International Review of the Red Cross, Page 1 of 28.
doi:10.1017/S1816383124000158

IRRC

Provisional justice in protracted conflicts: The place of temporality in bridging the international humanitarian law and transitional justice divide

Luke Moffett[1]* and Nikhil Narayan[2]†**
[1]Professor of Law, Queen's University Belfast, Belfast, Northern Ireland, UK
[2]Lecturer in Law, Queen's University Belfast, Belfast, Northern Ireland, UK
*Email: l.moffett@qub.ac.uk
**Corresponding author email: n.narayan@qub.ac.uk

Abstract

2024 will mark seventy-five years since the adoption of the 1949 Geneva Conventions. Despite the drafters' efforts to mitigate the worst horrors of armed conflict, contemporary conflicts continue to witness the death and suffering of millions. This raises fundamental concerns over the ability of international law to

† Our thanks to the reviewers, the editorial team and Professor Kieran McEvoy for their comments and encouragement on this article. All errors are solely attributable to the authors.

alleviate the harm caused to those caught up in armed conflict, to redress violations and to prevent their recurrence. In international policy, international humanitarian law (IHL) is increasingly intertwined with transitional justice and in particular its emphasis on the centrality of human rights. This article focuses on the intersection between IHL and transitional justice in protracted conflicts, interrogating their increasing overlaps, complementary intersections and even tensions. In particular, the article examines the importance of the temporal dimensions of humanity and justice in prevention of violations. In doing so, the article concentrates on the impact of time on those harmed by armed conflict and the repercussions this has on the law and justice efforts. The article argues that time can be weaponized to frustrate accountability and prevent interference with belligerents' behaviour. Victims in war cannot wait until the end of fighting to seek the recovery of the remains of their loved ones, for those responsible to be brought to justice, and for redress of their continuing suffering. Indeed, such delays amount to violations of victims' right to an effective remedy and fail to stop the continuation of violations or the re-victimization of civilians and their communities. The article suggests the need for "provisional justice", whereby, in the increasing number of situations of protracted conflict, efforts to redress conflict-related violations should be, at least in part, dealt with at the time, rather than waiting until the end of hostilities, so as to mitigate harm to victims and to correct belligerents' behaviour in order to prevent recurrence.

Keywords: international humanitarian law, transitional justice, temporality, humanity, artificial intelligence.

Introduction

Seventy-five years on from the adoption of the Geneva Conventions, war continues to cause mass suffering to civilians and combatants alike. The International Committee of the Red Cross (ICRC) has found that there are currently over 100 ongoing conflicts, with an increasing number of them being protracted in that they last longer than five years and/or are post-conflict societies slipping back into violence.[1] This raises fundamental concerns over the ability of international and domestic law to alleviate the suffering of those caught up in armed conflict and, more problematically, the prospects for transitional justice to redress violations and prevent their recurrence. For some time now, international humanitarian law (IHL) has become increasingly intertwined with transitional justice and, in particular, its normative framework of human rights in addressing

1 See Ellen Policinski and Jovana Kuzmanovic, "Protracted Conflicts: The Enduring Legacy of Endless War", *International Review of the Red Cross*, Vol. 101, No. 912, 2019.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

conflict-related atrocities.[2] This can be seen most recently in the United Nations (UN) Secretary-General's Guidance Note on Transitional Justice, in which transitional justice is unequivocally and unqualifiedly positioned alongside conflict prevention and peacebuilding as a "strategic policy tool" for societies fractured by conflict to "help build just and inclusive futures".[3] Together, the two fields of IHL and transitional justice are framed by the UN as part of a continuum towards sustainable peace.[4]

Given the legal basis of many of their norms, IHL and transitional justice also speak to the place of law in regulating violence and alleviating its consequences. The lingering duration and effects of contemporary armed conflict raise substantive challenges that require a more considered approach to the place of justice in the midst of hostilities. When should justice be pursued in protracted conflicts? Should victims wait for justice until peace is secured years or decades later? What is the impact of violence on stakeholder participation in justice efforts? When should justice issues be considered by those who engage in hostilities? This article adds to these debates by tackling the temporal place of both fields in protracted conflicts, interrogating their increasing overlaps, complementary intersections and even tensions. The article focuses in particular on the place and implications of time and the timing of legal interventions in such circumstances. The article argues that victims in war cannot wait until the end of fighting to seek redress – indeed, such delays amount to violations of victims' right to an effective remedy and, more profoundly, fail to provide a safety valve to stop the continuation of violations or re-victimization of civilians and their communities.

The interconnectedness of time in IHL and transitional justice has been examined by others. For example, Policinski and Kuzmanovic point to the emergent policy in humanitarian organizations of moving beyond the binary of violence and peace to see the "triple nexus" between humanitarian action, development and peace as a continuum, given that the effects of prolonged violence become more severe over time.[5] While such a vision aims to find complementarity between these various humanitarian policy efforts, debates on justice are often neglected. The literature and practice of transitional justice has a similar aversion to doing justice in the midst of armed conflict. Frequently, transitional justice's role in negotiating post-conflict settlement is relegated to being a tool of conflict resolution so as to "translate violent conflict into a set of political and legal institutional structures that enable the same political struggles

2 The preamble of Additional Protocol II recalls the place of human rights in offering "basic protection to the human person" and emphasizes the need to ensure "better protection for the victims" of armed conflicts. Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), preambular paras 3–4.

3 UN Secretary-General, *Guidance Note of the Secretary General on Transitional Justice: A Strategic Tool for People, Prevention and Peace*, 11 October 2023 (Guidance Note on Transitional Justice), p. 2.

4 Fabian Salvioli, *Sustainable Development Goals and Transitional Justice: Leaving No Victim Behind: Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN Doc. A/77/162, 14 July 2022, para. 3.

5 E. Policinski and J. Kuzmanovic, above note 1, p. 968.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

to take place less violently".[6] As Salmón suggests, the relationship between IHL and transitional justice processes can be identified by two discrete points of time, the first being the outbreak of conflict, when the preventative role of IHL in averting violations is applicable, and the second being the end of hostilities, when transitional justice kicks in.[7]

This article does not suggest that the frequently protracted nature of contemporary conflicts requires the expansion of IHL or transitional justice, or the development of new laws. Indeed, as Lewis suggests, such legalistic overreach risks giving the "illusion of more protection" and elides more effective existing protections under human rights law.[8] This article instead argues that nearly two decades since these initial works by Salmón and Bell, this temporal relationship has become more complex, with the pervasiveness of transitional justice and its normative status being juxtaposed by the proliferation and protracted nature of conflicts that strains IHL compliance. The binary nature of the traditional peace versus justice paradigm has given way to a normative recognition of their interdependence, articulated as requiring robust justice efforts in order to ensure long-term sustainable peace and avoid situations of protracted conflict.[9] Transitional justice does not offer a road map to travel from war to peace – like the conflicts and transitions themselves, it is a continual, at times contradictory, and complex struggle. At its minimum, transitional justice offers a language articulated in human rights law that can give procedural protection to vindicate conflict victims' rights, enable those responsible to take ownership of their wrongdoing, remedy conflict's consequences and take efforts to prevent its repetition. At the same time, honesty and modesty dictate acknowledging that it is but one tool for dealing with the tip of the iceberg of violations; it is not a panacea for bad governance or generational harms caused by colonialism, historic discrimination and structural inequality that often drive conflict or cause it to reoccur.

With this dose of realism in mind, the present article suggests that transitional justice is increasingly important in situations of *ongoing* protracted conflict as one among several tools for tackling the consequences of violence, but for doing so within a rights-based framework. This is not to displace IHL, but rather to bridge some of the gaps left by a framework that focuses near-exclusively on belligerent behaviour, in order to better assert victims' rights in pursuit of Grotius' admonishment that "in war, peace [and justice] should always be kept in view".[10] This article contributes to the debates on the intersection of the two fields by asserting the need for "provisional justice" as a key pathway to bridge the

6 Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'", *International Journal of Transitional Justice*, Vol. 3, No. 1, 2009, p. 25.

7 Elizabeth Salmón, "Reflections on International Humanitarian Law and Transitional Justice: Lessons to Be Learnt from the Latin American Experience", *International Review of the Red Cross*, Vol. 88, No. 862, 2006, p. 328.

8 Dustin Lewis, "The Notion of 'Protracted Armed Conflict' in the Rome Statute and the Termination of Armed Conflicts under International Law: An Analysis of Select Issues", *International Review of the Red Cross*, Vol. 101, No. 912, 2019, p. 1113.

9 See Guidance Note on Transitional Justice, above note 3; F. Salvioli, above note 4.

10 Hugo Grotius, *The Law of War and Peace*, 1625, Chap. 25.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

impunity gap that exists in protracted and ongoing conflicts. The article focuses in particular on three enquiries: the existing normative connections and operational overlaps between IHL and transitional justice; the temporal dimensions of justice and humanity in armed conflict; and bridging the continuing divide between the two fields. The first part begins by mapping out the normative and operational links between IHL and transitional justice. The second part articulates an alternate theoretical framework for marrying both fields, based on coinciding temporalities, conceptions of humanity as a common driving ideal, and notions of justice. As such, the article contrasts this with transitional justice's evolution beyond linear transitions to apply even where there are ongoing or, at best, "imperfect", non-linear "steady-state" conflicts. The final part draws upon the emerging practice of justice efforts in ongoing contemporary armed conflicts to advance a proposed way forward based on a theory of provisional justice.

