses, for good reason, are defined specifically and narrowly to cover only particular (and particularly heinous) forms of wrongdoing by individuals.").

58. *See infra* Section III.A (discussing the confusion behind whether the CoH proscriptions contain a requisite mental element).

59. *See infra* Section III.B (examining the CoH rules in accordance with the VCLT methodology).

60. *See infra* Section III.C (clarifying what does and does not constitute an internationally wrongful act).

61. *See, e.g.*, Wolfgang Benedek et al., *Report on Violations of International Humanitarian and Human Rights Law, War Crimes, and Crimes against Humanity Committed in Ukraine Since 24 February 2022*, OSCE 25 (Apr. 13, 2023), https://www.osce.org/files/f/documents/f/a/515868.pdf ("[W]hether an attack is lawful under [IHL on the conduct of hostilities] does not depend on the results of the attack but rather on an *ex ante* evaluation by the attacking party.").

62. On the various aspects of the rule, see HONEST ERRORS? COMBAT DECISION-MAKING 75 YEARS AFTER THE HOSTAGE CASE (Nobuo Hayashi & Carola Lingaas eds., 1st ed. 2023).

63. *See generally* Mateusz Piatkowski, *The Rendelic Rule and the Law of Aerial Warfare*, 2 POLISH REV. INT'L & EUR. L. 69, 69 (2013) (explaining the history of the Rendulic Rule).

that aspect was stressed by the U.S. Military Tribunal in Nuremberg, which delivered the judgement:

> [T]he conditions as they appeared to the defendant at the time, were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, *the defendant may have erred in the exercise of his judgement but he was guilty of no criminal act*.[64]

As discussed below, the logic of *ex ante* assessment encapsulated in the Rendulic Rule has been incorporated into some CoH obligations, but given that state responsibility for CoH decisions arises independently from the criminal liability of the commanders, there is no reason to elevate it into a principle of state responsibility for violations of the conventional CoH rules in general.[65]

The second source of confusion regarding the *mens rea* standard of CoH rules stems from the internal logic of IHL. As the U.S. *Department of Defense Law of War Manual* usefully elucidates, IHL offers two types of protection: (1) "the protection from being made the object of attack" and (2) "the protection from the [disproportionate] incidental effects of an attack."[66] To distinguish from attacks incidentally affecting civilians and civilian property, attacks making them the object of attack are sometimes referred to in shorthand as "intentional attacks,"[67] but such a formulation, absent from the AP I, nonetheless, should not be taken to imply a criminal law standard of intention. While the distinction between the two types of protection is a useful one, it does not cast much light on the issue at hand, and the question of whether the given CoH rules under AP I include a mental element needs to be answered in accordance with the methodology set forth in the VCLT.[68]

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64. Nuremberg Military Tribunals, *The High Command Case*, *in* TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1, 402 (1948) (emphasis added).

65. *See infra* Section III.B (clarifying the principle reflected in some state reservations to AP I).

66. DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, ¶ 5.4.1, https://media.defense.gov/2023/Jul/31/2003271432/-1/-1/0/DOD-LAW-OF-WAR-MANUAL-JUNE-2015-UPDATED-JULY%202023.PDF (last updated July 2023), (brackets added for clarification).

67. This phrase, unfortunately, is also quite frequently used by professional actors in the field. *See, e.g.*, *The Practical Guide to Humanitarian Law: Attacks*, MEDECINS SANS FRONTIERES, https://guide-humanitarian-law.org/content/article/3/attacks/ (last visited Sept. 19, 2023) ("International humanitarian law clearly defines the persons and objects that must be protected in times of armed conflict, both international and internal. It forbids intentionally launching attacks and reprisals against them. This stems from the principle of distinction.").

68. *See* VCLT, *supra* note 15, arts. 31–33.

