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IHL'S REASONABLE MILITARY COMMANDER STANDARD AND CULTURE: APPLYING THE LESSONS OF ICL AND IHRL

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ABSTRACT

Empirical studies have demonstrated that cultural considerations are a factor in assessing proportionality and evaluating whether an attack causes unreasonable injury. Yet, culture's influence has received minimal attention in the literature on International Humanitarian Law ("IHL"). This article seeks to redress this gap by opening a discussion on how the "reasonable military commander" standard—determining the relative values assigned in the proportionality equation—might be made "reasonable" from a cultural perspective. Undeniably, incorporating culture into IHL risks a dangerous slide into cultural relativism; however, ignoring culture's hidden applications under IHL also has risks. Ignoring cultural factors has exposed the IHL to charges of Eurocentrism and neocolonialism, which has compromised its institutional reputation and effectiveness; nations are less likely to adhere to a standard which they view as biased.

Requiring prevention of harm to civilians is a starting point; however, current hegemonic applications necessitate careful consideration of how a balanced interpretation of cultural reasonableness might be achieved. Through an analysis of cultural relativism and defenses in International Criminal Law ("ICL"), this article offers a preliminary discussion of the potential risks and benefits of introducing a narrow application of cultural defense into IHL as a means of counterbalancing culture's hidden influence.

I. INTRODUCTION

Consider a hypothetical situation: The year is 2008, and an English captain named Harry Windsor has fallen captive in Afghanistan. To determine whether a rescue mission should be sent to retrieve this captive soldier, the Law of Armed Conflict would need to be applied, specifically the principle of proportionality. In assessing the military gain of this mission versus the potential loss of innocent civilian lives, should Captain Windsor's identity matter? Is it relevant that the captain is Prince Charles' son and that as a member of the royal family, Captain Windsor represents the monarchy—a prominent aspect of British culture? According to the principle of proportionality as understood under IHL,

cultural values should not come into play when applying the principle of proportionality.[1] Yet, Captain Windsor's identity as a member of the royal family would play a role in this assessment. The armed forces of all sixteen countries of the Commonwealth, plus possibly The North Atlantic Treaty Organization ("NATO"), would launch a mission to rescue Captain Harry Windsor, even at the risk of harming dozens of innocent civilians. It is doubtful that this action would prompt much criticism or spark public backlash. Most would not question the proportionality of saving this one soldier's life despite the dozens of innocent lives that might be lost during such a rescue mission, given the monarchy's cultural significance in Great Britain.

However, if instead of Captain Windsor, the British soldier that needed rescuing was an ordinary British foot soldier, it is likely that the same mission would receive greater scrutiny from the media and the public. More questions would be asked about whether the attack was justified. Yet, the math has not changed; the mission still entails saving one life at the expense of a larger number of foreign civilian lives. The only difference is the cultural value of the person being saved, which according to IHL principles should not matter.

However, as we shall see, empirical studies have shown that culture not only influences public and media perceptions of such missions, but it also affects how commanders apply the proportionality principle.[2] Still, IHL literature pays little attention to the role of culture in assessing proportionality and evaluating whether an attack causes unreasonable injury.[3] This absence stems from concerns that incorporating culture into IHL risks a dangerous slide into cultural relativism in which no shared standard for narrowing wartime objectives would be possible. While this danger is undeniably real, it is also true that current hegemonic applications of the principle of proportionality have exposed IHL policies to charges of Eurocentrism and neocolonialism and thus compromised the stature of IHL among some nations.[4] Thus, this article seeks to open a debate on if and how culture's influence might be highlighted, mitigated, and regulated.

This article consists of eight substantive parts. In Part II, we explain our decision to incorporate ICL and International Human Rights Law ("IHRL") into our discussion of potential cultural applications in IHL, since this may appear counterintuitive, given these are separate fields of international law. Parts III and IV outline two key concepts in IHL—the standard of reasonableness and the principle of proportionality, respectively. We discuss the challenges and deficiencies associated with each concept. The subsequent four parts present the central thesis of this article. Part V focuses on how IHRL and ICL have understood culture. Part VI details the rejection of cultural defenses by international criminal courts and analyzes the legal and moral problems posed by this rejection. Part VII tackles possible practical hurdles in implementing culture in IHL, as well as potentially dangerous abuses that could occur. Part VIII examines the recognition of force protection

1. *See* Luke Whittemore, *Proportionality Decision Making in Targeting: Heuristics, Cognitive Biases, and the Law*, 7 HARV. NAT'L SEC. J. 577, 583 (2016) (outlining the common standard for proportionality; note that culture does not play a factor).

2. *See* discussion *infra* Section IV.A.

3. *See* discussion *infra* Part IV.

4. *See* discussion *infra* Section V.A.

and defense capabilities as legitimate considerations and asks why cultural considerations are left out of the analysis. Section VIII.C offers an initial exploration of watershed moments in IHL and considers the normative implications of cultural construction in IHL. Finally, we conclude by emphasizing that the IHL should not necessarily accommodate all cultural norms; any future incorporation of culture must proceed cautiously to avoid sliding into cultural relativism. In any case, we cannot ignore culture's hidden influence on IHL if we are to preserve its legitimacy.

II. THE INTERPLAY BETWEEN THE FIELDS OF IHL, IHRL, AND ICL

At first glance, it may seem counterintuitive to include IHRL and ICL in a discussion of culture in IHL. After all, IHRL, ICL, and IHL are three distinct fields of international law.[5] IHRL establishes a set of rules that protect the fundamental rights of individuals and groups from government action.[6] ICL is responsible for prosecuting individuals who have committed international crimes, while IHL regulates warfare and protects individuals during armed conflicts.[7] Yet as Antonio Cassese—one of the architects of modern international law—first noted, these once "tight legal compartments" are "gradually tending to influence one another . . . and the international courts are coming to look upon them as parts of a whole."[8] Moreover, the concurrent application of IHL and IHRL has been recognized in multiple international tribunals, including the International Court of Justice, the European Court of Human Rights, and the American Commission on Human Rights.[9] Thus, the relationship between IHL and IHRL is often viewed as one of complementarity.[10] Similarly, there are overlaps between IHL and ICL; for example, one of the methods for the enforcement of IHL is through ICL.[11] In highlighting these overlaps, our intent is not to downplay the significant divergences between these fields; rather, we believe that the convergences between them provide valuable lessons from a comparative study of their respective understandings and applications of culture. Thus, rather than discuss cultural considerations in IHL in isolation—especially given the scarcity of IHL literature addressing culture—we opted to integrate IHRL and ICL into our analysis.

III. THE STANDARD OF REASONABLENESS IN INTERNATIONAL LAW

A. Is the Reasonableness Standard "Reasonable"?

The legal usage of "reasonableness" primarily compares the behavior in question

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5. HUMA HAIDER, INTERNATIONAL LEGAL FRAMEWORKS FOR HUMANITARIAN ACTION TOPIC GUIDE 13 (2013) (ebook).

6. *Id.* at 8.

7. *Id.* at 7.

8. Christine Byron, *A Blurring of the Boundaries: The Application of International Humanitarian Law*, 47 VA. J. INT'L L. 839, 840 (2009).

9. HAIDER, *supra* note 5 at 7–8, 21.

10. *See generally* Katharine Fortin, *The relationship between international human rights law and international humanitarian law: Taking stock at the end of 2022*, 40 NETH. Q. HUM. RTS. 341 (2022).

11. Stephen R. Ratner, *Sources of International Humanitarian Law and International Criminal Law: War Crimes and the Limits of the Doctrine of Sources* 4 (U. Mich., Pub. L. & Legal Theory Rsch. Paper Series Paper No. 505, 2016), https://bit.ly/40w15li.

with the standard that society sets as the accepted norm of behavior in similar situations.[12] The goal of using a standard norm, such as reasonableness, is essential for dealing with the inability of legislators to foresee the implications of fully applying the law to reality.[13] "In a complex environment . . . law becomes deformalized,"[14] and such a standard mediates between law and reality.[15]

Reasonableness provides a particular legal safety net to exclude apparent unfair or irrational consequences of applying strict legal rules that collide with our basic sense of justice, fairness, and decency.[16] While resorting to such a standard reduces legal certainty, the policy decision to replace rules with standards demonstrates a preference for pluralism and diversity over uniform application of the law.[17]

The standard of reasonableness plays a vital role in IHL's targeting principles, for they are all susceptible to a significant amount of discretion on the part of the military commander.[18] For instance, Adil Haque argues that a paradigm of reasonableness arises even in the target verification context, in that there needs to be a reasonable belief that an individual is a combatant before action is taken.[19] Haque notes that an element of doubt will always exist when determining enemy status; so, the commander applies the principle of reasonableness in making that determination.[20]

B. Is "Hindsight" Always 20/20 with the Right ("Left") Glasses?

In domestic administrative law, legislators authorize executives to make "reasonable" decisions.[21] This authorization assumes that executives are unbiased and make decisions with the greater good in mind.[22] When IHL places the responsibility on commanders to make reasonable decisions, it ignores that military commanders cannot be unbiased.[23] Indeed, one can account for this by observing a reasonable person with a certain amount of bias.[24] In other words, one need not see commanders as benevolent, altruistic, and neutral persons, but one can assume that commanders want to achieve their military goals.[25] The question remains: who is to say what a reasonable way to accomplish these military goals is, specifically concerning force protection cases?

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12. Alberto Artosi, *Reasonableness, Common Sense, and Science*, *in* REASONABLENESS AND LAW 69 (Giorgio Bongiovanni et al. eds., 2009).

13. Eyal Benvenisti, *How Challenges of Warfare Influence the Laws of Warfare*, 4 MIL. AND STRATEGIC AFFS. 33, 36 (2012).

14. Martti Koskenniemi, *Occupied Zone—A Zone of Reasonableness*, 41 ISR. L. REV. 13, 21 (2008). *See also* MAX WEBBER, ON LAW AND ECONOMY IN SOCIETY 303–21 (Max Rheinstein ed. & trans., 1954).

15. Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 908, 915 (2006).