Normative connections and operational overlaps

The emergence of transitional justice has not directly altered IHL, as most of transitional justice's developments occurred after the 1977 Additional Protocols to the Geneva Conventions. Nonetheless, as transitional justice has materialized by degrees through human rights law, State practice reinforcing the two fields has served to nuance some of IHL's sharper edges. This is apparent in the evolution of the UN's lofty goals of peace and security no longer being limited to upholding and respecting IHL during conflict, but also requiring peacebuilding efforts to be firmly rooted in justice terms.[11] The UN Secretary-General's October 2023 Guidance Note on Transitional Justice aimed to further internalize this linkage within the strategy and operations of the UN as a "pragmatic human rights-based policy tool at the disposal of national stakeholders that is relevant to enhancing peace and security, human rights and accountability, and sustainable development".[12] The UN Special Rapporteur on Truth, Justice, Reparations and Non-Recurrence has indicated that IHL and transitional justice are part of a peacebuilding–humanitarian–development continuum, which looks to support the UN's goals of peace and security through ending hostilities and restoring the rule of law.[13] There are a number of operational overlaps between the two fields that are relevant for this discussion.

Operational overlaps

Transitional justice and IHL are neither *sui generis* nor mutually exclusive. Bell describes IHL, along with human rights and international criminal law, as part of

11 *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, UN Doc. S/2004/616, 2004; *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc. S/2011/634, 2011; UN Secretary-General, *Guidance Note of the Secretary General: United Nations Approach to Transitional Justice*, March 2010.
12 Guidance Note on Transitional Justice, above note 3, p. 3.
13 F. Salvioli, above note 4.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

the international legal architecture that frames and "collectively informs the development of transitional justice".[14] In reflecting on the mutual contributions of IHL and transitional justice, Salmón defines transitional justice as the attempt by societies to deal with the *human rights violations* committed during the conflict.[15] While there is not a universally accepted definition of transitional justice, nor is this the conventionally used definition, it is telling that Salmón's focus on "human rights" is somewhat at odds with others, such as Camins, who argue that applying this sort of human rights-based approach to the harms suffered in armed conflict, and in turn IHL, is ill-fitting.[16] De Greiff and other transitional justice scholars and practitioners similarly adopt a more pragmatic perspective with regard to ongoing justice post-conflict.[17] Nonetheless, it is argued here that human rights continues to influence the scope and relevance of IHL in the post-conflict phase by limiting it to punitive measures aimed at suppressing IHL violations through investigation and punishment of only those violations which rise to the level of serious breaches or war crimes.[18]

Meanwhile, transitional justice itself encompasses more than criminal justice. Transitional justice is now understood as consisting of five pillars: truth, justice, reparations, guarantees of non-repetition, and (more recently) memorialization. Criminal investigations and trials continue to be an important part of transitional justice, but often, given the scale of violations in war, create evidentiary and capacity difficulties in seeing every perpetrator brought to court. The International Criminal Court (ICC) and domestic and hybrid courts remain key bodies in holding the most responsible perpetrators of international crimes to account,[19] but there is a rich range of mechanisms, processes and effective transitional justice ecosystems encompassing the scale and prevalence of harms caused by conflict that go beyond the courtroom. Here it is worth turning to discuss four of these that most closely intersect IHL and transitional justice beyond trials: truth-seeking, amnesties, reparations, and guarantees of non-repetition.[20]

Truth recovery is a core mechanism of transitional justice, often framed as delivering on victims' right to know what happened, why and by whom, as well as contributing to broader social and political reconciliation by raising public

14 C. Bell, above note 6, p. 22.
15 E. Salmón, above note 7, p. 328.
16 Emily L. Camins, "Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law", *International Journal of Transitional Justice*, Vol. 10, No. 1, 2016.
17 Pablo de Greiff, "Theorizing Transitional Justice", *Nomos*, Vol. 51, No. 1, 2012, p. 35; Briony Jones, "The Performance and Persistence of Transitional Justice and Its Ways of Knowing Atrocity", *Cooperation and Conflict*, Vol. 56, No. 2, 2021, p. 173.
18 E. Salmón, above note 7, pp. 328, 352. See Articles 49, 50, 129 and 146 of Geneva Conventions I, II, III and IV respectively.
19 Brianne McGonigle Leyh, "Transitional Justice and International Criminal Justice", in Cheryl Lawther and Luke Moffett (eds), *Research Handbook on Transitional Justice*, Edward Elgar, Cheltenham, 2023.
20 Memorialization has been recognized as a fifth pillar of transitional justice by the UN Special Rapporteur on Transitional Justice, but it is often folded in under reparations as a measure of satisfaction. See *Memorialization Processes in the Context of Serious Violations of Human Rights and International Humanitarian Law: Report of the United Nations Special Rapporteur for Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN Doc. A/HRC/45/45, 9 July 2020.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

awareness of violations in the past.[21] Although much of transitional justice practice on truth has emerged from truth commissions, it has also been articulated as a "right" by regional human rights courts and normative best practices towards ending impunity.[22] This is not the entire picture, however, as IHL too has played a significant role in the development of the right to truth in transitional justice. For example, Additional Protocol I (AP I) stipulates that in cases of missing or dead persons, families have a "right to know" the fate of their relatives.[23] During the drafting of this provision, some delegates felt that there was a "basic need" for families to know the fate of their loved ones, but that this neither amounted to a "fundamental right"[24] nor endowed a legal entitlement to demand certain action from a government.[25] There has also been a proliferation of international commissions of inquiry that provide an external investigation into ongoing conflicts and mass atrocities and which are often mandated to examine violations of IHL as well as to recommend the establishment of transitional justice mechanisms, such as in the former Yugoslavia, Yemen and Ukraine.[26]

One issue that is often overlooked in discussions on the right to truth is the obligation to investigate, identify and bury those killed that persists throughout ongoing conflicts and decades after the end of hostilities. The Inter-American Court of Human Rights (IACtHR) found, in dealing with the siege of the Palace of Justice during the armed conflict with the M-19 guerrillas in Colombia, that IHL continued to provide obligations of due diligence to ensure the "correct and adequate removal of corpses" of suspected guerrillas whose remains were disappeared.[27] Even in cases heard decades after a conflict, human rights and civil courts have revisited issues of compliance with IHL at the time of the civilian loss of life, pointing to non-compliance with the State force's manuals, notices and other regulations.[28] These IHL obligations on the right to truth during armed conflict are important in terms of transitional justice and reflect a strong

21 See Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, London, 2001.
22 See *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005; International Convention for the Protection of All Persons from Enforced Disappearance, 2010, Art. 24(2).
23 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 32.
24 Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 1198.
25 *Ibid.*, para. 1212.
26 See Catherine Harwood, "The Contributions of International Commissions of Inquiry to Transitional Justice", in C. Lawther and L. Moffett (eds), above note 19.
27 IACtHR, *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Series C, No. 287, Judgment (Preliminary Objections, Merits, Reparations and Costs), 14 November 2014, para. 496, citing Articles 17, 20, 120 and 130 of Geneva Conventions I, II, III and IV respectively, Article 8 of AP II, and Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 112–116, available at: https://ihl-databases.icrc.org/en/customary-ihl/rules (all internet references were accessed in March 2024).
28 IACtHR, *Santo Domingo Massacre v. Colombia*, Series C, No. 259, Judgment (Preliminary Objections, Merits and Reparations), 30 November 2012, paras 220, 236; Crown Court for Northern Ireland, *R v. Holden,* ICOS No. 19/005923, [2022] NICC 17, 16 March 2022, para. 24.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

convergence over time between the two fields. IHL has been invoked by truth commissions as a means to reflect the serious gravity of the violence and to "help to address the victims' sense of hurt", but through a more reconciliatory approach rather than a purely punitive one through criminal trials alone.[29]

Linked to the pursuit of truth is the use of amnesties in post-conflict settings. Again, IHL is relevant here. The justification for conditional or partial amnesties on the basis of IHL has been an important part of facilitating truth and reconciliation processes and the recovery of remains.[30] Additional Protocol II (AP II) indicates that the broadest possible amnesty should be adopted at the end of hostilities in the interest of promoting peace.[31] South Africa's Constitutional Court notably held that its Truth and Reconciliation Commission's amnesty provision was not incompatible with international law.[32] However, nearly three decades on since the South African case, as human rights have become increasingly prominent in transitional justice, this broad tolerance of amnesties in transitional justice's early development has given way to a more nuanced reading of IHL's resort to amnesties to end hostilities in non-international armed conflicts (NIACs), framing the provision as conditional and limited.[33] Both AP II and customary IHL are interpreted now to preclude amnesties where such measures would prevent proper investigation and prosecution of alleged perpetrators of war crimes.[34] This understanding has been reaffirmed by various international criminal courts.[35]

Domestic and regional human rights courts have similarly recognized that broad amnesties can violate the obligation to prosecute grave breaches. The Ugandan Supreme Court has underscored that its Amnesty Act, in light of the provisions of AP II, would not cover international crimes and was intended to cover participation in the conflict "in furtherance of war or rebellion".[36] In so ruling, the Court allowed the trial against Lord's Resistance Army commander Thomas Kwoyelo to continue.[37] The bar on blanket amnesties for war crimes has been extended to other international crimes, including crimes against humanity,

29 Colm Campbell, "Peace and the Laws of War: The Role of International Humanitarian Law in the Post-Conflict Environment", *International Review of the Red Cross*, Vol. 82, No. 839, 2000, pp. 648–649.

30 ICRC Advisory Service on International Humanitarian Law (ICRC Advisory Service), "Amnesties and International Humanitarian Law: Purpose and Scope", *International Review of the Red Cross*, Vol. 101, No. 1, 2019, p. 358.

