

CONTORTING COMMON ARTICLE 3: REFLECTIONS ON THE REVISED ICRC COMMENTARY

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The International Committee of the Red Cross (ICRC) Revised Commentary on the First Geneva Convention issued in 2016 advances an understanding of Common Article 3 that is supported neither by its plain text nor its negotiating history. The ICRC Revised Commentary posits as an unquestioned aspect of *lex lata* that Common Article 3 encompasses crimes committed during non-international armed conflicts between members of the same fighting force. This extension represents a laudable humanitarian impulse, yet it appears for the first time in the Revised Commentary as a self-standing truism without regard to its potentially lamentable larger effects. The ICRC also embraces without caveat what appears to be an unseemly symbiosis with ongoing litigation in the International Criminal Court (ICC) case *Prosecutor v. Bosco Ntaganda*.

This short Essay describes the circularity of support between the ICRC and the Chambers of the ICC. Its successive sections describe the problematic potential of extending the substantive coverage of Common Article 3 to encompass members of the same armed group who commit criminal acts against one another.¹ In particular, the Revised Commentary fails to address the due process ramifications of an enlarged Common Article 3, even as the development of the text documented by the readily available negotiating record warrants an alternative understanding. Lastly, the ICRC position could indicate a radical shift in the very design of the field of international humanitarian law.² This Essay closes by restating the

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¹ The ICC Statute largely replicates the text of Common Article 3 in Article 8(2)(c). The slight differences between the texts are the result of stylistic changes but the substantive protections afforded are identical. The Rome Statute of the International Criminal Court, art. 8(2)(c), July 17, 1998, U.N. Doc. A/Conf.183/9 [hereinafter Rome Statute].

² The classic concept of “the law of war” has shifted over time and in the modern usage the terms “law of armed conflict” and “international humanitarian law” and “the laws and customs of war” are now used interchangeably. Jean-Marie Henckaerts, *Concurrent Application: A Victim Perspective*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 237, 242 (Roberta Arnold & Noëlle Quénivet eds., 2008).

imperative balance between military pragmatism and humanitarian imperatives that is preserved by the careful blending of values within the laws and customs of warfare. While wholly appealing on humanitarian grounds, particularly on the facts presented in *Ntaganda*, the reconceived approach to Common Article 3 may well endanger the larger structure of international humanitarian law. The Revised ICRC Commentary omits any mention of these competing concerns.

Common Article 3 represents by all accounts one of the “most important Articles” of the 1949 Geneva Conventions.³ As such, it figures prominently in the modern jurisprudence.⁴ The ICRC Commentary of 2016 explains and strengthens the extant jurisprudential basis for applying Common Article 3 in admirable ways. The Revised ICRC Commentary does great service to the profession and public by providing a tour de force of the structure and law behind Common Article 3 as it has evolved since the 1952 publication of the classic Pictet Commentaries (also issued under ICRC auspices).⁵ In modern operations, the mandate for humane treatment to all persons is unquestionably established as one of the most important legal tenets restraining unfettered military discretion. The principle of humane treatment without adverse distinction is explicit on the face of Common Article 3 *vis-à-vis* civilians and persons who are not participating in the conflict, but flows through other norms to require fighters to “refrain from cruelties and perfidious acts also against fighters” during all armed conflicts.⁶

³ INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 38 (Jean S. Pictet ed., 1952) [hereinafter Pictet Commentary on Common Article 3], <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1919123E0D121FEFC12563CD0041FC08>.

⁴ See, e.g., Prosecutor v. Blaškić, Case No. IT-95-14-T, Trial Judgement, ¶ 166 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), <http://icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf> (“Common Article 3 must be considered as a rule of customary international law.”); Prosecutor v. Kunarac, Kovac & Vukovic, Case Nos. IT-96-23, IT-96-23/1-A, Appeals Judgement, ¶ 49-70 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002) (extending the coverage of Common Article 3 to include rapes committed during armed conflict not of an international character and rejecting arguments that Common Article 3 is limited to the protection of property and the proper use of permitted weapons).

⁵ The Pictet Commentaries were based “primarily on the negotiating history of the respective treaties, as observed firsthand by the authors, and on prior practice, especially that of World War II. They contain important institutional and historical knowledge and, in this respect, retain their value.” Lindsey Cameron et al., *The Updated Commentary on the First Geneva Convention – a New Tool for Generating Respect for International Humanitarian Law*, 97 INT. REV. RED CROSS 1209, 1214 (2015).