16. Artosi, *supra* note 12, at 131.

17. Koskenniemi, *supra* note 14, at 17, 22.

18. Whittemore, *supra* note 1, at 583.

19. ADIL AHMAD HAQUE, LAW AND MORALITY AT WAR 108–11, 134–35 (2017).

20. *Id.*

21. Benvenisti, *supra* note 13, at 36.

22. *Id.*

23. *Id.*

24. *Id.*

25. Tel Aviv University, *Beyond the Humanitarian vs. Human Rights Law Debate*, YOUTUBE (Dec. 6, 2011), https://youtu.be/buTa98VS7GE?t=840 (Hebrew).

As every first-year law student learns, the variety of questions implicating the "reasonable person" standard is countless. What might be unreasonable to a German commander might be reasonable to a British commander and vice versa. There is a sense that such judgments are no more determinate than the issues they are meant to resolve, as so eloquently expressed by Martti Koskenniemi:

> [i]n Beit Sourik, the HCJ aims to assure us by using the vocabulary of "testing," invoking the image of scientific experimentation, painstaking work at technical laboratories with cutting-edge equipment, computer screens blinking, needles jumping, men and women in white coats carrying clipboards, nervously anticipating the results; does the medicine work, is the hypothesis corroborated?[26]

Of course, having some form of commitment to continual monitoring is essential in preventing bias.[27] Yet, one should recognize that when a foreign or international court "prefer[s] to accommodat[e] one set of biases over the other," that "is a political decision."[28] Though some form of supervision is essential to prevent the biases to which we alluded, the vision of international courts as "impartial guardians of international law" can be challenged by competing visions of world order that see universalism as a form of imperialism.[29]

One can assume that judicial review of commanders' application of the principle of proportionality is not about results, but initial expectations. In principle, the law focuses on foresight (before the event) rather than hindsight; in practice, however, judges with hindsight bias may forcibly attribute unforeseeable results to circumstantial evidence.[30] When looking at a situation in retrospect, there is a tendency, even among judges, to view events as more foreseeable than they are.[31]

Moreover, since international judges often must make rulings in cases involving cultures with very different values than their own, the potential that unconscious cultural biases may influence their decisions is more pronounced than in domestic courts—where judges and defendants are more likely to share some cultural values.[32] As Judge Koopmans of the European Court of Justice revealed, "[w]e are not only from different

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26. Koskenniemi, *supra* note 14, at 22.

27. *See generally* Whittemore, *supra* note 1; *see also* Geoffrey S. Corn, *War, Law, and Precautionary Measures: Broadening the Perspective of This Vital Risk Mitigation Principle*, 42 PEPPERDINE L. REV. 419, 435–44 (2015); Pat Croskerry et al., *Cognitive debiasing 1: origins of bias and theory of debiasing*, 22 BMJ QUALITY & SAFETY ii58–64 (2013); *and* Chiara Acciarini et al, *Cognitive biases and decisionmaking strategies in times of change: a systematic literature review*, 59 MGMT. DECISION 638, 643, 647 (2021).

28. Shany, *supra* note 15, at 924.

29. *Id.*

30. *See, e.g.*, Henri Decoeur, *The ICTY Appeals Judgement in* Prosecutor v Gotovina *and* Markac*: Scratching below the Surface*, CAMBRIDGE INT'L L.J. ONLINE (Nov. 19, 2012), http://cilj.co.uk/2012/11/19/the-icty-appeals-judgement-in-prosecutor-v-gotovina-and-markac-scratching-below-the-surface-2/; Aaron Fellmeth, *The Proportionality Principle in Operation: Methodological Limitations of Empirical Research and the Need for Transparency*, 45 ISR. L. REV. 125, 133–35 (2012); *and* Roee Ariav, *Hardly the* Tadic *of Targeting: Missed Opportunities in the ICTY's* Gotovina *Judgments*, 48 ISR. L. REV. 299, 352 (2015).

31. *See generally* Aileen Oeberst & Ingke Goeckenjan, *When Being Wise After the Event Results in Injustice: Evidence for Hindsight Bias in Judges' Negligence Assessments*, 22 PSYCH. PUB. POL'Y & L. 271 (2016); s*ee also* Erin M. Harley, *Hindsight Bias in Legal Decision Making*, 25 SOC. COGNITION 48 (2007).

32. Tom Dannenbaum, *Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why it Must Be Reversed*, 45 CORNELL INT'L L.J. 77, 87 (2012). S*ee also* Henry Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, 80 FOREIGN AFF. 86 (2001).

cultures and from different nations, but also from different professional backgrounds. There are differences of opinion which manifest themselves in different ways according to the kind of difficulties we are faced with . . . ."[33] Indeed, previous studies demonstrate that international judges favor their home country[34] and the states that appointed them.[35]

Thus, while the principle of weighing the expected military advantage against potential collateral damage in armed conflict is clear in theory, it is not clear in practice.[36] As the Committee that reviewed the NATO bombing in Yugoslavia for the International Criminal Tribunal for the Former Yugoslavia ("ICTY") acknowledged, determining the "relative values to be assigned the military advantage gained and the injury to non-combatants and or the damage to civilian objects" is a complex process.[37] No simple solution exists for deciding what should be "include[d] and exclude[d]" in the proportionality equation, what the standard of measurement is in time or space, or even to what extent a military commander should be expected "to expose his own forces to danger" to mitigate civilian casualties or civilian loss of property.[38] This dilemma led the committee to conclude:

> It may be necessary to resolve them on a case-by-case basis, and the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the "reasonable military commander."[39]

This section has demonstrated the limitations of the reasonable decision-making principle for military commanders. It points out that the impartiality and orientation towards the greater good, which are inherent in the concept, cannot always be attained by

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33. GARRY STURGESS & PHILLIP CHUBB, JUDGING THE WORLD: LAW AND POLITICS IN THE WORLD'S LEADING COURTS 501 (1988).

34. Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 607–08 (2005) (showing that judges on the International Court of Justice are more likely to favor the states that appoint them, not only because they are rationally advancing their reappointment, but also as an emotional response):

> Psychologically, if judges identify with their countries, they may find it difficult to maintain impartiality. International Court of Justice judges are not only nationals who would normally have strong emotional ties with their country; they also have spent their careers in national service as diplomats, legal advisors, administrators, and politicians. Even with the best intentions, they may have trouble seeing the dispute from the perspective of any country but that of their native land.

Id.

35. Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 425–27 (2008) (showing that judges on the European Court of Human Rights tend to favor their national government when it is a party to a dispute).

36. *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA (2000), https://www.icty.org/sid/10052 (hereinafter *NATO Bombing*) (paragraph 19 of the *NATO Bombing* report admits that it is "difficult to assess the relative value to be assigned" between military advantage on the one hand and civilian harm on the other).

37. *Id.*

38. *Id.* ¶ 49.

39. *Id.* ¶ 50.

military commanders. The subjective nature of determining a reasonable course of action for achieving military objectives is shaped by the decision maker's background and values. Part IV examines these subjective determinations in relation to the concept of proportionality, and Section IV.B provides an analysis of this topic through the presentation of empirical legal studies

IV. PROPORTIONALITY AND CULTURAL CONSIDERATIONS

One of the cardinal principles underlying IHL is proportionality.[40] Proportionality aims to establish "an equitable balance between the humanitarian requirements and the sad necessities of war."[41] The practical application of the proportionality principle is effectively encapsulated in Articles 51(5)(b)[42] and 57(2) of the 1977 Protocols Additional to the Geneva Conventions of 1949 ("API").[43] These articles hold that there must be a "reasonable" relationship between the legitimate destructive effect (the military advantage gained) and the undesirable collateral damage (the incidental harm to civilians).[44] That being said, the principle of proportionality raises some of the most perplexing and controversial questions in IHL,[45] and there is no easy standard or test for determining proportionality.[46]

A. Issues in the Proportionality Analysis

One of the main problems with the proportionality principle is that it hinges on the concept of a military advantage.[47] The difficulty of framing a military advantage in concrete ways opens the door to potential abuse of the principle of proportionality.[48] Framing hypothetical and speculative military advantages, such as saving the British Monarchy, leads to what Robin Geiss calls "mind games" of uncertainty.[49] According to Geiss, a military advantage means tactical advantages, not an opaque strategy or political

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40. HAIDER, *supra* note 5, at 14.

41. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 683 (Yves Sandoz et al. eds., 1987) (hereinafter ADDITIONAL PROTOCOLS COMMENTARY).

42. PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF AUGUST 12 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), OF 8 JUNE 1977 art. 51(5)(b) (1977) (hereinafter PROTOCOL I) (formulating the proportionality principle as "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.").

43. *Id.* art. 51(5)(b), 57(2).

44. *NATO Bombing*, *supra* note 36, ¶ 48.

45. Robin Geiss, *The Principle of Proportionality: 'Force Protection' as a Military Advantage*, 45 ISR. L. REV. 71, 76 (2012).

46. The proportionality principle is perhaps more "subjective and susceptible to broad ranges of judgment" than any of IHL's principles. Whittemore, *supra* note 1, at 601. *See also* ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 41, at 684; Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT'L REV. RED CROSS 445, 457 (2005); GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 278–79 (2010); *and* Tomer Broude, *Behavioral International Law*, 163 U. PA. L. REV. 1099, 1151 (2015).

47. Whittemore, *supra* note 1, at 615.

48. *See generally* AMICHAI COHEN, PROPORTIONALITY IN MODERN ASYMMETRICAL WARS (2010).

49. Geiss, *supra* note 45, at 84.

gains.[50] Therefore, a tactical military advantage can enter the proportionality calculus if it can be described in absolute terms and is concrete and direct.[51]

Another vexing problem with proportionality is comparing values that seem incommensurable, i.e., military advantage and collateral damage.[52] Most scholars suppose that proportionality judgments in IHL are somewhat imprecise since it lacks precise methodology.[53] For example, in our hypothetical scenario, a commander would need to weigh the strategic value of rescuing Prince Harry against the potential loss of innocent civilian lives. Such an assessment is inevitably subjective and subject to a broad range of judgments within a wide "margin of appreciation."[54] There is no objective way to quantify these competing values, and different people may have different perspectives on what constitutes an acceptable balance.