31 AP II, Art. 6(5); ICRC Advisory Service, above note 30, p. 357.

32 Laura M. Olson, "Provoking the Dragon on the Patio – Matters of Transitional Justice: Penal Repression vs Amnesties", *International Review of the Red Cross*, Vol. 88, No. 862, 2006, pp. 275, 288; South Africa Constitutional Court, *Azapo v. South Africa*, Case No. [1996] ZACC 16, 1996.

33 John Dugard, "Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question", *South African Journal on Human Rights*, Vol. 13, 1997, pp. 258, 267; John Dugard, "Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?", *Leiden Journal of International Law*, Vol. 12, No. 4, 1999.

34 ICRC Advisory Service, above note 30, pp. 359–360.

35 See e.g. Special Court for Sierra Leone (SCSL), *Prosecutor v. Furundžija*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 2003; International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Anto Furundžija,* Case No. IT-95-17/1-T, Judgment (Trial Chamber), 10 December 1998.

36 Uganda Supreme Court, *Uganda v. Kwoyelo*, Case No. [2015] UGSC 5 (Constitutional Appeal No. 1 of 2012), 8 April 2015.

37 *Ibid.*

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

torture, genocide and other gross human rights violations by international and regional bodies.[38] Comparable findings by the IACtHR have held, in for instance the cases involving Peru, that amnesties which "eliminate responsibility" for serious violations of human rights are prohibited. Similarly, with respect to El Salvador's amnesty law, the IACtHR held that, while conditional or partial amnesties may sometimes be warranted to encourage peace, the AP II Article 6 (5) "norm is not absolute" as against States' obligation to investigate and prosecute war crimes and crimes against humanity.[39] The European Court of Human Rights (ECtHR) similarly concluded that there is a general trend in international law to view amnesties for international crimes as "unacceptable" due to their incompatibility with "unanimously recognised" obligations on States.[40]

That said, the anti-impunity movement that characterized transitional justice efforts since the 1990s has not precluded or limited the use of amnesties outright.[41] For instance, Mallinder found that most amnesty laws required affirmative legislative annulment, which only Argentina and Uruguay have done.[42] Meanwhile, despite two adverse domestic court judgments finding that Brazil's amnesty law does not cover disappearances and ordering Brazil to set it aside, the law still remains in effect.[43] Similarly, negotiations around the Rome

38 See *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2011/634, 12 October 2011, p. 18; IACtHR, *Almonacid-Arellano et al. v. Chile*, Series C, No. 154, Judgment (Preliminary Objections, Merits, Reparations and Costs), 26 September 2006 (IACtHR holding that amnesty is unavailable for crimes against humanity); European Court of Human Rights (ECtHR), *Abdülsamet Yaman v. Turkey*, Case No. 32446/96, Judgment (Second Section), 2 November 2004 (ECtHR barring amnesties for crimes involving torture); IACtHR, *Barrios Altos v. Peru*, Series C, No. 75, Judgment (Merits), 14 March 2001 (IACtHR precluding amnesties for the crime of enforced disappearance); African Commission on Human and Peoples' Rights, *Malawi African Association and Others v. Mauritania*, Comm. Nos 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, 11 May 2000 (holding that the amnesty law could not shield the State from its international obligations under the African Charter for Human and Peoples' Rights); Inter-American Commission on Human Rights, *Juan Gelman et al. v. Uruguay*, Case No. 438-06, Report 30/07, Doc. OEA/Ser.L/V/II.130 Doc. 22, Rev. 1, 2007, Judgment on Admissibility, 9 March 2007 (blanket amnesty law incompatible with State's duty to investigate non-derogable human rights violations). The Special Court for Sierra Leone rejected the broad amnesty of the country's peace agreement: see *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, UN Doc. S/1999/777, 7 July 1999. SCSL, *The Prosecutor v. Morris Kallon and Brima Buzzy Kamara*, Case Nos SCSL-2004-15AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber), 13 March 2004; Simon M. Meisenberg, "Legalities of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone", *International Review of the Red Cross*, Vol. 86, No. 856, 2004; Carsten Stahn, "United Nations Peace-Building, Amnesties and Alternative Forms of Justice: A Change in Practice?", *International Review of the Red Cross*, Vo. 84, No. 845, 2002, pp. 198–201.

39 IACtHR, *The Massacres of El Mozote and Nearby Places v. El Salvador*, Series C, No. 252, Judgment (Merits, Reparations and Costs), 25 October 2012, para. 286.

40 ECtHR, *Marguš v. Croatia*, Case No. 4455/10, Judgment (Grand Chamber), 27 May 2014, para. 139.

41 See Kieran McEvoy and Louise Mallinder, "Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy", *Journal of Law and Society*, Vol. 39, No. 3, 2012.

42 Louise Mallinder, "The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws", *International and Comparative Law Quarterly*, Vol. 65, No. 3, 2016, pp. 655–656.

43 See Alonso Gurmendi, "At Long Last, Brazil's Amnesty Law Is Declared Anti-Conventional", *Opinio Juris*, 16 August 2019, available at: https://opiniojuris.org/2019/08/16/at-long-last-brazils-amnesty-law-is-declared-anti-conventional/.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

Statute of the ICC did not stipulate amnesty's outright prohibition under international criminal law.[44] Rather, State practice suggests that conditional amnesties remain an important political tool, particularly in the context of NIACs, in encouraging arms carriers to commit to a peace process while leveraging some form of accountability in return.[45] In this regard, IHL and transitional justice often work in conjunction to provide the legal basis both for imposing accountability for perpetrators and for conditional amnesties in post-conflict peace and justice practice, as seen in Colombia's Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP).[46] Likewise, it has been argued by some that the use of amnesties for Free Aceh Movement fighters was instrumental in the peace process in Aceh, Indonesia.[47]

Still, domestic amnesty laws explicitly excluding alleged war crimes and other serious international crimes from their scope have proliferated.[48] Such jurisprudence and State practice in transitional justice suggests that while amnesties are still very much a part of peace efforts in NIACs, reflected in the 289 such laws that have been adopted between 1990 and 2016 alone, there is a ceiling of what amnesties are permitted to cover under international law.[49] Some form of clemency may invariably be required to further transitional justice's central goal of reconciliation in divided post-conflict societies by encouraging the return of former combatants to civilian life.[50] This often requires some *quid pro quo* by fighters who have committed violations to engage in truth and reconciliation processes, alongside red lines to exclude those responsible for war crimes and other grave international crimes from eligibility for any form of amnesties.[51] However, such a transactional approach to peace, foreclosing all other investigative mechanisms that could lead to prosecution or civil remedy, has recently been challenged by victims in Northern Ireland domestic courts and simultaneously by the Irish government in an inter-State case against the United

44 Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, Hart, Oxford, 2008, pp. 279–280.

45 See Louise Mallinder, "Amnesties and Transitional Justice", in C. Lawther and L. Moffett (eds), above note 19.

46 Maria Camila Correa Florez, Andrés Felipe Martin Parada and Juan Francisco Soto Hoyos, "Punishment and Pardon: The Use of International Humanitarian Law by the Special Jurisdiction for Peace in Colombia", *International Review of the Red Cross*, Vol. 104, No. 919, 2022, p. 1212–1213. See Colombia's Law No. 1820 of 2016, Articles 8 and 23, invoking IHL as the legal basis for determining grant of amnesties, as well as those crimes, including war crimes, that are not eligible for amnesty; and see C. Campbell, above note 29.

47 Renée Jeffery, "Amnesty and Accountability: The Price of Peace in Aceh, Indonesia", *International Journal of Transitional Justice*, Vol. 6, No. 1, 2012.

48 See e.g., Côte d'Ivoire, Act No. 2003-309, 8 August 2003; Central African Republic, Act No. 08-020, 13 October 2008; Democratic Republic of the Congo (DRC), Act No. 014/006, 11 February 2014; and Colombia, Law No. 1820, 30 December 2016, which establishes the JEP and bars amnesties for crimes against humanity, genocide, war crimes, torture and other gross human rights violations.

49 L. Mallinder, above note 45, p. 276.

50 M. C. Correa Flórez, A. F. Martin Parada and J. F. Soto Hoyos, above note 46; Louise Mallinder, "Can Amnesties and International Justice Be Reconciled?", *International Journal of Transitional Justice*, Vol. 1, No. 2, 2007, p. 218.

51 ICRC Customary Law Study, above note 27, Rule 159.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

Kingdom's Legacy Act 2023[52] that provides a conditional amnesty for those involved in murder, torture and other violations during the Troubles.[53] In such cases, the passage of time has meant that amnesties frustrate protracted justice efforts, leaving victims feeling like the government is waiting for them to die.