⁶ Dieter Fleck, *The Law of Non-international Armed Conflict*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 592, ¶ 1203(4) (Dieter Fleck et al. eds., 3d ed. 2013). See also 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, June 8, 1977,

Nevertheless, the normative structure of *jus in bello* exists to empower those in the vortex of armed conflicts to balance legitimate military needs whilst simultaneously achieving larger humanitarian imperatives. In the memorable framing of Yoram Dinstein, “every single norm” within the laws and customs of armed conflict operates as “a parallelogram of forces; it confronts an inveterate tension between the demands of military necessity and humanitarian considerations, working out a compromise formula.”⁷

The Revised ICRC policy position extending⁸ the application of Common Article 3 to intra-party offenses committed by participants in the conflict contorts its meaning and clouds the larger normative framework of the *jus in bello*. To be clear, the ICRC Commentary asserts without support that normal domestic criminal law may be bypassed in favor of prosecution based on Common Article 3 during an armed conflict not of an international character when conduct proscribed by its substantive provisions has been committed by members of an armed group against victims fighting in the same military or para-military organization. No examples of state practice or jurisprudence support the ICRC assertion that the humanitarian protections embedded in Common Article 3 may be extended to such intra-force offenses. The ICRC simply cites to the ICC Prosecutor’s position in charging Bosco Ntaganda as evidence that such an extension is warranted.⁹

Reliance on the ICC charging documents by the ICRC represents an aspirational statement of *lex ferenda* because it is divorced from tenets of established law and state practice. In fact, the ICC Prosecutor pointedly went out of her way during her public press conference in the case of *Prosecutor v. Bosco Ntaganda* to express her pride that the theory of the case by which the law of war encompasses “crimes committed against his own group” represents “an innovation that the Office of the Prosecutor will be

1125 U.N.T.S. 3 (entered into force 7 December 1978), 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; 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. 4, June 8, 1977, 1125 U.N.T.S. 609 (entered into force 7 December 1978), 16 I.L.M. 1442 (1977).

⁷ YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 5 (2d ed. 2010) (Professor Dinstein concludes the thought by noting that “it can be categorically stated that no part of” the laws and customs of warfare “overlooks military requirements, just as no part of [the law] loses sight of humanitarian considerations”).

⁸ Lindsey Cameron et al., *Common Article 3: Conflicts not of an International Character*, in INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD ¶¶ 546–547 (Jean Marie Henckaerts et al., 2d. ed. 2016) [hereinafter Revised Commentary on Common Article 3], <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6C DFA490736C1C1257F7D004BA0EC>.

⁹ Revised Commentary on Common Article 3, *supra* note 8, at n.293.

bringing to international criminal justice.”¹⁰ Until *Ntaganda*, the premise that “the laws of war applicable in internal armed conflicts bind members of armed forces and armed groups *vis-à-vis* their opponents who share the same nationality” was unchallenged in academia or extant case law.¹¹ Indeed, the ICRC website summarizes Common Article 3 by noting that it “requires humane treatment for all persons in enemy hands,” because the text functions like “a mini-Convention within the Conventions as it contains the essential rules of the Geneva Conventions in a condensed format and makes them applicable to conflicts not of an international character.”¹²

The text of the Revised 2016 Commentary does embed an odd duality in that it also reflects the conventional understanding of Common Article 3 by noting that non-state participants in conflicts “may be prosecuted under domestic law for their participation in hostilities, including for acts that are not unlawful under humanitarian law” articles of the Conventions.¹³ As any modern practitioner recognizes, the full range of applicable human rights treaties also protects various dimensions of humane treatment and remains fully binding during non-international armed conflicts.¹⁴ This in turn means that differing bodies of law, along with differing judicial enforcement mechanisms, operate alongside each other to provide remedies for impermissible inhumane treatment during armed conflicts.¹⁵

The universal practice since 1949 has been to treat participants in an armed conflict of a non-international character as remaining fully subject to the domestic criminal laws applicable either to their national jurisdictions or the state that would normally exercise territorially based criminal jurisdiction. In other words, the conventional and long-established framing is that Common Article 3 instantiates fundamental humanitarian protections to a defined set of victims caught in the midst of armed conflicts. The text plainly states that Common Article 3 prohibits acts “committed against persons taking no active part in the hostilities.”¹⁶ It predates the development of human rights treaties, and is best understood in the modern era as a supplementary gap-filler that creates a seamless web of basic rights

¹⁰ Fatou Bensouda, *Ntaganda* Case Press conference of 1 Sept. 2015, min. 33:38 to 34:07, <https://www.youtube.com/watch?v=gOgZc-IgDIA>.

¹¹ EVE LA HAYE, *WAR CRIMES IN INTERNAL ARMED CONFLICTS* 119 (2008).

¹² *The Geneva Conventions of 1949 and Their Additional Protocols*, INT’L COMM. OF THE RED CROSS (Jan. 1, 2014), <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols>.