### *B. Reading the CoH Rules Through the Lenses of the VCLT*

The two types of protection mentioned in the preceding paragraph are known in the IHL parlance as, on the one hand, the principle of distinction (which prohibits making, *inter alia*, civilians and their property the object of attack),[69] and on the other, the proportionality rule[70] accompanied by the duty to take precautions in attack (together providing protection from [disproportionate] incidental effects of an attack).[71]

A plain reading of the obligations in the latter category leaves little doubt that compliance therewith needs to be evaluated *ex ante*, which implies that the acting individuals need to have knowledge of the relevant circumstances at the material time.[72] Indeed, the proportionality rule expressly refers to *expected* incidental harm and *anticipated* military advantage.[73] The same can be said about the obligation to take precautions in attack, limited verbatim to what is *feasible* and what *circumstances permit*, both of which can only be assessed based on the information reasonably available by those who plan or decide upon the attack.[74] Nothing in the text of either of those two provisions indicates, however, that they need to be committed intentionally; knowledge suffices.[75]

In contrast, the protection from being made the object of attack, stemming from the "cardinal"[76] principle of distinction, is construed differently, and there is nothing suggesting that it hinges on knowledge of the acting individuals, let alone their intent. To the contrary, all three methods of treaty interpretation under the VCLT (textual, contextual, and teleological)[77] support the principle's objective nature. According to the textual method, known in some common law jurisdictions as the "plain meaning rule," the plain meaning of the text ought to be the starting point of the interpretation.[78] It is worth recalling in full the "basic rule" the principle of distinction derives from:

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69. *See* AP I, *supra* note 13, arts. 48, 51, 52.

70. *Id.* arts. 51(5)(b), 57(2)(iii).

71. *Id.* arts. 57(1), 57(2)(ii).

72. *Id.* art. 57(2)(iii).

73. *Id.* arts. 51(5)(b), 57(2)(iii).

74. *Id.* art. 57; Michael N. Schmitt, *International Humanitarian Law and the Conduct of Hostilities*, *in* THE OXFORD GUIDE TO INTERNATIONAL HUMANITARIAN LAW 167–68 (Ben Saul & Dapo Akande eds., 2020) ("Feasibility is essentially a reasonableness standard that requires attackers to take those measures to avoid collateral damage that a reasonable attacker would in the same or similar circumstances, in light of the information that is 'reasonably available at the relevant time and place.'").

75. *See* AP I, *supra* note 13, arts. 51, 57.

76. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78, at 257 (July 8, 1996).

77. VCLT, *supra* note 15, art. 31(1); Tunari v. Rep. of Bol., ICSID Case No. ARB/02/03, Decision on Respondent's Objection to Jurisdiction, ¶ 91 (Oct. 21, 2005).

78. RICHARD GARDINER, TREATY INTERPRETATION 164 (Oxford Univ. Press, 2d ed. 2015).

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall *at all times distinguish* between the civilian population and combatants and between civilian objects and military objectives and accordingly *shall direct* their operations *only* against military objectives.[79]

Notably, unlike the rules regulating proportionality and precautions in attack, the Article at hand does not include qualifiers indicating that the compliance with it needs to be assessed *ex ante*. To the contrary, Part IV, Section I of AP I, including the analyzed provisions entitled "General Protection Against Effects of Hostilities" to clarify its overarching purpose, set forth two obligations incumbent on states in case of doubt: (1) with regard to all persons, the presumption of the civilian status[80] and (2) with regard to objects normally dedicated to civilian purposes, a presumption of not being used to make an effective contribution to military action.[81] The protection granted to civilians and their property is reiterated in a number of articles prohibiting making civilians "the object of attack,"[82] prescribing that "[a]ttacks shall be limited *strictly* to military objectives,"[83] and outlawing indiscriminate attacks, encompassing attacks "not directed at a specific military objective."[84]

Contextual interpretation of AP I points in the same direction. Reading the principle of distinction and its various emanations laid down throughout Part IV, Section I of AP I in concert with Part V thereof corroborates that the principle of distinction does not hinge on any mental element. Part V distinguishes between "grave breaches," the repression of which is regulated by article 85, and "regular" breaches subject to article 91.[85] Per article 85, a breach is grave, and as such entails individual criminal responsibility, if certain acts enumerated in the provision at hand[86] are "committed willfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health."[87] Furthermore, the listed acts explicitly require knowledge of the protected status in cases when no presumption exists.[88] It has been argued in scholarship, and logically so, that the explicit

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79. AP I, *supra* note 13, art. 48 (emphasis added).