In addition, there is a moral standing issue with proportionality.[55] Proportionality in IHL is viewed as a manifestation of the Catholic theological doctrine of double effect, according to which subjective intent is dispositive.[56] In other words, while the intention to cause harm renders an action immoral, the choice to bring about good, in which the harm is only incidental, renders an action moral.[57] Proportionality adopts a similar structure as that of the doctrine of "double effect," but it substitutes a military advantage for a universal good.[58]

While certain military advantages may result in a universal good, not all do or are even intended to do so.[59] Yet, the proportionality principle still applies and can be used to justify collateral damage if the military advantage is deemed to outweigh the losses.[60] Therefore, the proportionality principle diverges from the doctrine of double effect, since it is not contingent on producing a greater good.[61] So, how do we determine when it is acceptable to harm some people to help others?

In answering this question, Francis Kamm draws a distinction between deaths which result from the saving of lives, and deaths which are a means of saving lives.[62] The former scenario, she argues, constitutes permissible harm, while the latter does not.[63] Thus, like

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50. *Id.* at 77–78.

51. PROTOCOL I, *supra* note 42, art. 51(5)(b).

52. Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT'L L.J. 163, 189 (2011).

53. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 122 (1st ed. 2004) ("pondering dissimilar considerations—to wit, civilian losses and military advantage—[] is not an exact science.").

54. Whittemore, *supra* note 1, at 601. *See also* Shany, *supra* note 15.

55. Janina Dill, *Distinction, Necessity, and Proportionality: Afghan Civilians' Attitudes toward Wartime Harm*, 33 ETHICS & INT'L. AFFS. 315, 317 (2019).

56. Blum, *supra* note 52, at 189.

57. *Id.*

58. *Id.*

59. *See generally* FRANCES KAMM, THE TROLLEY PROBLEM MYSTERIES (Eric Rakowski ed., 2016).

60. *See generally* discussion *supra* Part III.

61. *See* Blum, *supra* note 52, at 189.

62. Richard Baron, *The Trolley Problem Mysteries by F.M. Kamm*, PHIL. NOW (2018), https://bit.ly/3N560a3 (last visited Apr. 18, 2023) (noting Kamm's subtlety in distinguishing between "means to the saving of lives" and "result[s]" from saving lives).

63. KAMM, *supra* note 59, at 66.

"double effect," her solution is based on causal relationships.[64] Thomas Hurka counters that, while Kamm's solution may yield the right answer in some scenarios, it does not make sense in the context of war.[65] To illustrate his point, Hurka gives the example of a proposed attack on a munitions factory—a legitimate military target—that has civilians living near it.[66] If one applies Kamm's solution, the bombing is morally impermissible if civilian deaths are caused by flying pieces of the bomb, since the bomb explosion is the causal means to achieving the good of destroying the factory.[67] However, it would be morally permissible if civilian deaths resulted only from flying pieces of the factory.[68] Hurka concludes that Kamm's principle, if applied here, gives moral significance to things that have none—namely, flying objects.[69] Thus, the distinctions Kamm draws between permissible and unacceptable killing are arbitrary, at least in some scenarios.[70]

Nevertheless, Hurka applies an analogous principle to address problems that arise from "the just-war condition of proportionality, which says the resort to war is permitted only if the relevant goods the war will secure are proportionate to, or sufficiently large compared to, the evils it will cause."[71] However, the just-war condition excludes some benefits as acceptable greater goods, such as economic benefits (e.g., lifting a country out of a recession).[72] While Hurka agrees that not all economic benefits should qualify as greater goods, he rejects a unilateral exclusion of economic benefits.[73] He asks us to imagine a scenario in which "Saddam Hussein [in 1990] had occupied not only Kuwait but also the Saudi oilfields and then drastically reduced both countries' oil production."[74] This action would have driven up global oil prices and "hurt[] the economies of African countries."[75] Thus, "a war against Saddam Hussein" would have eliminated economic harm to Africa—a benefit which he maintains is "a relevant good," since here it follows from the ends, unlike the recession example, in which industrial production, a means to an end, results in a boost in GDP.[76] Ultimately, however, no matter how one applies the principle of proportionality, given that military attacks may lead to the loss of some innocent lives, decisions based on proportionality are about choosing between the lesser of two evils.

B. Empirical Analysis of the Proportionality Judgment

As noted earlier, a common approach used in assessing if an action will result in excessive harm is to look at the action from the viewpoint of a "reasonable observer."[77]

64. *Id.* at 67, 70.
65. *Id.* at 137–38.
66. *Id.* at 138.
67. *Id.*
68. KAMM, *supra* note 59, at 138.
69. *Id.* at 146.
70. *Id.* at 142–46.
71. *Id.* at 147.
72. *Id.*
73. KAMM, *supra* note 59, at 148.
74. *Id.* at 147.
75. *Id.* at 147–48.
76. *Id.* at 148.
77. Janina Dill, *Assessing Proportionality: An Unreasonable Demand on the Reasonable Commander?*,

However, empirical investigations have shown that no consensus exists on what constitutes proportional incidental harm.[78] For example, in 2015, Janina Dill, an expert in the field of law and morality in international relations, asked a group of American and British respondents to put themselves in the place of a commander who is undertaking a mission to clear a town of Taliban fighters.[79] How many civilian deaths would they consider acceptable to achieve this military gain?[80] Dill found that no agreement existed among respondents on when collateral civilian harm is excessive in relation to military gain.[81] However, responses converged in rejecting the idea that there was a "knowable 'balance' between human life and military gain with neither value simply overriding the other."[82] Based on this survey and on her conversations with military commanders who admitted that, even in atypical easy cases, two commanders could reach different conclusions about the projected excessiveness of an attack, Dill highlights the vast disagreements that exist about what constitutes excessive incidental harm.[83]

Statman, Sulitzeanu-Kenan, and Mandel concluded similarly to Dill after researching the reliability of wartime proportionality judgments.[84] They surveyed legal and moral experts in eleven countries, military experts in two countries, and lay people to evaluate reliability according to three criteria: inter-expert convergence, sensitivity to relevant factors, and relative susceptibility to bias.[85] They found that academic and military experts failed to reach a reasonable convergence on the maximum acceptable loss of civilian life that may be risked in the scenarios presented to them.[86] This result, given the experts' training in proportionality theory, was unsurprising.[87]

However, there were two unexpected results. First, despite wide acceptance of the proportionality theory among experts, there were significant cultural differences in the application of the principle: "[t]he median response of American experts and military officers was higher, and their level of judgment convergence was lower (that is, more dispersed)" than their non-American counterparts.[88] Second, they observed a "consistent negative relationship between the median proportionality judgment of a group and its level of judgment convergence."[89] This is the opposite of what one would expect if experts or military officers had a reliable method of applying the proportionality principle.[90] Based on these findings, they concluded that the protection provided to civilians during warfare

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INTERCROSS BLOG ARCHIVE (Oct. 11, 2016) (on file with author) (hereinafter *Assessing Proportionality*).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Assessing Proportionality*, *supra* note 77. *See also* Janina Dill, *Distinction, Necessity, and Proportionality: Afghan Civilians' Attitudes toward Wartime Harm*, 33 ETHICS & INT'L. AFFS. 315, 330 (2019).

83. *Assessing Proportionality*, *supra* note 77.

84. Daniel Statman et al., *Unreliable Protection: An Experimental Study of Experts' In Bello Proportionality Decisions*, 31 EUR. J. INT'L L. 429, 451 (2020) (hereinafter *Unreliable Protection*).

85. *Id.* at 430; Daniel Statman et al., *The Difficulty of Determining If Collateral Harm to Civilians in Wartime Is Proportionate*, ISR. DEMOCRACY INST. 11–12 (2019).

86. *Unreliable Protection*, *supra* note 84, at 450.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 446, 450–51.

is unreliable, even when the combatant commanders "attempt to abide by the proportionality principle."[91]

As we have seen, doctrinal differences in proportionality exist across nations,[92] legal spheres,[93] and ideological preferences.[94] Given proven variances across domains, in codification, and in application, commanders need legal standards that account for cultural differences.[95]

V. CULTURAL DEFENSE AS A DISREGARDED CONSIDERATION

"An international criminal justice system is an exercise in public international law, comparative law, language, and culture."[96] Until very recently, though, not much significance had been given to cultural diversity in International Criminal Law or in IHL.[97] While a growing number of domestic courts recognize the doctrine of cultural defense,[98]

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91. *Unreliable Protection*, *supra* note 84, at 452.

92. *See* Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 INT'L J. CONST. L. 263 (2010); Niels Petersen, *How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law*, 14 GERMAN L.J. 1387 (2013); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 73 (2008); *and* Christopher L. Blakesley, *Wrestling Tyrants: Do We Need an International Criminal Justice System?*, 48 U. PAC. L. REV. 175, 177 (2017).

93. For instance, implementation in domestic laws is different from the principles of IHL. *See* Amichai Cohen & Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case*, 5 J. INT'L CRIM. JUST. 310 (2007); Larry May, *Targeted Killings and Proportionality in Law: Two Models*, 11 J. INT'L CRIM. JUST. 47 (2013).

94. Raanan Sulitzeanu-Kenan et al., *Facts, Preferences, and Doctrine: An Empirical Analysis of Proportionality Judgment*, 50 L. & SOC'Y REV. 348 (2016). Relying on a sample of 331 legal experts, Sulitzeanu-Kenan, Mordechai Kremnitzer, and Sharon Alon find solid correlational evidence for the effect of ideological preferences on proportionality judgments regarding the antiterrorist military practice of targeted killings. *Id.* at 349. They suggest that proportionality judgments in international law are anchored jointly on policy preferences and the facts of the case. *Id.* at 348. *See also* Daniel Statman et al., *In Bello Proportionality: Philosophical Reflections on a Disturbing Empirical Study*, 21 J. MIL. ETHICS 116 (2022) (hereinafter *In Bello Proportionality*).

95. Bernard L. Brown, *The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification*, 10 CORNELL INT'L L.J. 134, 138–47, 155 (1976).