¹³ Revised Commentary on Common Article 3, *supra* note 8, ¶ 531.

¹⁴ *See, e.g.*, DARAGH MURRAY, *PRACTITIONER’S GUIDE TO HUMAN RIGHTS LAW IN ARMED CONFLICT* (2016); GERD OBERLEITNER, *HUMAN RIGHTS IN ARMED CONFLICT: LAW, PRACTICE, POLICY* (2015).

¹⁵ *Id.* ¶¶ 1.04–1.86.

¹⁶ Rome Statute, *supra* note 1, art. 8(2)(c).

applicable to all armed conflicts. The core substantive protections that flow in the original text of the Geneva Conventions modify the concept of “persons taking no active part in hostilities” by referring to crimes committed “with respect to *the above-mentioned persons*.”¹⁷ Thus, the concept of protecting persons “taking no active part in the hostilities” is the load-bearing pillar from which the humanitarian protections of Common Article 3 flow.

Despite this textual clarity, the Revised ICRC Commentary embarks upon an unsupported teleological theory to innovate a broader scope of Common Article 3. Relying solely on the Prosecutor’s position in the charges filed in *Ntaganda*, the Revised Commentary posits without caveat that “armed forces of a Party to the conflict benefit from the application of common Article 3 by their own Party.”¹⁸ It accordingly concludes that “[t]he fact that the trial is undertaken or the abuse committed by their own Party should not be a ground to deny such persons the protection of common Article 3.”¹⁹ As a textual matter, this ICRC framing misstates the central dimension of Common Article 3, which is to provide core protections to civilians, persons rendered *hors de combat* for any reason, and all others “taking no active part in hostilities.”²⁰ The only purported justification for this dramatic reformulation of Common Article 3 is the premise that distinguishing between civilians and active participants in an armed conflict not of an international character is complicated due to shared nationality of all participants. Hence, the text posits as a self-standing justification that “[l]imiting protection under common Article 3 to persons affiliated or perceived to be affiliated with the opposing Party is therefore difficult to reconcile with the protective purpose of common Article 3.”²¹

The mutually reinforcing analysis between the ICRC and the ongoing litigation is clear upon closer examination. In filings that predated the release of the ICRC Commentary, the ICC Office of the Prosecutor argued in *Ntaganda* that the charges against an alleged perpetrator²² for the rape of

¹⁷ Pictet Commentary on Common Article 3, *supra* note 3 (emphasis added).

¹⁸ Revised Commentary on Common Article 3, *supra* note 8, ¶ 547.

¹⁹ *Id.*

²⁰ M. Gandhi, *Common Article 3 of Geneva Conventions, 1949 in Era of International Criminal Tribunals*, ISIL YEARBOOK OF INT’L AND REFUGEE LAWS.

²¹ Revised Commentary on Common Article 3, *supra* note 8, ¶ 546.

²² There was extensive debate during the drafting of the Elements of Crimes for the International Criminal Court over the relative merits of the terms “perpetrator” or “accused.” Though some delegations were concerned that the term “perpetrator” would undermine the presumption of innocence, the delegates to the Preparatory Commission (PrepCom) ultimately agreed to use it in the Elements after including a comment in the introductory chapeau that “the term ‘perpetrator’ is neutral as to guilt or innocence.” See Rep. of the Prep. Comm’n for the Int’l Crim. Court, U.N. Doc. PCNICC/2000/INF/3/Add.2 (Nov. 2, 2000), in KNÜT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 14 (2002).

child soldiers and the war crimes of sexual slavery against those same persons refers to “children under the age of 15 years of age *who were members of the UPC/FPLC* [using the titles of the insurgent non-state actor forces]” were warranted under Common Article 3.²³ The ICC Prosecutor amended the original charges against Ntaganda to include violations of Article 8(2)(e)(vi) on the basis of rape and sexual slavery committed within the rebel force against conscripted child soldiers within that force.²⁴ On its face, Article 8(2)(e)(vi) criminalizes a variety of *acti rei* that encompass a wide range of sexual violence “also constituting a serious violation of article 3 common to the four Geneva Conventions.”²⁵ Pre-Trial Chamber II confirmed those charges by reasoning that because the Rome Statute specifically criminalizes conscription or recruitment of child soldiers,

the mere membership of children under the age of 15 years in an armed group cannot be considered as determinative proof of direct/active participation in hostilities, considering that their presence in the armed group is specifically proscribed under international law in the first place. Indeed, to hold that children under the age of 15 years lose the protection afforded to them by IHL merely by joining an armed group, whether as a result of coercion or other circumstances, would contradict the very rationale underlying the protection afforded to such children against recruitment and use in hostilities.²⁶