80. *Id.* art. 50(1).

81. *Id.* art. 52(3).

82. *Id.* art. 51(2).

83. *Id.* art. 52(2).

84. *Id.* art. 51(4).

85. AP I, *supra* note 13, arts. 85, 91.

86. Note that the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) significantly extended the list of IHL violations giving rise to individual responsibility for war crimes, but many of the additions were not transposed into the Rome Statute of the ICC. For a discussion, see Gaeta & Jain, *supra* note 32, at 5–8.

87. AP I, *supra* note 13, art. 85(3).

88. *Compare id.* art. 41(1) (providing that "[a] person who is recognized or who, in the circumstances, should be recognized to be hors de combat shall not be made the object of attack"), *with*

addition of the *mens rea* element of willfulness and knowledge with regard to grave breaches related to the principle of distinction confirms their absence in the underlying rules as addressed to states.[89] Such an interpretation is also in line with the text of article 91 regulating state responsibility for "regular" breaches, not conditioned on any specific mental state, and simply providing that:

> A [p]arty to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.[90]

Put simply, from a procedural standpoint, directing an attack at any of the protected persons or the property normally dedicated to civilian purposes is not in conformity with the principle of distinction as incumbent upon a state whenever they are made an object of an attack, irrespective of whether or not the person launching an attack intended to do so or even knew of their protected status.[91] That does not mean, however, that all such attacks entail state responsibility since the presumption of civilian status is rebuttable, as further clarified in Section III.C.[92]

It ought to be noted, nevertheless, that an alternative position on the mental element of the principle of distinction has been advanced.[93] According to some, "the concept of *directing* attacks implies some level of *intent*;"[94] as

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*id.* art. 85(3)(e) (providing that willfully "making a person the object of attack *in the knowledge* that he is hors de combat" is a grave breach entailing individual responsibility) (emphasis added).

89. Lawrence Hill-Cawthorne, *Appealing the High Court's Judgment in the Public Law Challenge Against UK Arms Export Licenses to Saudi Arabia*, EJIL: TALK! (Nov. 29, 2018), https://www.ejiltalk.org/appealing-the-high-courts-judgment-in-the-public-law-challenge-against-uk-arms-export-licenses-to-saudi-arabia/#more-16674 ("The specific inclusion in the criminal law standard of a mens rea requirement as a supplement to the basic principle of distinction (the humanitarian law standard) confirms the absence of such a requirement in that basic principle itself.").

90. Note that the provision at hand reflects article 3 of the 1907 Hague Convention, which was subject to abundant commentary at the time, mostly due to codifying (then exceptional) objective responsibility. *See, e.g.*, Hans Kelsen, *Théorie Générale du droit International Public Problèmes Choisis*, *in* 42 COLLECTED COURSES HAGUE ACAD. OF INT'L L. (1932) ("[A]ccording to article 3 of the Hague Convention of 1907 . . . the belligerent [s]tate is obligated to pay compensation for the damage caused, even if the violation was not committed intentionally or through negligence.").

91. AP I, *supra* note 13, art. 91. For a similar conclusion, see also Tsvetelina J. van Benthem, *Exploring Changing Battlefields: Autonomous Weapons, Unintended Engagements and the Law of Armed Conflict*, 14th INT'L CONFERENCE CYBER CONFLICT 189, 196–97 (2022); T. Jančárková, G. Visky & I. Winther, *14th International Conference on Cyber Conflict: Keep Moving*, CCDCOE (2022), https://ccdcoe.org/uploads/2022/06/CyCon_2022_book.pdf.