96. Blakesley, *supra* note 92.

97. *See, e.g.*, Leigh Swigart, *Now You See It, Now You Don't: Culture At The International Criminal Court*, *in* INTERSECTIONS OF LAW AND CULTURE AT THE INTERNATIONAL CRIMINAL COURT 14, 19, 35–36 (2020); Jessica M. Almqvist, *The Impact of Cultural Diversity on International Criminal Proceedings*, 4 J. INT'L CRIM. JUST. 745 (2006); Leigh Swigart, *Linguistic and Cultural Diversity in International Criminal Justice: Toward Bridging the Divide*, 48 U. PAC. L. REV. 197 (2017); Fabián Raimondo, *For Further Research on the Relationship Between Cultural Diversity and International Criminal Law*, 11 INT'L CRIM. L. REV. 299 (2011); Tim Kelsall, *International Criminal Justice and Non-Western Cultures*, *in* AFRICAN ARGUMENTS 2010, at 1–5 (2010); Mike Farrell et al., *War Crimes and Other Human Rights Abuses in the Former Yugoslavia*, 16 WHITTIER L. REV. 359, 374–80 (1995); Alison Dundes Renteln, *The Child Soldier: The Challenge of Enforcing International Standards*, 21 WHITTIER L. REV. 191, 191–204 (1999); Ida L. Bostian, *Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda*, 12 J. INT'L & COMP. L. 1 (2005); WILSON RICHARD ASHY, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS (2011); *and* NANCY A. COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2010).

98. Jeroen Van Broeck, *Cultural Defence and Culturally Motivated Crimes (Cultural Offences)*, 9 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 1 (2001); Alison Dundes Renteln & Rene Valladares, *The Importance of Culture for the Justice System*, 92 JUDICATURE 193 (2009); Alison Dundes Renteln, *Making Room for Culture in the Court*, 49 JUDGES' J. 7 (2010) (hereinafter *Making Room for Culture*); Alison Dundes Renteln, *The Use and Abuse of the Cultural Defense*, 20 CANADIAN J.L. & SOC'Y 47 (2005).

international courts rarely use it.[99] There could be several reasons for this absence. Culture is difficult to define and changes over time and place.[100] Although somewhat broad and vague, the following definition of culture was formulated by UNESCO: "[A] dynamic value system of learned elements, with assumptions, conventions, beliefs, and rules permitting members of the group to relate to each other and the world, to communicate and to develop their creative potential."[101]

Culture informs our motivations and influences our actions,[102] even though we may not be cognizant of its influence.[103] The extent to which culture influences people's moral and cognitive perception of the world and their status in it[104] is captured in the following joke:

> The Englishman gives his paper on "Elephant Hunting in India."
> The Russian presents "The Elephant and the Five-Year Plan."
> The Italian offers "The Elephant and the Renaissance."
> The Frenchman delivers "Les Amours des Elephants" or "The Elephant in the Kitchen."
> The German gives "The Military Use of the Elephant."
> Finally, the American rises to give his paper on "How to Build a Bigger and Better Elephant."[105]

As this joke suggests, an individual's interpretation of any given situation is influenced by their national cultural identity.[106] This also applies to people's behavior.[107] Cultural influences can make an action seem reasonable to one person that would not seem reasonable to another without similar cultural influences.[108] This has potential implications for evaluating the culpability of a person under the law.[109]

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99. NOELLE HIGGINS, CULTURAL DEFENCES AT THE INTERNATIONAL CRIMINAL COURT 104 (2018) (arguing that the cultural framework should be raised in Articles 31–33 of the statute); Noelle Higgins, *In Defence of Culture: Should Defences Based on Culture Apply at the ICC?*, *in* INTERSECTIONS OF LAW AND CULTURE AT THE INTERNATIONAL CRIMINAL COURT 229, 230 (2020) (hereinafter *In Defence of Culture*); Alison Dundes Renteln, *Cultural Defenses in International Criminal Tribunals: A Preliminary Consideration of the Issues*, 18 SW. J. INT. L. 267, 267 (2011) (arguing that courts "should permit the introduction of cultural evidence in all cases" through current defenses); Bostian, *supra* note 97.

100. Canadian Commission for UNESCO, *A Working Definition of "Culture"*, 6 CULTURAL TRENDS 83 (1977).

101. *Id.* Culture is vital to what it means to be human and to one's or a group's feeling of self. ELSA STAMATOPOULOU, THE RIGHT TO CULTURE IN INTERNATIONAL LAW 107–08 (2007). The UN committee on Economic, Social and Cultural Rights defines culture as "a broad, inclusive concept encompassing all manifestations of human existence." Comm. on Econ., Soc., & Cultural Rts., General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social, and Cultural Rights), U.N. Doc. E/C.12/GC/21 (2009).

102. *In Defence of Culture, supra* note 99, at 231.

103. *See generally* WAYNE H. BREKHUS, CULTURE AND COGNITION: PATTERNS IN THE SOCIAL CONSTRUCTION OF REALITY (2015).

104. Menahem Mautner et al., *Reflections on Multiculturalism in Israel*, *in* MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE 67 (1988) [Hebrew].

105. ALAN DUNDES, CRACKING JOKES: STUDIES OF SICK HUMOR CYCLES & STEREOTYPES, 109–10 (1987). *See also* Kenneth E. Boulding, *National Images and International Systems*, 3 J. CONFLICT RESOL. 120, 120 (1959).

106. *See, e.g.*, DUNDES, *supra* note 105; HUBERTUS CARL JOHANNES DUIJKER & NICO H. FRIJDA, NATIONAL CHARACTER AND NATIONAL STEREOTYPES (1960); *and* Boulding, *supra* note 105.

107. DUIJKER & FRIJDA, *supra* note 106; Boulding, *supra* note 105.

108. DUIJKER & FRIJDA, *supra* note 106; Boulding, *supra* note 105.

109. HIGGINS, *supra* note 99; Kent Greenawalt, *Cultural Defense: Reflections in Light of the Model Penal*

This dynamic can be seen in U.S. domestic courts, for example, in the *Kimura* case.[110] In January 1985, Fumiko Kimura—a Japanese-American woman living in California—attempted to commit parent-child suicide after learning of her husband's affair.[111] Although initially charged with murder, she was allowed to plead no contest to voluntary manslaughter and was sentenced to one-year imprisonment after her attorney argued Kimura's cultural background diminished her ability to comply with the law.[112] The attorney explained that her actions in traditional Japanese culture were an accepted means for a woman to rid herself of the shame of her husband's infidelity.[113]

Although the cultural defense put forward by Kimura's lawyers has never been codified in positive law, it has gained recognition in domestic courts.[114] Kent Greenawalt eloquently articulates the core idea of cultural defense as "a wide range of ways in which evidence about a defendant's cultural upbringing or practices could influence legal judgment about his guilt or responsibility."[115] Cultural evidence is specifically relevant in domestic courts' handling of cases involving victims and defendants whose culture differs from the majority culture—i.e., refugees, members of indigenous communities, or other minority groups.[116]

For international courts and tribunals that regularly handle cases involving persons from different cultural backgrounds, the significance of cultural differences is even more pronounced.[117] Yet, despite changes in international criminal law over the past decades, international criminal courts have not yet recognized the doctrine of cultural defense.[118] This lack of recognition may stem from the harsh crimes, such as genocide and other war crimes, with which international criminal courts deal.[119]

ICL's limited attention to cultural differences contrasts sharply with the attention

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Code and the Religious Freedom Restoration Act, 6 OHIO ST. J. CRIM. L. 299, 299 (2008); Dundes Renteln, *supra* note 99.

110. Yuko Kawanishi, *Japanese Mother-Child Suicide: The Psychological and Sociological Implications of the Kimura Case*, 8 UCLA PAC. BASIN L.J. 32, 32 (1990).

111. Taimie L. Bryant, *Oya-Ko Shinju: Death at the Center of the Heart*, 8 UCLA PAC. BASIN L.J. 1, 1 (1990).

112. *Id.* at 2.

113. *Id.* at 2–6.

114. Charmaine M. Wong, *Good Intentions, Troublesome Applications: The Cultural Defence and Other Uses of Cultural Evidence in Canada*, 42 CRIM. L.Q. 367, 367–96 (1999).

115. Greenawalt, *supra* note 108, at 299. Noelle Higgins argues in relation to the ICC that "the cultural context of a defendant's actions should be allowed to be raised before the Court with respect to the defences set out in Articles 31-33 of the Statute." HIGGINS, *supra* note 99, at 104. Alison Dundes Renteln proposes that judges incorporate the accused's cultural background in their decisions and considers how this could be introduced via existing defenses. *See* Dundes Renteln, *supra* note 99, at 267 (arguing that courts "should permit the introduction of cultural evidence in all cases" through current defenses).

116. ALISON DUNDES RENTELN, THE CULTURAL DEFENSE (2004); Alison Dundes Renteln, *The Use and Abuse of the Cultural Defense*, 20 CANADIAN J.L. & SOC'Y 47 (2005). *See generally* CRIMINAL LAW AND CULTURAL DIVERSITY (Will Kymlicka et al. eds., 2014).

117. W.L. Cheah, *International Criminal Law and Culture*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW 748, 749 (Kevin Jon Heller et al. eds., 2020); Carla Del Ponte, *Investigation and Prosecution of Large-Scale Crimes at the International Level: The Experience of the ICTY*, 4 J. INT'L CRIM. JUST. 539, 552 (2006).

118. GEERT-JAN A. KNOOPS, AN INTRODUCTION TO THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS: A COMPARATIVE STUDY 157–77 (2d ed. 2014) (note the lack of a cultural defense).

119. *See* discussion *infra* Section V.A; *see also* Rome Statute of the International Criminal Court art. 8(2)(b)(iv), 17 July 1998, 2187 U.N.T.S. 90 (hereinafter Rome Statute).

given culture in IHRL, as evidenced by its appearance in multiple law conventions, including the International Covenant on Economic, Social and Cultural Rights,[120] the UN Convention on the Rights of Children,[121] and the International Convention on Civil and Political Rights.[122] Such documents' sensitivity to cultural differences stems from IHRL's flexible use of general principles and standards that provide guidance on how to interpret and apply specific rights in different contexts based on the diverse needs and circumstances of different societies and cultures.[123]

Judges ruling on human rights complaints have also considered culture in assessing states' damages.[124] In the Aloeboetoe case, for example, the Inter-American Court calculated Suriname's damages based on the customary family law of his people.[125] Recently, the UN's Human Rights Committee recognized indigenous peoples' right to culture.[126] The Committee found that the Australian government had violated Torres Strait islanders' "rights to enjoy their culture" by failing to protect them adequately from the adverse impacts of climate change.[127] Rising sea levels had not only destroyed beaches, but also ancestral burial grounds.[128] The Committee recommended that the Australian government compensate the islanders for their losses and take action to secure their safe existence.[129] In sum, IHRL recognizes the universality of human rights while concomitantly acknowledging that these rights may have different articulations in different cultures.[130]

IHRL's accounting for cultural differences through an interfacing of international conventions and local meanings has not yet influenced IHL, where culture is not an apparent right.[131] IHL remains based on a strictly universalist ethics.[132] In the next sections, we focus on how IHL might incorporate culture by examining its place in ICL and IHRL.