Reflecting this stance, the drafters of the Revised ICRC Commentary subsequently cited the Prosecutor’s position and provided only the oft-cited pablum from the *Nicaragua* case in the International Court of Justice that Common Article 3 provides protections of such fundamental character that they reflect the “minimum yardstick” of treatment applicable in all armed conflicts.²⁷ Common Article 3 on its face reflects basic considerations of humanity, which is reflected by the extension of protections to “*any* time and

²³ Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-804, Prosecution Response to the “Application on behalf of Mr. Ntaganda challenging the jurisdiction of the Court in response to Counts 6 and 9 of the Document Containing the Charges, ¶ 6 (Sept. 11, 2015) (emphasis added), <https://www.icc-cpi.int/pages/record.aspx?docNo=icc-01/04-02/06-818>.

²⁴ *Id.* at Pre-Trial Chamber II, Decision on the Prosecutor’s Application under Article 58, ¶ 44 (July 13, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_07506.PDF.

²⁵ Rome Statute, *supra* note 1, art. 8(2)(e)(vi).

²⁶ Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-804, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ¶ 78 (June 9, 2014), <https://www.icc-cpi.int/courtrecords/cr2012.07506.pdf> [hereinafter Ntaganda Confirmation of Charges Decision].

²⁷ Revised Commentary on Common Article 3, *supra* note 8, ¶ 356.

in *any* place whatsoever.”²⁸ For a provision seeking to maximize respect for human dignity and the fundamental human rights of persons adversely affected by armed conflicts not of an international character, this breadth is both logical and wholly legitimate.

The International Court of Justice and other tribunals have been clear in the decades since the 1949 adoption of Common Article 3 that its character and coverage are fundamental in terms of providing a baseline of humanitarian protection. Extending this tenet, Trial Chamber VI opined that prohibitions on rape represent *jus cogens* norms, which necessarily implies that such conduct is “prohibited at all times, both in times of peace and during armed conflicts, and against all persons, irrespective of any legal status.”²⁹ That conclusion is inarguable on its face, but the very fact that such conduct is criminally proscribed is quite a different question from a precise assessment of the circumstances and persons that benefit from the admittedly fundamental protections of Common Article 3. In its authoritative Revised Commentary, the ICRC provided no intellectual buttressing for the novel proposition that Common Article 3 extends to intra-force offenses, notwithstanding the fact that no international or domestic tribunal or court has so opined in the sixty-seven-year history of the 1949 Geneva Conventions.

The ICRC simply relied upon the Prosecutor’s framing of that “innovation” in *Ntaganda*, along with the implicit inference that the extension of humanitarian protections warranted the use of the laws of war rather than any other normally applicable provisions of domestic criminal law. It is telling to close readers that there is no justification provided by the ICRC drafters for such an expansion of Article 3. Simultaneous rumors in The Hague at the time of this writing of deliberate coordination between the ICC Office of the Prosecutor and the ICRC do little to disquiet the sense that there is something untoward in this unilateral extension of previously accepted understandings. In fact, following the release of the Revised ICRC Commentary, Trial Chamber VI denied renewed jurisdictional challenges raised by the defense by relying in part on the observation that the ICRC perspective is “noteworthy” and “consistent with humanitarian principles” that are integral to the law of armed conflict.³⁰

The circularity of sources is striking in that the ICRC relied upon the filings of the ICC Prosecutor as its primary source of authority, and the ICC

²⁸ Military and Paramilitary Activities in and against Nicaragua, *Nicaragua v. United States*, Merits, Judgement 1986, I.C.J. Rep. 14 ¶¶ 218–219.

²⁹ Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06-804, Trial Chamber VI, Second Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ¶ 52 (Jan. 4, 2017), https://www.icc-cpi-int/CourtRecords/CR2017_00011.

³⁰ *Id.* ¶ 51.

Trial Chamber in turn relied upon the purportedly authoritative ICRC position as the capstone of its legal analysis. In filing its revised charging document for a warrant of arrest of Bosco Ntaganda, the OTP relied upon the provisions of Article 8(2)(e) rather than Common Article 3 (Article 8(2)(c)) in charging the sexual offenses committed intra-force against the conscripted child soldiers.³¹ The Pre-Trial Chamber referenced broader prohibitions found in other parts of international humanitarian law such as Protocol II³² and injected Common Article 3 into its analysis by hypothesizing that the “sexual character of these crimes, which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time.”³³