92. *See infra* Section III.C (clarifying the scope of CoH rules).

93. Marco Milanovic & Sangeeta Shah, *Ukraine and the Netherland v. Russia re MH17, Amicus Curiae on Behalf of the Human Rights Law Centre of the University of Nottingham*, ¶ 30, at 7 (U. Nottingham, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3775402.

94. *Id.*; Marko Milanovic, *Mistakes of Fact When Using Lethal Force in International Law: Part I*, EJIL: TALK! (Jan. 14, 2020), https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-i.

purportedly manifested in some states' reservations to the AP I, often also repeated in military manuals.[95] Such a position might be viable with regards to states' customary CoH obligations, but is methodologically flawed in the realm of treaty interpretation for three intertwined reasons. First, a special meaning is given to a treaty term only if it established that the parties intended to do so,[96] and given the absence of a special definition given to the verb "direct," it shall be understood in accordance with its ordinary meaning, that is a physical act of "aiming something in a particular direction or at a particular person."[97] Second, "[t]he reservation does not modify the provisions of the treaty for the other parties to the treaty inter se,"[98] and as neither Ukraine nor Russia attached a reservation regarding the CoH rules, there are no grounds to alter their meaning as applicable to either of those two states.[99] Finally, subsequent practice in the application of the treaty—which state military manuals could be conceptualized as—can only be taken into account when it establishes the agreement among all parties to a given treaty;[100] no such agreement exists among state parties to AP I.

### *C. Clarifications and Comparisons*

An important clarification needs to be made here—none of the above should be taken to imply that all attacks at civilians and the property normally dedicated to civilian purposes constitute an internationally wrongful act giving rise to state responsibility.[101] A couple of elucidations on the scope of what is wrongful are required.

First, as mentioned in Part II, a breach of an international obligation incumbent upon a state constitutes an internationally wrongful act only if its

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95. Milanovic & Shah, *supra* note 93, at 8 n.51.

96. VCLT, *supra* note 15, art. 31(4).

97. *See Direct*, NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005). The interchangeable use of "direct" and "make the object of attack" supports reading both as referring to the physical action of aiming at.

98. VCLT, *supra* note 15, art. 21(2).

99. Out of 177 state parties to AP I, only thirteen submitted reservations relating to Part IV, Section I. Out of those, only Canada altered the meaning of article 48 to be assessed based on information available *ex ante*. Some (e.g., Germany) refined the text of Part IV, Section I "in the application . . . to military commanders." Australia, Ireland, Italy, the Netherlands, New Zealand, and Spain conditioned compliance with the principle of distinction, as scattered throughout articles 51–58 with *ex ante* assessment. For more, see Julie Gaudreau, *The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims*, 849 INT'L REV. RED CROSS 143, 143–84 (2003).

100. Under articles 31 and 32 of the Vienna Convention, it is only the practice "in the application of the treaty which establishes the agreement of the parties regarding its interpretation" that constitutes an authentic means of interpretation. It is the position of the ILC that the references to the agreement of "the parties" in article 31(3) suggest the agreement must be reached among all the parties to the treaty. See more in Rep. of the Int'l L. Comm'n, at 28, ¶ 4, U.N. Doc. A/73/10 (2018).

101. *See supra* Part II (describing the three elements that must be met for an attack to be an intentionally wrongful act necessitating state responsibility).

wrongfulness is not precluded.[102] ARS sets out six general circumstances precluding wrongfulness,[103] one of which—force majeure—requires a mention in the context at hand. Force majeure, understood in the regime of state responsibility as "the occurrence of an irresistible force or of an unforeseen event, beyond the control of the [s]tate, making it materially impossible in the circumstances to perform the obligation"[104] would preclude the wrongfulness of inadvertently initiated uses of force, such as accidents resulting from a weather condition or weapon malfunction.[105]