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120. International Covenant on Economic, Social and Cultural Rights art. 15, Dec. 16, 1966, 993 U.N.T.S. 3 (hereinafter ICESCR).

121. Convention on the Rights of the Child art. 20, Nov. 20, 1989, Doc. A/RES/44/25 (1989) 1577 U.N.T.S. 3 (hereinafter Convention on the Rights of the Child).

122. International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (hereinafter ICCPR).

123. Convention on the Rights of the Child, *supra* note 121, art. 20; ICESCR, *supra* note 120, art. 15; ICCPR, *supra* note 122, art. 27.

124. Alison Dundes Renteln, *2021: International Law Ten Years From Now: International Cultural Law: Cultural Defenses in International Criminal Tribunals: A Preliminary Consideration of the Issues*, 18 SW. J. INT'L L. 267, 279 (2011).

125. Aloeboetoe et al. v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. II., ¶¶ 17, 19, 27 (1993).

126. Human Rights Committee Communication No. 3624/2019, U.N. Doc. C/135/D/3624/2019, at 4 (Sep. 22, 2022).

127. *Id.* at 2–3.

128. *Id.* at 7.

129. *Id.* at 16.

130. *See generally id.*

131. Larissa van den Herik, *Economic, Social and Cultural Rights – International Criminal Law's Blind Spot?*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: CONTEMPORARY ISSUES AND CHALLENGES 343, 343 (Eibe Riedel et al. eds., 2013).

132. *See* JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY & PRACTICE 10 (2d ed. 2003).

A. Universalism v. Cultural Relativism

Though not emphasized in IHL, there is a significant debate at the heart of ICL over the opposing approaches of cultural relativism and universalism.[133] Cultural relativists argue that a defendant's culture should be considered in criminal proceedings.[134] In the international context, relativists hold that one state does not have the legitimacy to judge or denounce the cultural practices of other states.[135] This approach may be seen as a rejection of the West's "moral imperialism," which is the "negative face" of universalism.[136] Since there is no universal culture, judging another nation's traditions is problematic.[137] On the other hand, universalists believe that human rights are the rights that an individual has as a human being, regardless of nationality, culture, or background.[138]

An absolute universalist approach has informed IHL since its inception.[139] Thus, IHL's set of rules, established to limit the effects of armed conflict for humanitarian reasons, do not allow for cultural differences.[140] IHL's universalist approach to armed conflict is also seen in how international criminal courts approach war crimes.[141] For example, Justice Richard Goldstone, chairman of the International Advisory Board of the Coalition for the International Criminal Court has called cultural relativism a "a dangerous trend" that should not be followed in war crime prosecutions.[142] In fact, within international law circles, there is near-universal agreement on the existence of jus cogens norms, that is, norms from which no derogation is permitted.[143] Crimes against humanity, genocide, and human trafficking are examples of jus cogens norms, and few, including cultural relativists, would defend such actions.[144]

In prosecuting war crimes, the international criminal courts generally adhere to the universal model based on the legal fiction known as the "objectively reasonable person" standard.[145] This standard evaluates the culpability of a military commander's actions based on what an "objective" person would do under similar circumstances.[146] However, as numerous scholars have noted, this objectively reasonable person in practice equals a

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133. Bostian, *supra* note 97.

134. *Id.*

135. *See, e.g.*, Fabián Raimondo, *For Further Research on the Relationship between Cultural Diversity and International Criminal Law*, 11 INT. CRIM. L. REV. 299 (2011).

136. Bostian, *supra* note 97.

137. *Id.*

138. *Id.* at 4. DONNELLY, *supra* note 132, at 10.

139. *See* DONNELLY, *supra* note 132.

140. *See* Hugo Slim, Relief Agencies: Cultural Challenges and Cultural Responsibility, Address Before the International Committee of the Red Cross (Dec. 14, 1998), *in* Summary Report of the Seminar for Non-Governmental Organizations on Humanitarian Standards and Cultural Differences.

141. Bostian, *supra* note 97, at 11.

142. Richard Goldstone, Symposium: *Prosecuting International Crime: An Inside View*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 1, 11 (1997).

143. *See, e.g.*, Raimondo, *supra* note 135; Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT'L L. 527, 583, 586 (2001).

144. Raimando, *supra* note 135, at 299.

145. KAI AMBOSS, 1 TREATISE ON INTERNATIONAL CRIMINAL LAW 443–44 (2d ed. 2021) (discussing the common law reasonableness standard in self-defense analyses for the ICC).

146. *Id.* at 315–18.

reasonable "Western person" based on hegemonic European characteristics. For example, David Chuter, an expert in security and defense policy, argues that international criminal justice has a profoundly Western, white, Anglo-Saxon temperament.[147] Its vocabulary and concepts are not neutral but are swayed by a few culturally specific countries, the majority of which have English as their native or second language.[148]

Chuter criticizes ICL norms for reflecting Western biases in their focus on individual guilt, imputation of command responsibility, and the demand that soldiers disobey unlawful orders.[149] Thus, cultural relativists, such as Chuter, argue that the ICL standard is "the reasonable Western military commander," and describe the principles used as cultural artifacts masquerading as universal and immutable values.[150]

Chuter also points out that since all major players in the ICL have in recent history committed acts of brutality comparable to the atrocities in Rwanda and Yugoslavia, or turned a blind eye to such actions by their allies, they cannot judge the actions of other nations from a position of moral authority.[151] The moral authority of international criminal courts, he adds, is further compromised by the efforts of member nations to block investigations of their actions.[152] As one Serbian journalist commented, its readers will remain skeptical of the ICTY, so long as it "fails to even begin an investigation of NATO for its attacks on Yugoslavia in 1999."[153] Chuter concludes that the idea that the ICL agenda embodies universal values is not supported by the evidence.[154] Instead, he claims that a "respectable argument" can be made that the ICL agenda is a form of neocolonialism that gives Western nations leverage in attaining partisan objectives—namely, replacing leaders or governments.[155] In other words, under the guise of enforcing universal norms, the West uses ICL to intervene in the internal affairs of African, Asian, and Islamic nations.[156]

Indeed, Hailemariam Desalegn, Ethiopia's prime minister and the chairman of the African Union ("AU"), filed a complaint with the United Nations about the "flawed" ICC system, which disproportionately targeted and indicted Africans on various war-crime charges.[157] He claimed that the indictment process had degenerated into a form of "race hunting," given that ninety-nine percent of those charged were African.[158] While such

147. DAVID CHUTER, WAR CRIMES: CONFRONTING ATROCITY IN THE MODERN WORLD 94 (2003).
148. *Id.*
149. *Id.* at 97.
150. *Id.* at 94.
151. *Id.* at 95.
152. CHUTER, *supra* note 147, at 95.
153. *Id.*
154. *Id.*
155. *Id.*
156. CRISTINA GABRIELA BADESCU, HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: SECURITY AND HUMAN RIGHTS 34 (2011).
157. Aislinn Laing, *International Criminal Court is 'hunting' Africans*, TELEGRAPH (May 27, 2013), https://bit.ly/3osZnE4.
158. Manisuli Ssenyonjo, *The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders*, 13 INT'L CRIM. L. REV. 385, 428 (2013); RES SCHUERCH, THE INTERNATIONAL CRIMINAL COURT AT THE MERCY OF POWERFUL STATES: AN ASSESSMENT OF THE NEO-COLONIALISM CLAIM MADE BY AFRICAN STAKEHOLDERS 63 (2017); Manisuli Ssenyonjo, *State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and*

accusations should not be used as justification for ignoring war crimes outside of the United States, they should alert us to the power imbalance that informs current ICL and IHL agendas. It is hardly surprising that African and other non-Western nations resent the application of so-called "universal" legal concepts, given they were denied significant input into developing them.[159]

B. Normative Difficulties in the ICC: The Negative Face of Cultural Relativism

Should cultural relativism affect a legal assessment? As noted earlier, the ICC deals with heinous crimes that affect communities across the globe.[160] Given that cultural defenses are the last legal resort in such cases, some have objected to allowing them.[161] Yet, since the creation of the ICTY in 1993, historians and anthropologists have been called on to testify to intergroup relations in war crimes' cultural settings.[162] The argument is that expert testimony is needed because judges do not belong to the communities in question and need this information to understand the cultural context in which the alleged crime took place, and to assess collective responsibility.[163]

Yet, we would be appalled if the ICC judged the architect of a genocide in Africa differently from the architect of a genocide in Europe because the African defendant's actions reflected a part of his culture with which the international community should not interfere.[164] It would also be cause for concern if claims of cultural sensitivity or unauthentic cultural defenses became an excuse for the international community to look the other way when war crimes occurred.

VI. INTERNATIONAL CULTURAL DEFENSES: LESSONS FROM THE INTERNATIONAL CRIMINAL COURT

Article 31 of The Rome Statute recognizes four substantive "grounds for excluding criminal responsibility" (in short, defenses): mental disease or defect, intoxication, self-defense, and duress/necessity.[165] An additional exclusion is outlined in Article 32, which states that a mistake of fact or of law is grounds for excluding criminal responsibility if it negates the mens rea.[166] The statute provides a general outline of these defenses, but does not go into detail[167] due to the necessary accommodation of various domestic norms

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the Gambia, 29 CRIM. L.F. 76 (2018).

159. MUTOY MUBIALA, INTERNATIONAL HUMANITARIAN LAW IN THE AFRICAN CONTEXT, 48 (Monica Kathina Juma & Astri Suhrke eds., 2002).