However, Pre-Trial Chamber II implicitly rejected any presumption that Common Article 3 provides sufficient stand-alone authority to sustain intra-force offenses. The operative paragraph of the *Ntaganda* Confirmation of Charges expressly states that

the Chamber finds that UPC/FPLC child soldiers under the age of 15 years continue to enjoy protection under IHL from acts of rape and sexual slavery, as reflected in article 8(2)(e)(vi) of the Statute. The Chamber is, therefore, not barred from exercising jurisdiction over the crimes in counts 6 and 9.³⁴

Despite the fact that the ICC jurisdiction was explicitly grounded in other provisions applicable to armed conflicts not of an international character, the Revised ICRC Commentary subsequently relied upon *Ntaganda* as the only referenced authority for expanding the normative scope of Common Article 3. In its early 2017 ruling on a second challenge to ICC jurisdiction, Trial Chamber VI buttressed its own analysis by relying on the ICRC position to conclude that “persons alleged to have been ‘child soldiers’ . . . are to be considered as ‘members’ of this armed force at the relevant time.”³⁵ Its penultimate conclusion that “members of the same armed force are not *per se* excluded as potential victims of war crimes of rape and sexual slavery” is based on the broader protections applicable in non-international armed conflicts as well as the wholly unprecedented and factually unnecessary

³¹ Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06-804, Pre-Trial Chamber II, Decision on the Prosecutor's Application under Article 58, ¶ 44 (July 13, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_07506.PDF.

³² *Ntaganda* Confirmation of Charges Decision, *supra* note 26, ¶¶ 77–78, https://www.icc-cpi.int/CourtRecords/CR2014_04750.pdf.

³³ *Id.* ¶ 79.

³⁴ *Id.* ¶ 80.

³⁵ Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-804, Second Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ¶ 53 (Jan. 4, 2017).

extension to combatants participating in an international armed conflict governed by the provisions of Article 8(2)(b)(xxii).³⁶

Finally, while the ICC Appeals Chamber upheld the Trial Chamber's findings with respect to the second jurisdictional challenge on June 15, 2017, its decision notably fails to provide specific legal authority for an expanded interpretation of Common Article 3's plain textual scope. The Appeals Chamber noted the ICRC Commentary finding that Common Article 3 could be stretched to protect members of armed forces from offenses committed by the armed force to which they belong, but observed that its supporting sources were "limited and include a decision of the Pre-Trial Chamber in this very case."³⁷ The Appeals Chamber implicitly reaffirmed the textual limitations by noting in dicta that "Common Article 3 provides for unqualified protection against inhumane treatment irrespective of a person's affiliation, requiring only that the persons were "taking no active part in hostilities at the material time."³⁸ The legal substance of the Appeals Chamber rests on the finding that "international humanitarian law does not contain a general rule that categorically excludes members of an armed group from protection against crimes committed by the same armed group."³⁹ This finding in turn warranted the legal conclusion that the "established framework of international law" does not preclude charges for intra-force offenses under the provisions of article 8(2)(b)(xii) and article 8(2)(e)(vi) of the Rome Statute."⁴⁰ The Appeals Chamber's decision is notable because it held that the so-called "Status Requirements" of article 8(2)(a)(which replicate the grave breach provisions of the 1949 Geneva Conventions) or of article 8(2)(c)(replicated Common Article 3 as noted above) do not apply to charges under the other war crimes provisions of the Rome Statute. In other words, the Appeals Chamber expressly grounded its reasoning on the contradistinction between the grave breach provisions of the Geneva Conventions and Common Article 3 which both "make explicit reference to Status Requirements."⁴¹

Thus, at the time of this writing, the Revised ICRC Commentary is the only extant authority that posits the proposition that the core provisions of Common Article 3 are sufficiently expansible to cover crimes committed intra-force during non-international armed conflicts as a blanket matter.

³⁶ *Id.* ¶ 54.

³⁷ Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06 OA5, Appeals Chamber, Judgment on the appeals of Mr. Ntaganda against the "Second Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ¶ 61 (June 15, 2017), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-02/06-1962>.

³⁸ *Id.* ¶ 60.

³⁹ *Id.* ¶ 63.

⁴⁰ *Id.* ¶ 67.

⁴¹ *Id.* ¶ 46.

There is no hint of state practice or broader *opinio juris* to support that assertion by the ICRC. The use of other provisions of the Rome Statute in lieu of article 8(2)(c) to prosecute perpetrators who committed crimes of sexual violence against child soldiers who were conscripted into a non-State irregular armed force is indeed satisfying on a human level. However, the ICRC provides no support whatever to sustain its policy position that an extension of Common Article 3 protections (which limit its scope to persons taking no active part in hostilities, as noted above) is warranted, or why such a significant reconceptualization of Article 3 is useful to the field (apart from the inference that the intent is to assist the ICC Prosecutor). There is no explanation at all why charges under applicable domestic law or the parallel crimes against humanity provisions are insufficient to protect the fundamental rights of child soldiers when warranted by the evidence. Phrased another way, the ICRC provides no support whatever for its revolutionary extension of Common Article 3 to provide protections as a matter of established international law to persons beyond its explicit textual limits who are “taking no active part in hostilities.”