Aside from the general circumstances precluding wrongfulness under the secondary rules of state responsibility, ARS explicitly recognizes that additional ones can derive from special rules of international law.[106] In the context of the CoH rules of IHL, a successful rebuttal of the presumption of civilian status can be conceptualized as such a special circumstance.[107] To wit, an attack at civilians, irrespective of the acting individuals' intent or knowledge, is not in conformity with the principle of distinction, but it constitutes an internationally wrongful act only if the state cannot substantiate that a reasonable commander based on the information available to them at the time would designate the target as a military objective.[108]

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102. ARS Commentary, *supra* note 14, ¶ 1, at 71 ("The existence in a given case of a circumstance precluding wrongfulness in accordance with this chapter . . . provides a shield against an otherwise well-founded claim for the breach of an international obligation."). Note article 26 clarifies that circumstances precluding wrongfulness do not justify non-compliance with a peremptory norm of general international law, but the rules governing distinction under AP I and articles. 48 and 51(2) cannot be classified as such in light of the exception explicitly provided for in article 51(3).

103. These are consent, self-defense, countermeasures, force majeure, distress, and necessity. ARS, *supra* note 22, arts. 20–25.

104. *Id.* art. 23.

105. While the exact scope of force majeure remains elusive, weather conditions and natural disasters are accepted as falling within its scope. *See* ARS Commentary, *supra* note 14, ¶¶ 3, 5, at 76–77. Recently, force majeure was invoked by China to justify the entry of a Chinese unmanned airship into the U.S. airspace. *See* Zheng Zeguang, *Foreign Ministry Spokesperson's Remarks on the Unintended Entry of a Chinese Unmanned Airship into U.S. Airspace Due to Force Majeure III*, EMBASSY OF THE PEOPLE'S CHINA IN THE U.K. OF GR. BRIT. & N. IR. (Feb. 16, 2023), http://gb.china-embassy.gov.cn/eng/PressandMedia/Spokepersons/202302/t20230216_11025566.htm.

106. ARS, *supra* note 22, art. 55.

107. The presumption of civilian status, albeit on the basis of customary rather than treaty law, has recently been subject to extensive commentary due to the 2023 DoD Manual Revision which recognized the customary status of the principle. *See* Caroline Krass, *Department of Defense Issues Update to DoD Law of War Manual on Presumption of Civilian Status and Feasible Precautions to Verify Military Objectives*, LIEBER INST. W. POINT: ARTICLES OF WAR (July 31, 2023), https://lieber.westpoint.edu/department-of-defense-update-law-of-war-manual/. Also, in the context of a state rebutting the customary presumption of one's civilian status, see HCJ 769/02 Public Committee Against Torture v. Government, 2 IsrLR 459, 501 (2006) (Isr.) ("The burden of proof on the attacking army is heavy.").

108. Similar logic was the basis of the decision rendered by the District Court of The Hague, 23 November 2022, ECLI:NL:RBDHA:2022:12424 Chora Claimants v. the Netherlands (Neth.). The case concerned the responsibility of the Netherlands for a breach of the principle of distinction under the Dutch tort law. The Court found the state to be in violation of the principle of distinction due to the Dutch Armed Forces' failure to rebut the presumption of the civilian status of the target. In an *obiter dictum*, the court emphasized that it refrained from determining whether the bombing was a war crime and limited its findings to a breach of the state's obligations under IHL. Importantly, the Netherlands chose not to appeal

This is an important junction on the analysis. As opposed to the ICL, built on the general presumption of innocence (further secured by the Rendulic Rule in the realm of CoH war crimes), the legal starting point of state responsibility for CoH violations is the presumption of civilian status.[109] Practically, that means that in cases of attacks against civilians and the property normally dedicated to civilian purposes, the act is presumed to be wrongful until the state whose forces launched an attack rebuts it.[110] Putting the onus on the attacking state seems not only correct from a procedural perspective[111] but also particularly apt in the circumstances at hand, given that "only that [s]tate is fully aware of the facts which might excuse its non-performance."[112]