160. *See generally* Rome Statute, *supra* note 119. Article 1 of the Rome Statute states that the Court "shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions." *Id.* art. I.

161. *Id.*

162. *See* Richard Ashby Wilson, *Expert Evidence on Trial: Social Researchers in the International Criminal Courtroom*, 43 AM. ETHNOLOGIST 730, 732 (2016).

163. *Id.* at 743.

164. Bostian, *supra* note 97. *See also* Nigel Eltringham, '*Illuminating The Broader Context': Anthropological and Historical Knowledge at the International Criminal Tribunal for Rwanda*, 19 J. ROYAL ANTHROPOLOGICAL INST. 338 (2013); Wilson, *supra* note 162.

165. Rome Statute, *supra* note 119, art. 31(1).

166. *Id.* art. 32.

167. *Id.* art. 31(1).

regarding defenses.[168] The vast differences in legal philosophies between nations regarding cultural defense also mean it is not specified in the Rome Statute.[169]

Possible grounds for recognizing a cultural defense can be found in Article 31(2), which requires the state to rely on the subjective circumstances of the "case before it."[170] Could judges interpret this clause to allow cultural defenses on a case-by-case basis, depending on the circumstances? Put differently, could a cultural defense doctrine be introduced into ICL through international judicial activism? This would not be an easy task, given international criminal tribunals focus more on jurisdictional issues than on cultural issues,[171] even though many cases involve cultural disputes.[172] Still, this article explores six ways in which justices could implement the doctrine of cultural defense in the international sphere, and the challenges and risks associated with such implementations.

A. Insanity Defense

Firstly, the cultural defense could be raised as part of an "insanity defense"—e.g., mental incapacity, disease, or defect.[173] However, insufficient attempts have been made to use this defense in the context of armed conflicts,[174] and even fewer have led to acquittal.[175] For this defense to be established, defendants need to prove the destruction, as opposed to the impairment,[176] of their ability to comprehend the nature or unlawfulness of their offense.[177] Alison Dundes Renteln presents the example of terrorists committing crimes based on divine command.[178] Using this defense, attorneys could highlight alleged religious-cultural motivations behind the terrorists' actions.[179] Others would argue that it

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168. States have a variety of norms supporting legal defenses which, in an ideal world, could be integrated into one common universal defense. *See, e.g.*, Robert Cryer et al., *Defences/Grounds for Excluding Criminal Responsibility*, *in* AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 398, 398–99 (3d ed. 2014) (hereinafter Cryer 2014); Robert Cryer et al., *Defences/Grounds for Excluding Criminal Responsibility*, *in* AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 380, 380–81 (4th ed. 2019) (hereinafter Cryer 2019).

169. *See* Rome Statute, *supra* note 119 (lacking a cultural defense).

170. Rome Statute, *supra* note 119, art. 31(2).

171. Albin Eser, *Grounds for Excluding Criminal Responsibility*: *Article 31 of the Rome Statute*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 863, 869 (Otto Triffterer ed., 2d ed. 2008); Albin Eser, *"Defences" in War Crime Trials*, *in* ISRAEL YEARBOOK ON HUMAN RIGHTS 201, 201–02 (Y. Dinstein ed. 1996) (noting that defenses haven't been studied thoroughly, even though the right of the accused to defend himself has been ratified by various tribunals).

172. Patricia Wald, *Running the Trial of the Century: The Nuremberg Legacy*, 27 CARDOZO L. REV. 1559, 1587–88 (2006).

173. Alexa L. Davis, *In Defense of Cultural "Insanity": Using Insanity as a Proxy for Culture in Criminal Cases*, 49 COLUM. J.L. & SOC. PROBS. 387, 387, 405 (2016).

174. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 242 (6th ed. 2020).

175. Prosecutor v. Delalic, Case No. IT-96-21-A, Judgement, ¶¶ 582–83 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001). "Rudolf Hess and Julius Streicher unsuccessfully raised [the insanity defense] at [the] Nuremberg [trial]." SCHABAS, *supra* note 174, at 242.

176. Sander Janssen, *Mental Condition Defences in Supranational Criminal Law*, 4 INT'L CRIM. L. REV. 83, 84–85 (2004).

177. Rome Statute, *supra* note 119, art. 31(1)(a). *See also* Prosecutor v. Delalic, Case No. IT-16-21-A, Judgement, ¶ 582 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001); WILLIAM WILSON, CRIMINAL LAW: DOCTRINE AND THEORY 231 (I.H. Dennis et al. eds., 2d ed. 2003).

178. Renteln, *supra* note 99, at 278.

179. *Id.* However, *see* Mythri A. Jayaraman, *Rotten Social Background Revisited*, 14 CAP. DEF. J. 327, 328–29 (2002) (referring to a judicial dissent maintaining that an accused murderer was not able to advance a social

exemplifies a particular impairment of judgment, which does not satisfy the high "destruction threshold" demanded for this defense to be accepted.[180]

For children, a more convincing argument might be made linking culture and mental capacity.[181] Childhood cultural indoctrination can result in mental defects in legal adulthood.[182] Dominic Ongwen, a former Ugandan Lord's Resistance Army ("LRA") commander, presented a defense based on mental incapacity[183] and fitness to stand trial.[184] His lawyer argued that the perverted spiritual practices of the LRA impacted Ongwen's mental and moral development.[185] Although cultural aspects were not addressed directly, it is noteworthy that Ongwen rose to the rank of senior commander after being kidnapped by the LRA and forced to become a child soldier.[186] Spiritualism and indoctrination are rooted in the local Acholi culture as a means of structuring a person's essence and instilling ethical codes from a young age.[187]

Yet critics might claim that believing in magic or spirituality should not be conflated with a mental illness or a mental defect.[188] As political scientist Everisto Benyera has noted, there has been substantial resistance to recognizing how belief in magic might influence mental capacity, writing that "[i]nternational justice mechanisms apply Western-centric notions of reasonability to an individual with spiritual beliefs that, within a typical Eurocentric justice system, may not be seen as reasonable."[189] However, the child soldier cultural defense wasn't addressed by the ICC, and the court focused solely on how it related to Ongwen's mental health.[190]

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background defense); United States v. Alexander, 471 F.2d 923, 960–61 (1972); *and* Raphael Lorenzo Aguiling Pangalangan, *Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals*, 33 AM. U. INT'L L. REV. 605, 626–27 (2018).

180. HIGGINS, *supra* note 99, at 59.

181. *See* Richard Delgado, *'Rotten Social Background': Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 MINN. J.L. & INEQ. 9 (1985); Franklyn Bai Kargbo, *International Peacekeeping and Child Soldiers: Problems of Security and Rebuilding*, 37 CORNELL INT'L L.J. 485, 486–90 (2004).

182. *See* Michael Cottier, *Article 8 War Crimes para. 2(b)*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 466, 467 (Otto Triffterer ed., 2d ed. 2008).

183. Prosecutor v. Ongwen, ICC-02/04-01/15-1762-Red, Trial Judgment, ¶¶ 593, 612 (Feb. 4, 2021); Prosecutor v. Ongwen, ICC-02/04-01/15-1819-Red, Sentence (May 6, 2021); Prosecutor v. Ongwen, ICC-02/04-01/15-1937, Observations of the Association of Defence Counsel Practising Before the International Courts and Tribunals (Adc-Ict) as Amicus Curiae Regarding Questions Posed by the Appeals Chamber in Prosecutor v. Ongwen (Dec. 23, 2021). *See also* Pangalangan, *supra* note 179, at 624–29.

184. *See* Prosecutor v. Ongwen, ICC-02/04-01/15-637-Red, Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen (Dec. 16, 2016); Prosecutor v. Ongwen, ICC-02/04-01/15-1412-Red, Decision on Defence Request to Order an Adjournment and a Medical Examination (Jan. 16, 2019).

185. *See* Prosecutor v. Ongwen, ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges (Jan. 25, 2016).

186. *Dominic Ongwen - From Child Abductee to LRA Rebel Commander*, BBC NEWS (May 6, 2021), https://www.bbc.com/news/world-africa-30709581.

187. *See* Neil James Bilotta, Encompassing Acholi Values: Culturally Ethical Reintegration Ideology for Formerly Abducted Youth of the Lord's Resistance Army in Northern Uganda 23–26 (2011) (M.S.W. thesis, Smith College), https://scholarworks.smith.edu/theses/535/.

188. *See generally* Everisto Benyera, *Child Victim, Loyal War Spirit Medium or War Criminal: Shifting the Geography and Logic of Historical Accountability in Dominic Ongwen's ICC Trial*, AFR. IDENTITIES (Nov. 23, 2021).

189. *Id.* at 1, 2, 10–11.

190. *See* Prosecutor v. Ongwen, ICC-02/04-01/15-1762-Red, Trial Judgment (Feb. 4, 2021).

B. Duress or Necessity

To exclude criminal responsibility, defendants could also claim the influence of unseen forces making them unwillingly commit crimes.[191] These can be defined differently based on the individual's environment, age, and cultural background.[192] The threat to use magic, for example, could be seen as valid in specific cultures and unreasonable in others.[193] Tim Kelsall argues that the Special Court of Sierra Leone "proved deaf" to the phenomenon of "bullet proofing"—the widespread, popular belief that the Kamajor could use magic to make themselves immune to bullets.[194] Although Kelsall acknowledges that the court successfully blended some elements of international law with local customs, too often its rulings drew on unrealistic Western norms.[195]

In the Ongwen case, not only was the insanity defense denied, but a defense based on extensive threats and religious coercion was also rejected.[196] The defense relied on Ongwen's alleged belief that orders were given straight from spirits who would take revenge if he disobeyed them.[197] Fear of the spiritual powers of the LRA leader Joseph Kony became entangled with local cultural practices, thus facilitating the brainwashing of LRA members.[198] The court sidestepped these cultural and subjective issues by focusing on evidentiary issues,[199] consequently rejecting claims of threats.[200] Testimony indicated that, as abducted child soldiers grew older, the belief that spirits possessed Kony weakened.[201] Yet, some scholars argue that the verdict selectively reported statements of disbelief and excluded other testimonies.[202]

In the case of Allieu Kondewa, former high priest of the entire Civil Defense Forces

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191. Rome Statute, *supra* note 119, art. 31(1)(d). *See also* Sarah J. Heim, *The Applicability of the Duress Defense to the Killing of Innocent Persons by Civilians*, 46 CORNELL INT'L L.J. 165, 167–70, 190 (2013).