This Essay concludes by summarizing the potentially problematic aspects occasioned by such an extension. Firstly, international law is clear that a perpetrator can never be convicted “based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.”⁴² It is well established that “customary international law imposes criminal liability for serious violations of common Article 3.”⁴³ The Rome Statute itself reflects the core precept *nullem crimen sine lege* with the requirement in Article 22 that the concept of a crime sufficient to impute individual responsibility “shall be strictly construed and shall not be extended by analogy. In [the] case of ambiguity, the definition shall be interpreted in favour (sic) of the person being investigated, prosecuted or convicted.”⁴⁴ In practice, this standard means that “that the conduct in question is regarded as criminal under *that body of law* and that individual criminal responsibility may be imposed in case of breach.”⁴⁵ Thus, it should have been dispositive for ICRC purposes that the ICC Elements of Crimes specifies that Common Article 3 protects only victims that “were either *hors de combat*, or were civilians, medical personnel, or religious personnel

⁴² Prosecutor v. Vasiljević, IT-98-32-T, Trial Chamber II, Judgment, ¶ 193 (Int’l Crim. Trib. For the former Yugoslavia, Nov. 29, 2002).

⁴³ Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 134 (Int’l Crim. Trib. for the former Yugoslavia, Oct. 2, 1995).

⁴⁴ Rome Statute, *supra* note 1, art. 22(2).

⁴⁵ Vasiljević, *supra* note 42 (emphasis added).

taking no active part in hostilities.”⁴⁶ The ICRC simply ignored the due process ramifications of imposing its policy preference in extending Common Article 3 to cover intra-party offenses.

Similarly, the ICRC provided no justification for its position in the Revised Commentary that the substantive scope of Common Article 3 should depart so radically from the textual limits that were so important to the original negotiations. In fact, many states were hesitant to adopt Article 3 because of its potential for protecting criminals in civil war or other types of conflict. In light of this reluctance, it should be viewed narrowly, notwithstanding the modern teleological impulse to extend its coverage to all persons at all times. To reiterate, other overlapping provisions of law proscribe the acts of perpetrators committed against members of their own armed forces, so the notion that expansion of Common Article 3 is required to fill a lacunae in enforcement is not supported in practice. It is worth recalling that the original ICRC position during the drafting of the 1949 Geneva Conventions, soundly rejected by the actual delegates, sought to craft Article 3 to simply mirror the range of protections applicable to participants in international armed conflicts. Contrary to the bland ICRC assertion in the Revised Commentary, the deliberate intention of Article 3 at the time of its drafting was not to provide the broadest possible coverage of protections to all persons with a nexus to an armed conflict of a non-international character.

The *travaux* provide three reasons why the ICRC extension is unsupported based on the development of Common Article 3. Firstly, delegates were primarily concerned over what types of opponents would receive the newly crafted protections. At the beginning of the discussion of Common Article 3 in the Joint Committee, France expressed concerns that civilians on the opposing side in a civil war would be entitled to receive overly generous protection from the proposed article.⁴⁷ The French delegation argued that including insurgents within the scope of Common Article 3 would undermine the sovereignty of the state and that the text should make it impossible for insurgents to “claim the protection of the Convention under a mask of politics or any other pretext.”⁴⁸ Greece echoed the concern for protecting state sovereignty by stating that there was a danger that rebels would be entitled to the protections of prisoners of war and would

⁴⁶ KNÜT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 383 (2002).

⁴⁷ FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF 1949, VOL. II, SECTION B10 (Federal Political Department Berne 1949), https://www.loc.gov/rr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-2-B.pdf [hereinafter GENEVA CONVENTIONS FINAL DIPLOMATIC CONFERENCE RECORD].