It is further worth it to briefly flesh out the vastly different scopes of state responsibility for CoH violations and individual responsibility for CoH war crimes under the Rome Statute. First and foremost, not all CoH prohibitions and obligations incumbent upon states have their counterparts in the Rome Statute. Perhaps the most ostensive example thereof would be the failure to take all feasible precautions in attack, which has not been designated as a war crime under the Rome Statute or even a grave breach under the AP I, and as such may on the international plane, give rise only to state responsibility.[113]

Second, under the Rome Statute,[114] all CoH war crimes require "both intent (to engage in the relevant conduct) and knowledge (of consequences or circumstances)."[115] In the realm of state responsibility, the mental element of an internationally wrongful act stemming from violations of CoH rules is much more lenient, if required at all.[116] While intent is not a requisite element of any CoH obligations incumbent on states, the duty to take feasible

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the decision. For more on the case and the judgment, see Marten Zwanenburg, *Dutch Judgment on IHL Compliance in Chora District, Afghanistan*, LIEBER INST. W. POINT: ARTICLES OF WAR (Dec. 19, 2022), https://lieber.westpoint.edu/dutch-judgment-ihl-compliance-chora-district-afghanistan/; *see also* Marieke de Hoon, *Dutch Court, Applying IHL, Delivers Civil Judgment for Victims of 2007 Afghanistan Attack*, JUST SEC. (Feb. 27, 2023), https://www.justsecurity.org/85223/dutch-court-applying-ihl-delivers-civil-judgment-for-victims-of-2007-afghanistan-attack/.

109. AP I, *supra* note 13, arts. 50(1), 52(3).

110. On the differences and clash between the IHL presumption of civilian status and the ICL presumption of innocence, see Bartels, *supra* note 10, at 278–79.

111. Note that generally, in judicial proceeding the onus of proving an exception generally lies on the party relying thereon.

112. ARS Commentary, *supra* note 14, ¶ 8, at 72.

113. Albeit states are free to criminalize and domestically prosecute a much broader range of violations than those classified as grave breaches under IHL, so criminal accountability may be provided at the domestic level.

114. Rome Statute of the Int'l Crim. Ct., *supra* note 18, art. 30.

115. Donald K. Pigaroff & Darryl Robinson, *Article 30: Mental Element*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 337–38, 1117 (Otto Triffterer et al. eds., 3d ed. 2016).

116. *See supra* Section III.B (discussing the mental element regarding two specific CoH rules).

precautions in attack and the proportionality rule do hinge on the *ex ante* knowledge of the individuals acting in the name of the state.[117]

It is nonetheless the principle of distinction that best accentuates how much broader state responsibility is from the individual criminal one in the context of CoH.[118] As opposed to the war crimes of intentionally directing attacks against the civilian population[119] or civilian objects,[120] an internationally wrongful act of violating the principle of distinction requires mere proof that civilians or objects normally dedicated to civilian purposes were made the object of the attack by a person whose conduct is attributable to the state.[121] A state seeking to avoid its responsibility might however preclude the wrongfulness of its actions by providing sufficient data on the basis of which a reasonable commander would determine the target as a military objective.

Putting the onus of demonstrating that the target could have been reasonably perceived as a legitimate military objective on the state seeking to avoid its responsibility, instead of requiring the injured party to prove that it could not have been (as it is required under the ICL),[122] would make possibly the most consequential difference between the two regimes. It may also very well be the reason why state responsibility is the optimal avenue for providing broader accountability for violations of CoH rules.