The overlapping tensions and complementarities between IHL and transitional justice in the specific pursuit of justice and peace are thus apparent in the context of granting amnesties versus punishment. Some argue that IHL in fact provides the flexibility and legal basis for transitional justice processes to balance victims' right to justice with other important rights, including the right to peace.[54] The relevance of IHL in the application of conditional or limited amnesties when drawn upon by truth commissions or other transitional justice efforts is often inherently linked to temporal dimensions of post-conflict justice, as a means to an archival recording of a broader "truth" about the conflict (i.e., designating certain acts as breaches of IHL and thus war crimes, even if not immediately prosecutable) in pursuit of alternative justice or even postponed criminal justice.[55]

With regards to reparations, as a victim-centred range of measures for acknowledging and alleviating harm, they often intersect with human rights and IHL violations.[56] This is apparent from the 2005 UN Basic Principles[57] invoking both legal regimes as the basis for recognizing the right of victims to effective remedy and reparations. Domestic reparation programmes often make reference to IHL as the basis for victim eligibility, ranging from victims of "serious breaches" or "violations" of IHL[58] to victims of "war"[59] or (in the case of Northern Ireland) "the Troubles",[60] or simply by reference to "civilians".[61] The diversity of language on reparation entitlement is hardly surprising when IHL does not provide an obligation or right to reparations for individual victims.[62] Instead, the use of such language suggests the need to grasp at some international legal normative framework to justify claims to be brought for the violence wrought in armed conflict. Even the requirements of a victim's claim of suffering harm as a result of a serious breach of IHL are not closely analyzed, reflecting a more rhetorical, justificatory purpose based on the seriousness of the victim's

52 Northern Ireland Troubles (Legacy and Reconciliation) Act, 2023.
53 See Daniel Holder and Andrew Forde, "Avoiding the Legacy of Impunity", *Verfassungsblog*, 21 December 2023, available at: https://verfassungsblog.de/avoiding-the-legacy-of-impunity/.
54 M. C. Correa Flórez, A. F. Martin Parada and J. F. Soto Hoyos, above note 46, pp. 1206–1207.
55 C. Campbell, above note 29, p. 651; Vasuki Nesiah, "Overcoming Tensions between Family and Judicial Procedures", *International Review of the Red Cross*, Vol. 84, No. 848, 2002.
56 Luke Moffett, *Reparations and War*, Oxford University Press, Oxford, 2023, pp. 103–123.
57 *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 2005 (UN Basic Principles).
58 Sri Lanka Office for Reparations Act, 2018, Sec. 27(a); Colombian Victims Law, 2011, Art. 3.
59 Zimbabwe War Victims Compensation Act, 1980, Sec. 4.
60 Northern Ireland Victims' Payment Regulations, 2020, Reg. 5.
61 Serbian Law on Civilian Invalids of War, 1996.
62 Or a collective right: see Friedrich Rosenfeld, "Collective Reparation for Victims of Armed Conflict", *International Review of the Red Cross*, Vol. 92, No. 879, 2010, p. 738.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

suffering rather than a strict legal interpretation of distinction, proportionality and military necessity in such claims.

Some reparations programmes do not invoke IHL at all, instead basing victims' entitlement to redress on the basis of human rights violations. In Mali, for example, such claims are tied to "crises" which include "rebellions, coups d'état, inter- or intra-community conflicts and political violence" since 1960.[63] As such, the application of reparations in transitional justice framed as an element of a political settlement suggests a more flexible use of legal terminology rather than a substantive legal right to redress for civilians. It may also reflect that the passage of time prohibits a strict legal analysis of the applicability of IHL at the time of the violation. Such a usage of IHL to situate the justification of claims or delivery of reparations poses a paradox in the extent to which victims can bring claims and articulate their rights to shape such redress to their needs.[64] Indeed, practical jurisdictional limits in human rights law and the primarily domestic focus of transitional justice have often meant that victims of military operations (i.e., collateral damage) and occupations associated with, for instance, the War on Terror have been left without any forum for redress against those factually, if not legally, responsible.

Finally, guarantees of non-recurrence present clear overlaps with the peacebuilding and preventive dimension of IHL. It is widely accepted that guarantees of non-recurrence are necessary to prevent the recurrence of conflict, which is often driven by inequality and poverty that often go beyond the capacity of other transitional justice measures.[65] This is often a neglected area of study in transitional justice, despite the 2005 UN Basic Principles outlining an extensive range of good practices that intersect with IHL, such as ensuring effective civilian oversight of the military, promoting codes of conduct for the military, and supporting mechanisms for "preventing and monitoring social conflicts and their resolution".[66] Guarantees of non-recurrence require, *inter alia*, public commitments of transformation of military and political culture and practice by actors responsible for violations as well as concrete institutional reforms to prevent such violations reoccurring in the future, including continual IHL education for society and training for military and security forces.[67] In transitional justice practice these issues often occur in the post-conflict context and are regularly recommended as part of final truth commission reports or as part of peace agreements, as a means to tackle the "root causes" of violence.[68]

63 Fixant les Regles Generales Relatives a la Reparation des Prejudices Causes par les Violations Graves des Droits de l'Homme, Law No. 2022-041, 15 November 2022, Art. 8. The law lays down a range of serious human rights violations which include those that would fall under grave breaches.

64 L. Moffett, above note 56, p. 302.

65 *Report of the Special Rapporteur for the Promotion of Justice, Truth, Reparation and Guarantees of Non-Recurrence*, UN Doc. A/HRC/30/42, 7 September 2015, paras 34–35.

66 UN Basic Principles, above note 57, Principle 23(a), (f), (g).

67 *Ibid*., Principle 23(e).

68 See e.g. *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 2004.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

Normative connections

Beyond these operational mechanisms and processes, there are critical accounts of the overlapping hegemonic international legal order which encompasses both IHL and transitional justice. At the turn of the century, Teitel and others warned against the rise of transitional justice and the invocation of IHL as a legal basis for legitimizing international military interventions in situations such as Kosovo, the War on Terror and Libya. While this ostensibly reflected a growing universalization of norms, it also diminished the position of those trying to challenge States' use of violence.[69] In particular, transitional justice was no longer limited to discrete transitions from authoritarianism to liberal democracy or from war to peace, but could be applied to the "steady-state" of "heightened political instability and violence"; in this environment, transitional justice was no longer exceptional and instead became the paradigm for rule of law reconstruction.[70]

Similarly, IHL and transitional justice have at times been used interchangeably as normative frameworks to justify exceptions to human rights law or each other, such as during the occupation of Iraq, to bolster the hegemony of the Western coalition.[71] The level of constitutional intervention in Iraq by coalition forces may have violated the Hague Regulations, as well as principles of transitional justice around local ownership for sustainable justice efforts.[72] A cynical parallel could also be drawn with Russian occupation of Ukrainian territory, where unlawful referenda have been carried out and the accompanying forced passportization of Ukrainian civilians means that those who refuse Russian legal identity are denied access to health care, education, social security benefits and the ability to bring compensation claims.[73]

In human rights law there is often an uncritical use of IHL as including the same secondary obligations to remedy as there are for gross violations of human rights. This stems from the language of the 2005 UN Basic Principles, which incorporate the right to remedy and reparations as applying equally to gross violations of human rights *and* "serious breaches" of IHL. Some drafting delegates disagreed with this formulation of the equivalence of the right existing in both fields.[74] In part, such tensions may reflect the legal

69 Ruti Teitel, "Transitional Justice Genealogy", *Harvard Human Rights Journal*, Vol. 16, 2003, p. 91.
70 *Ibid.*, p. 71.
71 Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, "The Battle for Transitional Justice: Hegemony, Iraq and International Law", in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition, and Human Rights*, Oxford University Press, Oxford, 2007, pp. 147-165, 162.
72 Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (Hague Regulations), Art. 43.
73 Office of the UN High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine*, 4 October 2023, p. 22. This violates Article 45 of the Hague Regulations.
74 See Gabriela Echeverria, "The UN Principles and Guidelines on Reparation: Is There an Enforceable Right to Reparation for Victims of Human Rights and International Humanitarian Law Violations?", PhD thesis, University of Essex, 2017, p. 243.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

character of IHL, wherein the framework for protection of victims is directed at restraining those who wield force rather than necessarily providing those individuals affected with legal agency or enforceable rights. In contrast, human rights law is structured around vindicating the rights and dignity of individuals and groups. In effect, IHL treats individual and collective victims as objects of the legal framework of protection, rather than subjects with agency, identity, dignity and rights.[75] Human rights law as the *lex specialis* development of the right to remedy can be complementary, not coextensive, to IHL, especially when dealing not just with State violations but also those of non-State groups.[76]

A pivotal development in transitional justice has been an increased emphasis on transitional justice from below.[77] "Justice from below" involves an "on the ground" perspective of communities affected by conflict that shifts the "gaze" below that of official institutions to a resistant, grassroots mobilization against the hegemony of those in power by shaping justice to the needs of those affected.[78] As such it implies a move beyond the State-centric legal framing and top-down design of which types of violence must be addressed and through which mechanisms, and gives space and recognition to those directly affected to allow them to mediate how best to resolve such harms, including through informal justice processes or memorialization.[79] At its most effective, this involves victims collectively mobilizing and articulating their rights to shape justice processes to their needs through effective participation in the design, implementation and delivery of justice mechanisms.[80] This grassroots transitional justice movement may suggest a challenge to IHL as the preferred legal lexicon for ascertaining eligibility and victimhood, as well as an opportunity to go beyond trials as the main justice mechanism. This article will return to discuss this perspective in depth in the final section. Before this, the next section turns to the temporal dimensions of justice and humanity that permeate both IHL and transitional justice.

75 Kirsten J. Fisher, "Defining a Relationship between Transitional Justice and *Jus post Bellum*: A Call and an Opportunity for Post-Conflict Justice", *Journal of International Political Theory*, Vol. 16, No. 3, 2020, pp. 295–297.

76 See International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106; Katharine Fortin, "The Procedural Right to a Remedy when the State Has Left the Building? A Reflection on Armed Groups, Courts and Domestic Law", *Journal of Human Rights Practice*, Vol. 14, No. 2, 2022.

77 Kieran McEvoy, "Letting Go of Legalism: Developing a 'Thicker' Version of Transitional Justice", in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, Hart, Oxford, 2008, p. 16.

78 Kieran McEvoy and Lorna McGregor, "Transitional Justice From Below: An Agenda for Research, Policy and Praxis", in K. McEvoy and L. McGregor (eds), above note 77, pp. 3–4.

79 See Camilo Tamayo Gomez, "Recognition as Transitional Justice 'From Below': Analysing Victims' Grassroots Activism in Postconflict Colombia", *International Journal of Transitional Justice*, Vol. 16, No. 3, 2022, pp. 314–330.