⁴⁸ *Id.*

not be able to be charged for their crimes.⁴⁹ While some delegations (*inter alia* Romania) argued that Article 3 should have the broadest possible application, this view was not shared by the majority of the delegates.⁵⁰ Most of the delegates believed that the Article should be narrowly applied to those opposing forces that were organized and professional rather than bandits or anarchists in order to preserve the sovereign flexibility of the territorial state.⁵¹

Secondly, the debates show that Common Article 3 as adopted was not intended to provide the broadest possible umbrella of humanitarian protections. Russia proposed an amendment that would have given protection to all types of enemies and would have given prisoner of war status to any opposing force.⁵² This proposal was overwhelmingly rejected by twenty-five votes to nine, with three abstentions.⁵³ During these debates, the British delegation stated that “participating in hostilities” would apply to opposing forces who had started an illegal war.⁵⁴ The UK was clear however, in claiming that the protection was afforded only to opposing forces and not to members of one’s own military force.⁵⁵ The record of negotiations makes plain that the text was meant to protect only those members of an opposing force.⁵⁶

Finally, the overarching goal of the delegations was to preserve state sovereignty by reserving the ability to prosecute criminals under extant domestic laws. For example, the Burma delegation argued that adoption of Common Article 3 would be “taking away” from the “legal machinery” of the state to “maintain the security of its population and the prosperity of the State . . . It is also not the object of the Conference to intervene in matters essentially within the domestic jurisdiction of any State.”⁵⁷ In response, the Russian delegation proposed that all of the Conventional protections should apply in all conflicts and that a state should have no power to prosecute crimes during an NIAC.⁵⁸ This was overwhelmingly rejected, and with it the ICRC preference lost any salience.⁵⁹ Thus, Article 3 was specifically intended to apply only to opposing forces, while preserving the full prosecutorial discretion of the domestic state.

⁴⁹ *Id.* at 10–11.

⁵⁰ *Id.* at 11.

⁵¹ *Id.*

⁵² *Id.* at 129.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 10.

⁵⁶ *Id.* at 129.

⁵⁷ *Id.* at 328–30.

⁵⁸ *Id.* at 326–27.

⁵⁹ *Id.* at 338.

The Swiss delegation argued that Article 3 strikes the perfect balance between a state's sovereignty and humanitarian protections because it preserves the ability of the "legitimate government whose duty it is, in a non-international war, to compel rebels and insurgents to respect the national law of the country."⁶⁰ In light of the intentional design of Common Article 3, and the clearly expressed preference of the delegates for a narrow application of its protections, the Revised ICRC Commentary offers no support for its policy-based assertion that the text may be extended to intra-force offenses. The lingering whiff of an implicit interdependence between the ICRC and the ICC Prosecutor's *Ntaganda* filings is not dispelled by any evidence from the *travaux préparatoires*.

Finally, the ICRC position with respect to Common Article 3 represents something of an axial shift in the design of the entire field of *jus in bello*. It cannot be overemphasized that the laws and customs of warfare balance humanitarian objectives with the perfectly legitimate need to accomplish the mission. The *grundnorm* for the entire scope of the "laws and customs applicable in armed conflicts" (to borrow the language of the Rome Statute in Article 8) is to build a careful balance between the ability of practitioners to lawfully accomplish the military mission in a manner that, to the greatest degree possible, respects the enduring value of humanitarian considerations. Michael Waltzer is entirely correct in his conclusion that belligerent armies are "not entitled to do anything that is or seems to them necessary to win wars. They are subject to a set of restrictions that rest in part on the agreements of states but that also have an independent foundation in moral principle."⁶¹ At the same time, the normative standards of *jus in bello* that are intentionally designed to protect civilians and serve larger humanitarian goals "reflect the inherent recognition of authority to employ such combat power for the prompt and efficient defeat of an enemy."⁶²

The ICRC appears to elevate humanitarian concerns as the dominant leitmotif of *jus in bello* in a manner that would represent a radical shift in its intended function. While international humanitarian law⁶³ contains numerous express prohibitions subject to no caveats, combatants properly exercise what the ICRC has labeled a "fairly broad margin of judgment."⁶⁴ Therein lies the completely appropriate and distinctive permissiveness of the laws and customs of armed conflict. For example, "effective advance

⁶⁰ *Id.* at 334.

⁶¹ MICHAEL WALZER, *JUST AND UNJUST WARS* 131 (1977).

⁶² Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limits of Applying Human Rights Norms to Armed Conflict*, 1 INT'L HUMANITARIAN LEGAL STUD. 52, 92 (2010).

⁶³ See Henckaerts, *supra* note 2.

⁶⁴ INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, art. 57, ¶ 2187 (Sandoz et al. eds., 1987) [hereinafter ICRC COMMENTARY ON PROTOCOLS].

warning shall be given of attacks which may affect the civilian population, *unless circumstances do not permit*" (emphasis added).⁶⁵

As a logical extension of the duality embedded within *jus in bello*, medical care is due those in military custody only "to the fullest extent practicable and with the least possible delay."⁶⁶ Other obligations are often couched in aspirational terms such as "whenever possible"⁶⁷ or "as widely as possible."⁶⁸ Still more duties are couched in less than strident terms such as "shall endeavour"⁶⁹ or the duty to "take all practical precautions."⁷⁰ There are also numerous express exceptions permitted for reasons of "imperative military necessity."⁷¹ International law is clear that those who order military strikes must "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects"⁷² and "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."⁷³ Even in that evaluation, it is important to note that the benchmark for "feasible" is measured from the reasonable war-fighter's point of view in a manner that deliberately incorporates the twin foundations of *jus in bello*. The United Kingdom clarified the term in its official treaty practice as follows: "The United Kingdom understands the term 'feasible' as used in the Protocol to mean that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations."⁷⁴ The United States has also adopted a similar understanding of the term "feasible" in this *jus in bello* usage.⁷⁵

⁶⁵ Protocol I, art. 57(2)(c).