## IV. CONCLUSIONS

Despite often legitimate criticism over the selectivity of international law, the 2022 Russian invasion of Ukraine and the ensuing international armed conflict renewed the international community's interest in accountability.[123] Among many atrocities committed by the Russian forces in Ukraine, the bombardment of cities and their inhabitants, often with a complex compound of weapons,[124] including Russia's newest hypersonic missiles, has been seen as "a defining feature" of the conflict.[125] CoH war crimes are always difficult to prosecute, but it is safe to assume that the widespread, grass roots nature of the Ukrainian defense efforts encompassing civilians undertaking actions that could be construed as direct participation

117. *See supra* Section III.B (articulating the knowledge requirement for two CoH rules).

118. *See supra* Section III.B (examining the mental-state requirement of the principle of distinction).

119. Rome Statute of the Int'l Crim. Ct., *supra* note 18, art. 8(b)(i).

120. *Id.* art. 8(b)(ii).

121. ARS, *supra* note 22, art. 2.

122. Rome Statute of the Int'l Crim. Ct., *supra* note 18, art. 66, 67(1)(i).

123. Patryk I. Labuda, *Beyond Rhetoric: Interrogating the Eurocentric Critique of International Criminal Law's Selectivity in the Wake of the 2022 Ukraine Invasion*, LEIDEN J. INT'L L. 1–22 (2023).

124. *War in Ukraine: Russia Uses Hypersonic Missiles in Broad Strike on Ukraine*, N.Y. TIMES (Mar. 10, 2023), https://www.nytimes.com/live/2023/03/09/world/russia-ukraine-news.

125. Brian Finucane, *The Prohibition on Indiscriminate Attacks: The U.S. Position vs. the DoD Law of War Manual*, JUST SEC. (May 3, 2022), https://www.justsecurity.org/81351/the-prohibition-on-indiscriminate-attacks-the-us-position-vs-the-dod-law-of-war-manual/.

in hostilities, would make a conviction at the ICC for directing attacks against civilians and civilian objects particularly cumbersome.[126] Notably, while the court may order convicted persons to pay "appropriate" and "adequate" reparations to the victims of their crimes,[127] in practice, most of the persons standing trial at the international level are found indigent by the end of the process. The reparations, if any, are often paid by the Trust Fund for Victims, consisting of voluntary state contributions.[128] The situation is very different in the realm of state responsibility where providing "full reparation for the injury caused" is the key element of the regime,[129] making it an optimal avenue to account for violations of CoH rules.

These are not merely theoretical considerations. Russian forces' flagrant disregard of their IHL obligations during the hostilities in Ukraine have resulted in a large-scale destruction of property and infrastructure, and immense resources will be needed to "wipe out all the[ir] consequences."[130] Luckily, Russian assets abroad are equally large.[131] And, while debates over the legality of seizing them continue, many arguments questioning it will become moot when the Mechanism renders its awards, allowing states to rely on countermeasures to induce compliance therewith.[132] One way or another, the Mechanism's elucidation on the scope of state responsibility for CoH violations—encompassing much more than war crimes, as this Article has demonstrated—would be a very welcome corollary of the "Ukrainian moment" of (post) wartime international accountability.

126. Michael N. Schmitt & William Casey Biggerstaff, *Ukraine Symposium–Are Civilians Reporting with Cell Phones Directly Participating in Hostilities?*, LIEBER INST. W. POINT: ARTICLES OF WAR (Nov. 2, 2022), https://lieber.westpoint.edu/civilians-reporting-cell-phones-direct-participation-hostilities/.

127. Rome Statute of the Int'l Crim. Ct., *supra* note 18, art. 75; Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Order for Reparations, ¶ 44 (Mar. 3, 2015).

128. *See* Rome Statute of the Int'l Crim. Ct., *supra* note 18, art. 79.

129. ARS, *supra* note 22, art. 31.

130. *See* Factory at Chorzów, Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 29, 47 (Sept. 13).

131. Daniel Franchini, *Ukraine Symposium–Seizure of Russian State Assets: State Immunity and Countermeasures*, LIEBER INST. W. POINT: ARTICLES OF WAR (Mar. 8, 2023), https://lieber.westpoint.edu/seizure-russian-state-assets-state-immunity-countermeasures/.

132. *See id.*