80 L. Moffett, above note 56, p. 78.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

The temporal dimensions of justice and humanity in armed conflict

Temporal conundra in transitional justice and IHL

Time in law is often perceived as linear and iterative, which reflects our modern understanding as one that is characterized as "motion, change, mortality, and progress".[81] Temporality as the conceptual or functional element of time has been a critical lens through which to consider wider changes over time in legal institutions and rules as well as critical non-linear perspectives of law. Conceptualizing justice as "post-conflict" and thereby setting temporal boundaries on the law is often a "political act" that fixes the official discourse on relegating violence of the past to the status of a temporary aberration rather than an "ongoing structural concern".[82] Applying such a critical temporal lens to IHL and transitional justice helps to discern the continuing gaps that confound both fields in situations of protracted conflict. The linear understanding of time that dominates Western society has implications for war and post-war justice, where war is assumed to be a temporary exceptional period that will be followed by peacetime. As Dudziak argues, war has the power to frame history and, in turn, legal responses to itself.[83]

Time is a point of reference in IHL. As a framing device, Kleffner argues that time quintessentially dictates the applicability and the "entry point" for legal analysis of IHL.[84] IHL is given a strict temporal legal position where it applies only during the exceptional circumstances of armed conflict, not before or after.[85] In contrast, human rights applies at all times.[86] Increasingly, so too is transitional justice invoked before the end of hostilities where there is resistance to sequencing or choreographing justice mechanisms to fit technocratic approaches to resolving conflict. Transitional justice is a non-linear, "organic, multidimensional process that admits of a high degree of uncertainty in what is done and what ends are pursued".[87] In contrast, the temporal bookends of IHL create its own boundaries and limitations of scope.

81 Carol Greenhouse, "Just in Time: Temporality and the Cultural Legitimation of Law", *Yale Law Journal*, Vol. 98, No. 8, 1989, p. 1633.
82 Natascha Mueller-Hirth and Sandra Rios Oyola, "Temporal Perspectives on Transitional and Post-Conflict Societies", in Natascha Mueller-Hirth and Sandra Rios Oyola (eds), *Time and Temporality in Transitional and Post-Conflict Societies*, Routledge, London, 2018.
83 Mary Dudziak, *War Time: An Idea, Its History, Its Consequences*, Oxford University Press, Oxford, 2012, p. 4.
84 Jann K. Kleffner, "The Legal Fog of an Illusion: Three Reflections on 'Organization' and 'Intensity' as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict", *International Law Studies*, Vol. 95, 2019, p. 162.
85 E. Salmón, above note 7, p. 328.
86 Jean-Marie Henckaerts, "Concurrent Application of International Humanitarian Law and Human Rights Law: A Victim Perspective", in Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, Martinus Nijhoff, Leiden, 2008, p. 252.
87 Pádraig McAuliffe, "Transitional Justice, Institutions and Temporality: Towards a Dynamic Understanding", *International Criminal Law Review*, Vol. 21, No. 5, 2021, p. 833.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

Geneva Convention IV is the only IHL text that includes "time" in its title.[88] Jean Pictet, in his Commentary on the Convention, notes that the title failed to convey the limited protection afforded to civilians in wartime, which is primarily a compromise to protect them against "arbitrary action by the enemy" rather than the dangers of military operations.[89] Indeed, this minimum floor of protection afforded by IHL often leaves civilians without any recourse to justice or redress. Recent scholarship has underscored the value of historical, nostalgia-free analysis of IHL through time,[90] and the need to balance a grounded and dispassionate engagement with IHL despite the contemporary politicized nature of how the law is analyzed in wartime.[91] Baets finds that the customary nature of IHL roots its temporal jurisdiction backwards; this is then further expanded by the use of certain "self-evident" principles such as humanity to morally guide conduct where the law does not.[92] However, despite a steady addition of new weapons treaties, such as the Convention on Certain Conventional Weapons, as well as the development of international criminal law, there has been "very little to no development [of IHL] by either treaty or custom since 1977", with the field relying instead on the "slow pace" of customary law.[93] This gives a degree of continuity and relevance to IHL.

More critically, Droege and Giorgou contend that IHL is neither linear nor uniform, given the plurality of actors involved, and that the almost static nature of the field can enable belligerents to apply IHL in a regressive or distorted manner.[94] This is reflected in how temporality is often stretched to encompass "episodic" violence in order to make it sufficiently intense for the purposes of a NIAC, such as in military operations by Western States in the Middle East and the Sahel.[95] This suggests a cumulative approach in assessing intensity which involves violence by several organized armed groups over a "geographical and temporal continuum", such as with Al-Qaeda and ISIS.[96] Ultimately it means that "wartime" or the temporal dimensions of armed conflict are extended to all times, anywhere and everywhere, making violence appear more pervasive and legally justifiable. The scope and scale of the War on Terror, for instance, continue to reinforce this, despite the deaths of over 434,000 civilians directly and

88 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV).

89 Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 10.

90 See Boyd van Dijk, "What Is IHL History Now?", *International Review of the Red Cross*, Vol. 104, No. 920–921, 2022.

91 Naz Modirzadeh, "Cut These Words: Passion and International Law of War Scholarship", *Harvard International Law Journal*, Vol. 61, No. 1, 2020.

92 Antoon de Baets, "The View of the Past in International Humanitarian Law (1860–2020)", *International Review of the Red Cross*, Vol. 104, No. 920–921, 2022, p. 1593.

93 Cordula Droege and Eirini Giorgou, "How International Humanitarian Law Develops", *International Review of the Red Cross*, Vol. 104, No. 920–921, 2022, p. 1832.

94 *Ibid.*, pp. 1809–1810.

95 Matthew Waxman, "Temporality and Terrorism in International Humanitarian Law", *Yearbook of International Humanitarian Law*, Vol. 14, 2011, p. 414.

96 J. K. Kleffner, above note 84, p. 177.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

over 3.6 million indirectly.[97] Yet there has been little effort to comprehensively deal with this temporal expansion of perpetual "war" by the War on Terror in terms of transitional justice, as we continue to see transnational multi-actor conflict across the Middle East.

By seeing war as an aberration of the idealized version of law, such a perspective may encourage a "culture of irresponsibility" where continual violence "ruptures … the usual legal order".[98] Castillejo-Cuéllar argues that law itself renders certain violence "intelligible" and deserving of justice and redress, while at the same time making "unintelligible" historical and structural violence that is the root of such "intelligible" violence in the first place.[99] This is apparent in how the international community reifies certain harms as amounting to international crimes or *jus cogens* and episodic deviations, while sidelining the mundane or banal[100] daily and continuing violations that cause a "slow death"[101] to many civilians in conflict, such as damaged water infrastructure that causes cholera outbreaks months later or the destruction of health-care facilities that causes neonatal babies to suffocate weeks after an air strike.

In the same way, the relentless nature of violence in armed conflict can overwhelm justice responses by delaying investigations for years and by allowing those responsible for violations to weaponize time in order "to disempower and disenfranchise" those affected.[102] This is exacerbated by the increasing use of algorithmic input through machine learning analysis of intelligence and social media in targeting decisions, increasing the speed at which proportionality calculations (collateral damage estimates) for attacks can be carried out in urban areas. This is most immediately apparent in the bombardment of Gaza by Israel, with a hundred targets a day, that has witnessed tens of thousands of civilians being killed in only a few months.[103] While the speed of violence is being accelerated, justice efforts are neither being catalyzed to the same degree nor seeing any of the investment in technology that artificial intelligence (AI) integration in the military is witnessing. The temporal delay of transitional justice means that the gap between the harm caused during conflict and the eventual redress of that harm is often measured not in years but in "generations of time".[104] This AI accountability gap reflects the power dynamics of those

97 See Stephanie Savell, *How Death Outlives War: The Reverberating Impact of the Post-9/11 Wars on Human Health*, Costs of War Project, May 2023.
98 M. Dudziak, above note 83, pp. 7–8.
99 Alejandro Castillejo-Cuéllar, "Historical Injuries, Temporality and the Law: Articulations of a Violent Past in Two Transitional Scenarios", *Law Critique*, Vol. 25, No. 1, 2014.
100 Vasuki Nesiah, "The Trials of History: Losing Justice in the Monstrous and the Banal", in Ruth Buchanan and Peer Zumbansen (eds), *Law in Transition: Human Rights, Development and Transitional Justice*, Hart, Oxford, 2014.
101 Mary Hansel, "From Crisis to Quotidian: Countering the Temporal Myopia of *Jus Cogens*", in Kathryn McNeilly and Ben Warwick (eds), *The Times and Temporalities of International Human Rights Law*, Hart, Oxford, 2022.
102 *Ibid.*, p. 210.
103 Yuval Abraham, "'A Mass Assassination Factory': Inside Israel's Calculated Bombing of Gaza", *+972 Magazine*, 30 November 2023.
104 B. Jones, above note 17, p. 174.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

wielding violence and those subjected to it, making warfare and justice increasingly remote from the battlefield and the courtroom.

Added to this is the fact that certain violence can be "left and locked" in the past while other deeper violence persists, bringing into question the "post-conflict" nature of any transition from war and implicating incidents of violence as continuities rather than exceptional ruptures as transitional justice frames.[105] Dudai and Cohen suggest that, in such circumstances, "dealing with the past", rather than transitional justice in protracted conflict, is a more useful framing for encouraging greater societal and cultural engagement with violations committed and harm suffered by both sides, which in turn can be more productive in conflict transformation.[106] This, they argue, may lead to the foundation of more substantive institutions for doing justice in the future.[107] The final section of this article argues in the alternative for some provisional justice in the short term that speaks to humanity and justice beyond raising inter-communal awareness of suffering for justice in the long term. Before turning to that discussion, the next subsection unpacks the notions of humanity and justice, as they may help to navigate the temporal complexities alluded to thus far.