⁶⁶ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), U.N. Doc. A/32/144, art. 85 (Dec. 7, 1979, Art.10(2), *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

⁶⁷ *Id.* art. 12(4).

⁶⁸ *Id.* art. 83(1).

⁶⁹ *Id.* art. 76(3).

⁷⁰ *Id.* art. 56(3).

⁷¹ *Id.* art. 54(5).

⁷² *Id.* art. 57(2)(a)(i). The expression "feasible" is variously translated in French as "pratique" (art. 56), "pratiquement possible" or "possible dans la pratique" (arts. 57, 58, 78 and 86) and "utile" (art. 41), which in English also appears as "practical" (art. 56(3)).

⁷³ *Id.* art. 57(2)(a)(ii).

⁷⁴ *Ratification of the Additional Protocols by the United Kingdom of Great Britain and Nathan Ireland*, INT'L R. RED CROSS 322 (Mar. 3, 1998), <https://www.icre.org/eng/resources/documents/artile/other/57jp54.htm>.

⁷⁵ On 23 January 2003, the Optional Protocol on the Involvement of Children in Armed Conflict (the Child Soldier Protocol) entered into force in the United States. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, July 5, 2000, S. Treaty Doc. No. 106-37, 39 LL.M. 285. Former President William J. Clinton signed the protocol on 5 July 2000; the Senate gave its advice and consent

The key point that the Revised ICRC Commentary failed to acknowledge much less persuasively address is that the proper balance between humanitarian and military imperatives is intentionally and deeply integrated into the law itself. Conversely, courts and commentators must be clear when *jus in bello* applies or operates to displace other legally relevant criminal norms. As the ICTY Appeals Chamber noted in *Kunarac*, the “determination of what constitutes a war crime is therefore dependent on the development of the laws and customs of war at the time when an act charged in an indictment was committed.”⁷⁶ This is why the second circumstantial element that is embedded in every war crime specified in the Rome Statute requires evidence that “the perpetrator was aware of factual circumstances that established the existence of an armed conflict.”⁷⁷ In other words, there is a fundamental due process right that convictions only be grounded in the perpetrator’s knowledge that the *jus in bello* is applicable and should provide the signposts for acceptable conduct.

Common Article 3 is part of the larger fabric of *jus in bello*, and on its face deliberately preserved the applicability of domestic criminal sanctions to persons participating in non-international armed conflicts. Just as individual participants cannot lawfully inject individualized rationalizations as authority for ignoring *jus in bello* norms, the ICRC ought not negate the interlocking duality of provisions applicable to the conduct of non-international armed conflict. While superficially satisfying on a humanitarian basis, superimposing the humanitarian imperatives of *jus in bello* as its dominant component risks rupture to the carefully negotiated structure. The Revised ICRC policy position extending the application of Common Article 3 to intra-party offenses committed by participants in the conflict contorts its meaning and clouds the larger normative framework of the field.

to ratification on 18 June 2002; the State Department deposited it with the UN Secretary-General on 23 December 2002 and, according to article 10.2 of the protocol, it entered into force thirty days after the date of deposit. Article 1 of the Protocol requires parties to “take all feasible measures to ensure that members of [their] armed forces who have not attained the age of [eighteen] years do not take a ‘direct part’ in hostilities.” The Senate ratified the protocol subject to certain understandings regarding the definitions of ‘feasible measures’ and ‘direct part in hostilities.’ ‘Feasible measures’ means those that are “practical or practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations.” See Executive Report of Committee, Treaty Doc. 106-37(a) Optional Protocol No.1 to Convention on Rights of the Child on Involvement of Children in Armed Conflict, § 2(2)(A), 2(2)(B), 148 CONGO REC. S5454 (daily ed. June 12, 2002).

⁷⁶ Prosecutor v. Kunarac, Kovac & Vukovic, Case Nos. IT-96-23, IT-96-23/1-A, Appeals Judgement, ¶ 67 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

⁷⁷ ELEMENTS OF CRIMES 14 (International Criminal Court) (2011), <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.