192. *See In Defence of Culture*, *supra* note 99, at 240–41.

193. *Id.* at 240; HIGGINS, *supra* note 99, at 67–68.

194. TIM KELSALL, CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT OF SIERRA LEONE, 2–3 (2009).

195. *Id.* at 2–3, 106.

196. *See* Prosecutor v. Ongwen, ICC-02/04-01/15-1932, Amici Curiae Observations on Duress and the Standards Applicable to Assessing Evidence of Sexual Violence (Dec. 22, 2021); Prosecutor v Ongwen, ICC-02/04-01/15-1950, Defense Response to the Amici Curiae Observations, ¶¶ 27–32 (Jan. 17, 2022); *and* Pangalangan, *supra* note 179, at 621–23; *see also* Prosecutor v. Ongwen, ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges Against Dominic Ongwen, ¶ 153 (Mar. 23, 2016).

197. Prosecutor v. Ongwen, ICC-02/04-01/15-T-167-ENG, Transcript of Oral Argument, 54 (Mar. 27, 2018).

198. Prosecutor v. Ongwen, ICC-02/04-01/15-1762-Red, Trial Judgment, ¶ 870 (Feb. 4, 2021); Prosecutor v. Ongwen, ICC-02/04-01/15-T-121-Red-ENG, Transcript of Oral Argument, 31–32 (Oct. 31, 2017); Prosecutor v. Ongwen, ICC-02/04-01/15-T-167-ENG, Transcript of Oral Argument, 28 (Mar. 27, 2018). *See also* Ariadne Asimakopoulos, Justice and Accountability: Complex Political Perpetrators Abducted as Children by the LRA in Northern Uganda 31 (Aug. 13, 2010) (M.A. thesis, Utrecht University) (on file with the Student Thesis Repository, Utrecht University) (describing LRA's method of forcing its abductees to observe one of them be murdered as cautioning from escaping).

199. AMBOS, *supra* note 145, at 471; Sigurd D'hondt et al., *Spirituality and Duress: Local Culture Beliefs at the International Criminal Court*, OPINIO JURIS (Feb. 15, 2022), https://tinyurl.com/45sndff3.

200. Prosecutor v. Ongwen, ICC-02/04-01/15, Trial Judgment, ¶ 2645 (Feb. 4, 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF.

201. *Id.* ¶¶ 2646, 2650; Transcript of Record at 33, Prosecutor v Ongwen, ICC-02/04-01/15-T-123, Transcript of Examination of Wintess UGA-OTP-P-0231 (Nov. 2, 2017), https://icc.-cpi.int/sites/default/files/Transcripts/CR2019_00009.PDF.

202. D'hondt et. al, *supra* note 199.

of Sierra Leone's pro-government militia,[203] the Special Court of Sierra Leone initially refused to consider cultural factors, stating it was not a domestic court but rather an international tribunal.[204] That said, the Trial Chamber ultimately allowed some selective culture-specific evidence concerning the magical powers claimed by Kondewa.[205] Still, some scholars criticized the trial chamber for its "un-cultural" approach.[206] In making this criticism, scholars underscored that they were not endorsing Kondewa's actions, but rather suggesting that the appropriate solution was not imprisonment, particularly given that Kondewa's cultural background prevented him from appreciating the illegality of his actions.[207] As Kelsall notes, broader motivations of transitional justice require such judgments to be plausible for the communities in which they are made.[208] It is worth noting that Kondewa's convictions for child recruitment were overturned on appeal, although new convictions increased his sentence.[209]

C. Mistakes of Fact or Law

Another practical cultural aspect relates to knowledge of law or facts. Thomas Lubanga, founder and leader of the Union of Congolese Patriots, claimed that he could not have known that enlisting children as soldiers was unlawful.[210] Using a mistake-of-law defense, Lubanga maintained that ratifying the ICC statute was not acknowledged in the Democratic Republic of Congo or in the Ituri province occupied by Uganda in 2002.[211] The court denied the claim, and Thomas Lubanga became the first person convicted by the ICC based on the idea that a political and military leader should have been cognizant of the general prohibition on recruiting children as soldiers.[212] According to Michael Kurth and Noelle Higgins, the defense of a mistake of fact, rather than of law, might have been a better argument for Lubanga; he could have claimed that the children in his forces appeared to be older than fifteen.[213] This line of inquiry also suggests a potential cultural defense given the discrepancies that exist between nations in how births are registered.[214]

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203. Prosecutor v. Fofana, SCSL-04-14-A, Trial Judgement, ¶ 344 (Special Ct. for Sierra Leone Aug. 2, 2007).

204. Prosecutor v. Fofana, SCSL-04-14-T, Sentencing Judgement, ¶¶ 33–35 (Special Ct. for Sierra Leone Oct. 9, 2007), http://www.rscsl.org/Documents/Decisions/CDF/796/SCSL-04-14-T-796.pdf; Renteln, *supra* note 99, at 281.

205. Rene Provost, *Magic and Modernity in Tintin au Congo 1930 and the Sierra Leone Special Court*, 16 L. TEXT CULTURE 183, 195–96 (2012); Cheah, *supra* note 117, at 765.

206. KELSALL, *supra* note 194, at 170; Thomas Rauter, *Judicial Practice in International Criminal Law: Law-Making in Disguise?*, *in* LAW-MAKING AND LEGITIMACY IN INTERNATIONAL HUMANITARIAN LAW 196, 206 (Heike Krieger & Jonas Puschmann eds., 2021).

207. KELSALL, *supra* note 194, at 170.

208. *Id.* at 170.

209. Prosecutor v. Fofana, SCSL-04-14-A, Appeal Judgment, ¶¶ 146, 565 (Special Ct. for Sierra Leone May. 28, 2008), http://www.rscsl.org/Documents/Decisions/CDF/Appeal/829/SCSL-04-14-A-829.pdf.

210. Prosecutor v. Dyilo, ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 294 (Jan. 29, 2007), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2007_02360.PDF.

211. *Id.* ¶¶ 312–16.

212. *Id.* ¶¶ 313–16, 410.

213. Michael E. Kurth, *The Lubanga Case of the International Criminal Court: A Critical Analysis of the Trial Chamber's Findings on Issues of Active Use, Age, and Gravity*, 5 GOETTINGEN J. INT'L L. 431, 448 (2013); HIGGINS, *supra* note 99, at 66–67, 80–82.

214. *See* Kurth, *supra* note 213, at 448; HIGGINS, *supra* note 99, at 66–67, 80–82.

D. Intoxication

Alternatively, cultural considerations can be raised through the defense of intoxication,[215] particularly when drugs and alcohol consumption are used by soldiers to increase aggression.[216] Higgins exemplifies this defense with the Nazis' military application of drugs.[217] Another example is the use of an amphetamine, known as "captagon," by the Islamic State's ("ISIS") fighters and child soldiers.[218] In high doses, this drug "inhibits fear and pain" among fighters.[219]

However, under the Rome Statute, if an individual voluntarily becomes intoxicated knowing the likelihood of an offense, this defense cannot be raised.[220] Zoran Žigić, a former taxi driver and reserve police officer convicted of the killings of Bosnian civilians during the Bosnian war, tried pleading for a reduced sentence due to diminished mental capacity caused by substance consumption.[221] The ICTY Trial Chamber denied his request, emphasizing that, in environments where a firearm is accessible and aggression is normalized, deliberate consumption of substances does not lessen the severity of the offense.[222] On the contrary, it establishes aggravating circumstances,[223] though it should be noted that different regulations govern tribunals.[224]

However, childhood consumption of intoxicants could meet the intoxication criteria outlined in the Rome Statue and used as part of a "culture" defense.[225] Giving drugs to children from a young age creates dependency and leads to addiction that continues after the child reaches the age of consent.[226] Since dependency developed prior to adulthood, that is, prior to the age when a person could be expected to understand the ramifications of drug use, suppositionally the actions of that person as an adult were carried out in a state of involuntary intoxication.[227]

E. Self-Defense

For self-defense to be sustained, the use of force must be reasonable and

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215. Rome Statute, *supra* note 119, art. 31(1)(b) (intoxication must have destroyed the accused's capacity to appreciate the unlawfulness or nature of the offense).

216. Shane Darcy, *Defenses to international crimes*, *in* HANDBOOK OF INTERNATIONAL CRIMINAL LAW 231, 232–33 (William A. Schabas & Nadia Bernaz eds., 2011).

217. Cryer 2019, *supra* note 168, at 386; Cryer 2014, *supra* note 168, at 402; HIGGINS, *supra* note 99, at 59–60.

218. *In Defence of Culture*, *supra* note 99, at 238; HIGGINS, *supra* note 99, at 60.

219. Joseph El Khoury, *The Use Of Stimulants In The Ranks Of Islamic State: Myth Or Reality Of The Syrian Conflict*, 43 STUD. CONFLICT & TERRORISM 679, 683–85 (2020); Arianna Boccialone, The International Regulation of Countering the Three Phases of Terrorism Financing 20 (2021) (M.A. dissertation, LUISS Guido Carli University) (on file with author).

220. Rome Statute, *supra* note 119, art. 31(1)(b).

221. Prosecutor v. Kvocka, IT-98-30/1/T, Judgment, ¶ 706 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 15, 2001), https://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf.

222. *Id.*

223. *Id.*; HIGGINS, *supra* note 99, at 61.

224. At the ICC, defendants' intent and mens rea are examined. Cryer 2019, *supra* note 168, at 386; Cryer 2014, *supra* note 168, at 402.

225. *In Defence of Culture*, *supra* note 99, at 238–39.