Temporality, humanity and justice

Elaborating on the two concepts of humanity and justice may be helpful for navigating the temporal conundra for both IHL and transitional justice. Humanity as an "essential" or "universal" principle,[108] a "capstone of the other constraining principles",[109] is the "driving force" of IHL in that there is a moral undercurrent motivating legal intervention both to prevent and to redress the harm caused by armed conflict.[110] Mégret suggests that modern IHL theories speak to its evolving nature in shifting away from the "laws of war" nomenclature to "humanitarian" concerns, and reflect the increasing influence of human rights and international criminal law as a calling to a higher normative commitment of humanity which goes beyond the obligations owed to other States.[111] As such, humanity is the invocation of the commonality of human experience and moral conscience that is reflected in the Martens Clause.[112] Humanity is also invoked in transitional justice as a means to establish common values between affected communities and those responsible

105 A. Castillejo-Cuéllar, above note 99.

106 Ron Dudai and Hillel Cohen, "Dealing with the Past when the Conflict Is Still Present: Civil Society Truth-Seeking Initiatives in the Israeli-Palestinian Conflict", in Robert Shaw and Lars Waldorf (eds), *Localizing Transitional Justice*, Stanford University Press, Stanford, CA, 2010

107 *Ibid.*

108 Hugo Slim, "Sharing a Universal Ethic: The Principle of Humanity in War", *International Journal of Human Rights*, Vol. 2, No. 4, 1998.

109 Ryan J. Vogel, "Drone Warfare and the Law of Armed Conflict", *Denver Journal of International Law and Policy*, Vol. 39, No. 1, 2010, pp. 101, 127–128.

110 Jean Pictet, *The Principles of International Humanitarian Law*, ICRC, Geneva, 1966, p. 460.

111 Frédéric Mégret, "Theorizing the Laws of War", in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law*, Oxford University Press, Oxford, 2016, p. 770.

112 Convention (II) with Respect to the Laws of War on Land, 29 July 1899 (Hague Convention II), Preamble; AP I, Art. 1(2); AP II, Preamble.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

for violence.[113] It has been resorted to in rejecting amnesties for crimes against humanity, as such crimes not only violate individuals' rights but "offend humanity as a whole".[114] That said, the influence of human rights law, constitutional law and conflict resolution on the field of transitional justice means that notions of human dignity[115] and, in particular, reconciliation have a stronger sway.[116]

For its part, transitional "justice" has been pursued in the midst of ongoing conflicts, to varying degrees of success. One of the fundamental challenges in ongoing and protracted conflict is the lack of effective or legitimate authority over the whole of the country due to prevailing insecurity, ongoing hostilities and even armed groups controlling territory. Indeed, Winters argues that in situations of ongoing conflict, transitional justice can be legitimate as a "reasonable political order" to account for violations by the State, if not as a means to achieve wholesale "effective popular attitudinal change" in transitioning to peace and democracy.[117] Tabak is less convinced by such political ordering, where there is often a "false dichotomy" between conflict and post-conflict, with violence and insecurity continuing at the end of hostilities for women in particular.[118]

Indeed, efforts to do justice in the midst of hostilities often involve investigations by external actors, such as the ICC.[119] Sarkin argues that transitional justice has a role in halting violations that requires investigation and condemnation at the time, not years later when the violence has abated or ended.[120] While there are inherent risks to those carrying out such investigations and prosecutions, their actual deterrent effect in forestalling further conflict is inconclusive. Nonetheless, transitional justice in such circumstances is unlikely to benefit those most affected without a shift toward an end to hostilities and sustainable peace, as external approaches often suffer from legitimacy crises and long-term engagement.[121]

113 This is the common ground between human rights and IHL on the concern for "respect for human values and the dignity of the human person". Ruti Teitel, *Humanity's Law*, Oxford University Press, Oxford, 2011, p. 47.
114 IACtHR, *Almonacid-Arellano et al. v. Chile*, Series C, No. 154, Judgment, 26 September 2006, para. 152.
115 Sandra Milena Rios Oyola, "Uses of the Concept of Human Dignity and the Dignification of Victims in Transitional Justice in Colombia", *European Review of International Studies*, Vol. 9, No. 1, 2022.
116 See e.g. Gambia Truth, Reconciliation and Reparations Commission Act, 2017, Sec. 13(a)(i).
117 Stephen Winter, "Theorising Transitional Justice in Ongoing Conflict", in Tine Destrooper, Line Egbo Gissel and Kerstin Bree Carlson (eds), *Transitional Justice in Aparadigmatic Contexts*, Routledge, London, 2023.
118 Shana Tabak, "False Dichotomies of Transitional Justice: Gender, Conflict and Combatants in Colombia", *New York University Journal of International Law and Politics*, Vol. 44, 2011, p. 113–118.
119 Thomas Unger and Marieke Wierda, "Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice", in Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice*, Springer, Berlin, 2009.
120 Jeremy Sarkin, "Refocusing Transitional Justice to Focus Not Only on the Past, but also to Concentrate on Ongoing Conflicts and Enduring Human Rights Crises", *Journal of International Humanitarian Legal Studies*, Vol. 7, No. 2, 2016, p. 314.
121 See Par Engstrom, "Transitional Justice and Ongoing Conflicts", in Chandra Lekha Sriram, Jemima Garcia-Godos, Johanna Herman and Olga Martin-Ortega (eds), *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants*, Routledge, London, 2013.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

As an example, the transitional justice programme in Colombia, arguably one of the largest in the world, has been struggling to deliver justice to millions of victims of a range of ongoing conflicts. This has evolved over time, reflecting stability and peace in some parts of the country and chronic insecurity and violence in others, to the extent that in recent years the reparations body, Unity for Victims (Unidad para las Víctimas), has been adding about 10,000 new applicants each month.[122] Emerging research from the efforts of the JEP and other transitional justice mechanisms to operate in this "violent peace" suggests that it has a detrimental impact on victims and former fighters' participation, which in turn can undermine the legitimacy of such efforts and the broader goals of sustainable peace and trust-building.[123]

There are other shortcomings to "doing" transitional justice in the midst of violence. One recurrent theme is the gendered nature of such justice. In Colombia, Tabak speaks of the "superficial" nature of efforts to protect women's rights and include them in transitional justice processes, which ultimately fail to be gender-inclusive and to reflect the "multiple gendered roles that both men and women play in conflict and post-conflict".[124] Recent efforts at including women and girls in the post-2016 peace agreement comprehensive justice framework have struggled to deal with sexual and gender-based violence as well as to recognize intersecting identities, such as female fighters as victims.[125] In a study by one of the present authors on reparation practices in the early years of the Troubles, research found systemic bias and discrimination against women and girls, with the families of women and girls who were killed receiving far lower compensation than the families of men of the same age.[126]

Beyond IHL and transitional justice, *jus post bellum* theory within the "just peace" field has attempted to articulate a more expansive reading of "justice" to fill the gap left by "incomplete" IHL with regards to post-conflict justice.[127] *Jus post bellum* has also been justified as a response to the "elastic" nature of transitional justice,[128] which may leave it inept to address inter-State conflicts or navigate post-conflict settlements where justice issues may need to be temporarily parked to secure immediate peace. In discussing the links between these three fields, Freeman and Djukic suggest that, in contrast to transitional justice's more traditional focus on individual rights and social justice, *jus post bellum* provides a

122 This number stood at 9.593 million victims registered in 31 October 2023. See the Unity for Victims website, available at: www.unidadvictimas.gov.co/es/.

123 See Rosario Figari Layus and Juliette Vargas Trujillo, "The 'Domino Effect' of Ongoing Violence on Transitional Justice: The Case of Colombia's Special Jurisdiction for Peace", *International Journal of Transitional Justice*, forthcoming.

124 S. Tabak, above note 118, p. 105.

125 See Daniela Suarez Vargas, "The Subversive Victim: Victimhood and Sexual and Gender-Based Violence Inside Non-State Armed Groups in Colombia", PhD thesis, Queen's University Belfast, 2024.

126 See Luke Moffett and Kevin Hearty, *More than a Number: Reparations for those Bereaved during the Troubles*, Reparations, Responsibility and Victimhood in Transitional Societies, 2023, available at: https://reparations.qub.ac.uk/new-report-reparations-for-those-bereaved-during-the-troubles/.

127 K. J. Fisher, above note 75, p. 289.

128 Jens Iverson, "Transitional Justice, Jus Post Bellum, and International Criminal Law", *International Journal of Transitional Justice*, Vol. 7, No. 3, 2013, p. 414.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

specific legal framework for governing peace settlements and post-conflict occupation beyond the application of IHL during hostilities.[129] To the extent that *jus post bellum* seeks to "suppl[y] norms and principles applicable in the aftermath of armed conflict in periods of transition from conflict to peace, with a view to regulate how one gets from 'here' to 'there'",[130] there is an inherent overlap and normative "justice" element to this discussion. Rules and norms governing peacemaking after conflict are necessary extensions of the interweaving of conflict, intervention, post-conflict peace, justice etc.[131] Transitional justice, traditionally positioned as facilitating the transition from authoritarianism towards a more liberal democratic dispensation, is inept at dealing with situations of protracted conflict and fragile States.[132] For IHL, meanwhile, beyond protecting civilians and persons *hors de combat* from the ravages of war and the hope for peaceful resolution, the governance of a country after a conflict and its democratization are of little concern.[133] Hence, *jus post bellum* may in temporal terms appear to be a useful bridge to help stabilize the end of hostilities and provide the peaceful space for transitional justice to emerge,[134] such as allowing civil society to form and victims to mobilize and demand justice.

The realities of contemporary transitions from protracted conflicts and fragile States, in which victims and society cannot wait for just and sustainable peace to be attained and violence has completely ceased before justice may be rendered, necessitate moving beyond categorizing war and peace into manageably discrete phases.[135] Indeed, Freeman and Djukic suggest that the prevalence of low-intensity violence after the end of hostilities would complicate the application of *jus post bellum* as the bridge toward transitional justice without complete peace.[136] However, this bifurcation and sequencing of peace and justice is itself too formulaic. Instead, this article argues, there is a core need for justice to be a fundamental normative element of humanity when tackling ongoing and protracted conflicts. Such a normative commitment is the key to preventing the recurrence of violence through a rights-based approach to institutional reforms addressing the root causes of structural injustice, and to achieving a measure of accountability for conflict's atrocities, in that for rules to be effectively complied with, they need to allow some form of real-time remedy to those affected. It is through this normative commitment, rather than using *jus post bellum* as a temporal bridge, that IHL and transitional justice may be

129 Mark Freeman and Drazan Djukic, "Jus Post Bellum and Transitional Justice", in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace*, T. M. C. Asser Press, The Hague, 2008, p. 213.
130 Jann K. Kleffner, "Introduction: From Here to There… and the Law in the Middle", in C. Stahn and J. K. Kleffner (eds), above note 129, p. 2.
131 Carsten Stahn, "'*Jus ad Bellum*', '*Jus in Bello*'… '*Jus post Bellum*'? – Rethinking the Conception of the Law of Armed Force", *European Journal of International Law*, Vol. 17, No. 5, 2006, p. 921.
132 K. J. Fisher, above note 75, pp. 291–292.
133 *Ibid.*
134 J. Iverson, above note 128, p. 422.
135 K. J. Fisher, above note 75, p. 299.
136 M. Freeman and D. Djukic, above note 129, p. 226.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

reconciled to bridge the continuing divide in situations of ongoing and protracted conflict in fragility.

International law has witnessed a turn away from a solely "State-centric" approach in the creation of law and the possession of rights vis-à-vis other States, to a more humanized one[137] which recognizes the rights of individuals and groups along with their right to a remedy where those rights are violated.[138] Ish-Shalom has declared the contemporary position as an era of "responsibility" rather than simply the sovereignty of States.[139] This is demonstrated by transitional justice increasingly dealing with the responsibility of non-State actors such as armed groups and corporations.[140] Yet, while responsibility for the consequences of war has been construed in the extreme through individual criminal liability for war crimes and other international crimes, this often reflects only a small proportion of the overall loss and damage caused in armed conflict. For instance, for the conflict in Ituri in the eastern Democratic Republic of the Congo (DRC) in the early 2000s, four individuals from local militias were indicted for war crimes and crimes against humanity by the ICC, but only three of these (Lubanga, Katanga and Ntaganda) were convicted, and only for crimes based in specific locales and on a single day, reflecting very reductive temporalities of justice. Even in these high-profile cases, there were calls to temporarily suspend or prevent the arrest of Ntaganda in order to avoid escalating the conflict in the eastern DRC.[141] Even with Ntaganda's conviction and Uganda found liable by the International Court of Justice (ICJ) for $325 million for its involvement in the conflict, violence continues in the eastern DRC. Despite the common values of humanity and justice in IHL and transitional justice that temporarily transcend the war/peace divide, therefore, there remains a continuing divide between the two fields in dealing with protracted conflicts. The following section of this article explores ways to bridge this gap.

Bridging the continuing divide: Victims, prevention and provisional justice

A significant continuing divide between IHL and transitional justice relates to the "lawful" harms caused by military operations that result in death, serious injury and/or property or environmental damage. "Lawful" harms are the incidental

137 Theodor Meron, *The Humanization of International Law*, Martinus Nijhoff, Leiden, 2006, p. 2.

138 See Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice*, Oxford University Press, Oxford, 2012.

139 Piki Ish-Shalom, *Concepts at Work: On the Linguistic Infrastructure of World Politics*, Michigan University Press, Ann Arbor, MI, 2021, p. 1.

140 *Role and Responsibilities of Non-State Actors in Transitional Justice Processes*, UN Doc. A/HRC/51/34, July 2022; *Implementing the Third Pillar: Lessons from Transitional Justice*, UN Doc. A/HRC/50/40/Add.4, July 2022.

141 Valerie Arnould, "Transitional Justice in Peacebuilding: Dynamics of Contestation in the DRC", *Journal of Intervention and Statebuilding*, Vol. 10, No. 3, 2016. A number of other perpetrators have been prosecuted through the domestic military courts, but this remains only a fraction of those responsible.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

losses, injuries or damages caused to civilians and persons *hors de combat* as a result of military operations that were carried out in a discriminate and proportionate manner (or, colloquially, "collateral damage"), such as civilians killed in an air strike targeting a high-value enemy commander. Omitting these harms as violations has implications for which individuals and groups are seen as victims deserving of justice.

Transitional justice is fundamentally victim-centred, and only exists as a field due to the struggle against impunity by victims and their allies.[142] The notion of victimhood and the international normative framework that has developed around it has helped to articulate the obligations of States and other responsible actors in remedying mass atrocities. However, to be eligible for measures like reparations, the violations have to fall within legally recognized and categorized harms caused by certain wrongdoing in order for those affected to be accepted as victims.[143] To some extent this can be extended to injured or killed soldiers in State armed forces, who are often left outside of such remedial efforts and their next of kin left to the mercy of pension entitlements.[144] Such constructs of eligibility of victimhood and deservedness of justice reveal transitional justice as an inherently selective and political process, which, as Nagy notes, often constructs violations narrowly to the "exclusion of structural and gender-based violence"; this in turn results in the "privileging of legal responses which are at times detrimentally abstracted from lived realities".[145] Perhaps, over fifteen years on from Nagy's critique, transitional justice is slowly trying to tackle these issues, and some progress can be seen even in ongoing and protracted conflicts, such as in the reparation efforts in Colombia and Ukraine.

IHL has no comparable language for such subjects as victims, as all are objects of protection rather than agents or rights holders.[146] The rubric of victimhood under IHL in Additional Protocols I and II covers both civilian and military victims (persons *hors de combat*), but does not articulate their protections in terms of legal entitlements for when they are harmed. Instead, IHL is more preventative in mitigating for their protection and providing assistance to meet their humanitarian needs.[147] The vernacular of civilian protection in IHL can be a paper shield, dispensed with in favour of the convenience of military necessity, where military advantage trumps the killing of dozens, even hundreds, of civilians. Under IHL, civilian harm is *prima facie* caused by belligerents' actions, but IHL does not provide legal accountability for such collateral damage if deemed proportionate and necessary to achieve military objectives. This is apparent in Ukraine, Sudan and Gaza, where high-intensity fighting in urban

142 Juan Mendez, "Victims as Protagonists in Transitional Justice", *International Journal of Transitional Justice*, Vol. 10, No. 1, 2016, p. 1.
143 Trudy Govier, *Victims and Victimhood*, Broadview Press, Peterborough, 2015, p. 27.
144 Conall Mallory, *Human Rights Imperialists*, Hart, Oxford, 2020, p. 182.
145 Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections", *Third World Quarterly*, Vol. 29, No. 2, 2008, p. 276.
146 See E. L. Camins, above note 16.
147 AP I, Art. 81(1).

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

areas and the use of explosive weapons has resulted in the deaths of tens of thousands of civilians in the past year. Taking transitional justice and IHL together in such circumstances, and considering the increasing burden of time in protracted conflicts, we are left with a chasm of injustice for those civilians killed and maimed in military operations that do not amount to serious or grave breaches of IHL, much less war crimes.

Despite this continuing gap between the two fields, there is emerging practice that can help to bridge the void. In the absence of either field dealing squarely with ongoing violations in armed conflict, some form of justice is required to acknowledge and alleviate the human condition experienced in conflict. The nascent practice in this area indicates a cross-fertilization of the two fields into what one could term generally as "provisional justice", in that it has a flavour of transitional justice but is not a full accounting because of the continuing violent circumstances. This section focuses on three emerging aspects of provisional justice: prevention, mitigation, and justice efforts.

Prevention of violations, a common concern of both IHL and transitional justice, is the policy focus of many humanitarian organizations through a dynamic and responsive engagement with armed actors during conflict. For instance, the ICRC and Geneva Call engage with armed groups to promote internalizing IHL into their codes of conduct and regulations, and through efforts like the deeds of commitment to respect IHL and prevent violations.[148] This complements more condemnatory actions in ongoing armed conflicts such as investigations, publicly condemning bad behaviour, and the sanctions on actors or parties to conflict that are the common practice of UN commissions of inquiry and the UN Security Council.[149] These can be important in bringing visibility to harm caused by military operations as well as in encouraging those responsible not to repeat such harm, but they are not always effectively implemented or consistently monitored in order to generate respect for IHL[150] or address broader justice concerns over redressing victims' harm.[151]

Open-source intelligence (OSINT) has in many ways opened up and democratized publicizing information in wartime as a tool for prevention of repetition.[152] At the same time, however, it is subject to manipulation and can be a source of incitement to further violence; this occurred in the case of the Al-Ahli hospital in Gaza in October 2023, when an apparent misfired Hamas rocket that caused the deaths of a number of civilians was initially blamed on an Israeli air strike and claimed to have killed 500 civilians, only for subsequent verified OSINT analysis to dispute both the death toll and the source of the

148 See Ezequiel Heffes, "Responsible Rebels: Exploring Correlations between Compliance and Reparations in Non-International Armed Conflicts", *Journal of Human Rights Practice*, Vol. 14. No. 2, 2022.

149 See C. Harwood, above note 26.

150 Hilde Roskam, "Crime-Based Targeted Sanctions: Promoting Respect for International Humanitarian Law by the Security Council", *Yearbook of International Humanitarian Law*, Vol. 19, 2016.

151 Luke Moffett, "Violence and Repair: The Practice and Challenges of Non-State Armed Groups Engaging in Reparations", *International Review of the Red Cross*, Vol. 102, No. 915, 2020.

152 Brianne McGonigle Leyh, "The Role of Universities and Law Schools in Documenting Serious International Crimes and Advancing the Rule of Law", *Utrecht Law Review*, Vol. 17, No. 2, 2021.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

munition.[153] While these efforts to document and condemn harm during armed conflict can complement victims' efforts to obtain redress, they can also risk recrimination, especially given their external, distant and international source. The experience from transitional justice is that such externally driven efforts at prevention have to be internalized in the socio-political culture in order to avoid repetition.

One approach to changing this culture of practice can be seen in the increasing efforts to mitigate civilian harm by belligerents as a by-product of their "strategic self-interest" in "winning hearts and minds" in order to deter the civilian population from turning to support the enemy.[154] In August 2022, the US Department of Defence released its Civilian Harm Mitigation and Response Action Plan, which justifies itself on the basis that civilian protection is a "strategic priority" and a "moral imperative" of the US military and is required to mitigate and respond to civilian harm in the interests of "mission effectiveness", "professionalism" and "institutional values". This includes, *inter alia*, condolence payments as *ex gratia* compensation to those affected.[155] Such practices are framed as going beyond IHL, which offers no avenue to redress civilian harm, and so these mitigation strategies when implemented are intended to "strengthen adherence to the principles of proportionality, precaution and distinction".[156]

Adding a cost value to killing or injuring civilians in proportionality calculations could run counter to the humanitarian concern of protecting civilians in IHL. There is also a risk of creating a culture of "pay to violate" the rights of civilians with such an approach. The real value of such an approach is not in the cost of condolence payments, but in changing the culture of practice within military institutions to reflect and learn from the harms caused to civilians so as to prevent their repetition. There have similarly been emerging efforts to encourage non-State armed groups to comply with IHL norms through engaging with transitional justice mechanisms or at least informal redress to affected civilians during hostilities.[157]

Such practices are a welcome step in bridging the temporal divide between civilians being harmed in military operations and transitional justice mechanisms being set up. However, these processes need to be human rights-compliant so as to ensure their effectiveness and transparency. US and Saudi practices in Yemen have been criticized for their opaqueness and the use of waivers, where paying money to impoverished victims forecloses any future rights to an investigation, truth or reparations.[158] Although belligerents may need such legal reassurances so

153 See Human Rights Watch, "Gaza: Findings on October 17 Al-Ahli Hospital Explosion", 26 November 2023, available at: www.hrw.org/news/2023/11/26/gaza-findings-october-17-al-ahli-hospital-explosion.
154 Sarah Holewinski, "Do Less Harm: Protecting and Compensating Civilians in War", *Foreign Affairs*, Vol. 92, No. 1, 2013.
155 See Steven van de Put, "Ex Gratia Payments and Reparations: A Missed Opportunity?", *Journal of International Humanitarian Legal Studies*, Vol. 14, No. 1, 2023.
156 Sahr Muhammedally, "Minimizing Civilian Harm in Populated Areas: Lessons from Examining ISAF and AMISOM Policies", *International Review of the Red Cross*, Vol. 98, No. 901, 2016, p. 231.
157 See UN Doc. A/HRC/51/34, above note 140; L. Moffett, above note 151.
158 L. Moffett, above note 56, p. 184.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

that condolence payments do not establish legal liability, those payments inadequately discharge the obligation to uphold victims' right to a remedy.[159] They are also at the discretion of the belligerents and are not grounded in recognizing the rights of victims or being shaped from bottom-up input. While mitigation as a means of improving future practice is to be welcomed, there are obvious dangers in diluting the rights-based language and terminology used to protect civilians and legally vindicate their harms in armed conflict as a hegemonic means of depriving such human beings of their rights.

Issues of mitigation and prevention could be bridged under the rubric of humanity insofar as belligerents should, as a matter of moral responsibility to universally respect humanity, be responsive to the loss of civilians in war, especially where they factually cause the deaths of those civilians. Transitional justice efforts during the course of ongoing or protracted conflicts in situations of fragility may be a more effective hook in this regard, so long as such justice efforts during war do not bar the future claims of victims – but this nonetheless only temporarily alleviates their suffering.

The final aspect of provisional justice is the conceptual place of justice and victims' rights in ongoing or protracted armed conflicts. There have been a number of domestic prosecutions under the principle of universal jurisdiction, such as in the recent trials in Germany for war crimes committed in Syria. Such use of strategic litigation driven by civil society reflects justice "from below" in ongoing conflict, with the aim of combating impunity for war crimes and preventing their recurrence.[160] The ICC has also intervened in several ongoing conflicts, even where it has been criticized by some for undermining peace efforts or at least legitimizing the State's military operations,[161] such as in Libya, where a number of suspects were killed in fighting (Gaddafi, Al-Tuhamy, Al-Werfalli); in Uganda; and currently in Ukraine, Sudan and Israel/Palestine. There have also been a range of external fora that have been tackling ongoing violations, such as the ICJ, the Permanent Court of Arbitration and the ECtHR in relation to Russia's invasion of Ukraine. These are not speedy processes, but they can externally shape any post-conflict settlement. Furthermore, there are other supranational mechanisms established by the UN and regional bodies – such as the International, Impartial and Independent Mechanism for Syria, the Independent Investigative Mechanism for Myanmar, and the Registers of Damage for the Israeli Wall and Ukrainian conflict – that document the harm caused to civilians in order to support any future criminal investigations and reparation programmes. To say, therefore, that there is no justice in war without peace neglects the efforts of those affected to find some legal forum to hear their claims

159 See Luke Moffett *et al.*, *Belfast Guidelines on Reparations in Post-Conflict Societies*, Queen's University Belfast, 2023, Principle 8.

160 Brianne McGonigle Leyh, "Using Strategic Litigation and Universal Jurisdiction to Advance Accountability for Serious International Crimes", *International Journal of Transitional Justice*, Vol. 16, No. 3, 2022, p. 367.

161 Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention", *Ethics and International Affairs*, Vol. 21, No. 2, 2007, p. 186.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

beyond the State. While the struggle for justice in conflict continues, there is some hope; for victims, however, these efforts take years, even decades. Such justice efforts must therefore be mindful of narrowing this temporal gap through, for instance, greater support for international solidarity networks, engendering a bottom-up approach and local ownership, and leveraging the use of technology such as OSINT and AI data analysis to help corroborate victims' claims and reduce their evidential burden.

Conclusion

This article has tried to tackle the temporal overlaps between the operation of IHL and transitional justice during and after armed conflicts, and the gap that remains between the two fields in situations of ongoing or protracted conflict in fragile States. Time is a useful critical lens for analyzing the two fields and for appreciating that victims do not have the luxury of waiting for peace in order to seek justice and the non-repetition of their victimization. The article has focused on the pervasive nature of violence in situations of protracted conflict, in which justice is often pushed aside until there is "peace", or at least low levels of fighting, before victims are able to seek justice. However, the nature of human memory and the demand for justice to speak out for those who have suffered loss and continue to live with the consequences of war do not fade with time. Past violations and their seeds for future ones need to be recognized and kept at the forefront of international law's collective conscience, just as the ongoing atrocities committed in Israel and Gaza remind us that claims before the UN for redress for the Nabka/1948 war are still outstanding and hundreds of thousands remain intergenerationally displaced. Conflict-related harm reverberates across the everyday lives of victims, their families and their communities. As the father of one of the children killed in a loyalist massacre of civilians in Belfast in 1992 said when his wife died shortly thereafter of a broken heart, "the bullets that killed James didn't just travel in distance, they travelled in time. Some of those bullets never stop travelling."[162]

This article has argued that a normative commitment to victims' rights and justice should be instilled as a fundamental element of the core principle of humanity that is the driving force of IHL. In attempting to bridge the continuing divide between IHL and transitional justice, the article has mapped out some of the provisional justice efforts to respond to civilian harm during hostilities. Inevitably, scholars and practitioners have to acknowledge that wars cause immeasurable loss and suffering to human beings as "lawful" harms. Recognizing this, the question must be asked: should the arc of law bend to recognize the need to do justice for the lawful harm caused to enemies and civilians alike, in

162 David McKittrick, Seamus Kelters, Brian Feeney, Chris Thornton and David McVea, *Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles*, Mainstream Publishing, Edinburgh, 2004, p. 1265.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press

the interests of collective justice, reconciliation, and sustainable and just peace? Or should the performative nature of law continue to put a legitimizing, humane face on the brutality of war?[163]

IHL is the floor of protection for civilians in war. Humanity and justice as fundamental principles of IHL and transitional justice should impel both fields to strive for a higher formulation of the law that better protects and vindicates the rights of civilians. Engaging critically with the law is a means to get upstream of these issues in the flow of time, so as to avert the downriver consequences of future civilians suffering in armed conflict.

163 See Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War*, Verso, La Vergne, 2022.

https://doi.org/10.1017/S1816383124000158 Published online by Cambridge University Press