226. *Id.*

227. *Id.*

proportionate to the level of the threat.[228] As noted above, different cultures have varying standards of reasonableness, proportionality, and necessity of response to imminent threats on themselves, others, and property.[229] The Rome Statute includes not only the defensive response of persons but also the defense of property necessary for realizing a military objective or the survival of the defendant or others.[230] However, as William Schabas notes, the requirement that the property must be "essential to the survival of the person or another person" or "essential for accomplishing a military mission, against an imminent and unlawful use of force" places serious constraints on a property defense.[231] Noelle Higgins argues for more use of this defense, based on the importance of protecting cultural property and heritage.[232] However, to date, claims concerning the destruction of cultural property have mainly been used by the prosecution against defendants, such as when an expert witness testifying on the behalf of the prosecution equated the destruction of historical holy monuments in Mali to an offense against the soul of the Timbuktu community.[233]

According to self-defense doctrine, a person has a right to kill an individual who presents a lethal threat, even if that person is an "innocent aggressor" who is not culpable for his acts.[234] In short, individual self-defense is permitted as a necessary response to an immediate threat.[235] Critics assert that ICL permits the use of force much more extensively than individual self-defense, as armed conflicts are less individualistic and temporal.[236] When an aggressor uses an innocent citizen as a human shield, or launches attacks from populated civilian areas, the defenders might hurt the human shield to save their own lives, as a human shield is morally equivalent to an "innocent aggressor."[237]

F. Open List Interpretation—A Self-Contained Cultural Defense

Article 31(3) of the Rome Statute mentions that "at trial, the court may consider a ground for excluding criminal responsibility other than those referred to in [Article 31]."[238] In other words, the Rome Statute does not purport to be exhaustive; other grounds

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228. HIGGINS, *supra* note 99, at 62.

229. *Id.*

230. Rome Statute, *supra* note 119, art. 31(1)(c).

231. SCHABAS, *supra* note 174, at 243.

232. *In Defence of Culture*, *supra* note 99, at 240, 246–47; HIGGINS, *supra* note 99, at 62–64.

233. Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Trial Judgment, ¶ 80 (Sept. 27, 2016).

234. Whitley Kaufman, *Self-Defense, Innocent Aggressors, and the Duty of Martyrdom*, 91 PAC. PHIL. Q. 78, 79 (2010).

235. GEORGE P. FLETCHER & JENS DAVID OHLIN, DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY 86–87 (2008); DAVID RODIN, WAR AND SELF-DEFENSE 40–43 (2002).

236. David Rodin, *War and Self-Defense*, 18 ETHICS & INT'L AFF. 63, 63–67 (2004) (criticizing that an analogy cannot be drawn between the two scenarios). *See also* MICHAEL WALZER, JUST AND UNJUST WARS (4th ed. 2006) (stating the differences and similarities between armed conflicts and individual self defense). On the similar justifications in both defenses, *see* Jeff McMahan, *Self-Defense And The Problem Of The Innocent Attacker*, 104 ETHICS 252, 257 (1994); RODIN, *supra* note 235, at 40–43; Iddo Porat & Ziv Bohrer, *Preferring One's Own Civilians: May Soldiers Endanger Enemy Civilians More than They Would Endanger Their State's Civilians?*, 47 GEO. WASH. INT'L L. REV. 1, 4 (2015); *and* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 34–35 (1974).

237. Porat & Bohrer, *supra* note 236, at 4.

238. Rome Statute, *supra* note 119, art. 31(3).

for excluding criminal responsibility may be recognized. Thus, commanders can raise a defense not listed in the statute, but rather in customs, international treaties, and general principles of law.[239] While the statute does not specifically allow for a cultural defense to be raised, it does not expressly forbid it.[240] As a result of the statute's concise and vague elaboration of defenses, there should be leeway to consider cultural factors if they are supported by a relevant source in national or international law.[241]

Some courts allow additional defenses to be raised if they do not undermine other policies.[242] Article 21(3) of the Rome Statute anticipates the misuse of open defense claims.[243] Thus, it requires that the application and interpretation of law be consistent with human rights norms of equality and non-discrimination. Treating commanders differently based on their cultural values arguably breaches the principle of equality under the law,[244] regardless of considerable differences between parties to a conflict, hence the provisions of Article 21(3).[245]

Not only that, but most states have also yet to establish cultural defenses as part of their domestic laws.[246] As there is no consensus regarding its implementation in various nations, a universal cultural defense cannot be applied without undermining other policies. It is possible that, as states become more multicultural, the demand for the inclusion of cultural defenses at a formal level within domestic legal systems will increase.[247] In light of globalization and increased diversification of populations worldwide, one may expect cultural defenses to gain greater recognition in domestic laws, thereby giving greater legitimacy to their use in international law.

William Schabas points out that the Rome statute explicitly authorizes using other uncodified defenses.[248] Article 67(1)(e) states that "the accused shall also be entitled to raise defenses and to present other evidence admissible under this Statute."[249] Although Schabas does not mention the cultural defense as an example, he notes that attorneys can raise any uncodified defense, such as alibi, military necessity, abuse of process, consent,

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239. *Id.*

240. *Id.*

241. *Id.*

242. Renteln, *supra* note 99, at 277.

243. *See* Rome Statute, *supra* note 119, art. 21(3).

244. Rene Provost, *The Move to Substantive Equality in International Humanitarian Law: A Rejoinder to Marco Sassòli and Yuval Shany*, 93 INT'L REV. RED CROSS 437, 437 (2011) (discussing formal and substantive equality in IHL); James M. Donovan & John Stuart Garth, *Delimiting the Culture Defense*, 26 QUINNIPIAC L. REV. 109, 110 (2007).

245. These differences include relative strength, legal, and moral justifications for the use of force. *See* Yahli Shereshevsky, *Politics by Other Means: The Battle Over the Classification of Asymmetrical Conflicts*, 49 VAND. J. TRANSNAT'L L. 455, 458–59 (2016); Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1, 41–42 (2008); *and* Yahli Shereshevsky, *Are All Soldiers Created Equal?–On the Equal Application of the Law to Enhanced Soldiers*, 61 VA. J. INT'L L. 271, 289–90 (2021).

246. *See, e.g.*, Julia P. Sams, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMPAR. L. 335 (1986); Tamar Tomer-Fishman, *"Cultural Defense," Cultural Offense," or No Culture at All?: An Empirical Examination of the Israeli Judicial Decisions in Cultural Conflict Criminal Cases and the Factors Affecting Them*, 100 J. CRIM. L. & CRIMINOLOGY 475, 480–82 (2010).

247. *In Defence of Culture*, *supra* note 99, at 232–33.

248. SCHABAS, *supra* note 174, at 240–41.

249. Rome Statute, *supra* note 119, art. 67(1)(e).

and reprisal.[250] Commanders from different national armies have different cultural conceptions of what is necessary to accomplish their objective, and may be inclined to raise one of these uncodified defenses at trial.[251]

Due to the concern about international judicial activism, another option is to implement cultural defenses through domestic courts. International courts should exercise jurisdiction only when domestic courts cannot or are unwilling to do so.[252] Furthermore, to fend off accusations of Eurocentrism, judges would apply cultural defenses only in extreme cases. Courts could advocate for a universalist position on substantive humanitarian principles (e.g., reasonableness) while allowing culture-based deviations from IHL's norms at the level of interpretation (e.g., how reasonableness is defined in a specific situation).

VII. POSSIBLE (UN)ACCEPTABLE USES OF CULTURE IN IHL

As we have seen, there is a sharp contrast in the acceptability and effectiveness of using cultural arguments in IHRL versus ICL. Given this sharp contrast, the feasibility of cultural defenses in IHL is far from certain. Hypothetically, one could argue that proportionality's openness to interpretation might allow for the incorporation of cultural defenses in IHL. Rule 14 of Customary IHL[253] determines that proportionality is a customary principle concerning military conflict.[254] Therefore, it is not surprising that in 1977, upon ratifying API, many states added interpretative reservations regarding the implementation of proportionality.[255] Each state, as discussed *supra*, has a different perception of proportionality, and even within states significant divergence may exist between how different commanders apply the principle of proportionality.[256]

Cultural considerations have already been used de facto in IHL, such as in cases involving humiliating treatment—for example, the frisking of female Iraqi civilians, the shaving of detainees' beards at Guantanamo Bay, and the compelling of prisoners to eat religiously prohibited food.[257] Therefore, there is the possibility for including cultural consideration as a defense in IHL. Yet, taking cultural considerations into account as part of the military advantage opens the possibilities for allowing more collateral harm and,

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250. SCHABAS, *supra* note 174, at 240–41.

251. FRANÇOISE HAMPSON, MILITARY NECESSITY IN CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 251 (Roy Gitman & David Rieff eds., 1999).

252. *The International Criminal Court (ICC)*, GOV'T NETH., https://www.government.nl/topics/international-peace-and-security/international-legal-order/the-international-criminal-court-icc (last visited Apr. 21, 2023).

253. *Rule 14. Proportionality in Attack*, INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14 (last visited Apr. 21, 2023).

254. JEAN-MARIE HENCKARETS & LOUISE DOWALD BECK, *Proportionality in Attack*, *in* 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 1, 46 (2005).

255. Julie Gaudreau, *The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims*, 849 INT'L REV. RED CROSS 143, 143–84 (2003) (providing examples of reservations, including those of Belgium, Canada, France, Holland, New Zealand, the Netherlands, Spain, Australia, and the United Kingdom).

256. *See generally In Bello Proportionality*, *supra* note 94.

257. *See generally* Stephen Erikkson, *Humiliating and Degrading Treatment Under International Humanitarian Law: Criminal Accountability, State-Responsibility, and Cultural Considerations*, 55 A.F. L. REV. 269, 271, 298–310 (2004).

thus, it contradicts the rationale of proportionality.[258] If one argues cultural relativism, one must bear in mind that the argument is not about diversity in the sense that everybody should wear their cultural clothes to public universities, but rather about diversity which translates into permission to kill people. Consequently, one must examine whether the prism of diversity is sufficient to externalize one's cultural preferences to the lives of innocent third parties.

While cultural issues could influence a British commander to take more risks to save the monarchy or an Israeli commander to save an Israeli life, shifting this risk to third parties is something else—for instance, by expecting North Korea to have more deaths of civilians in their balance because civilians do not matter to them culturally. This relates to whether there is a universal minimum of morality that can allow one to evaluate what a moral person would do.[259] Should the in bello proportionality constraint on the North Korean armed forces be substantially less demanding than for liberal states that place a much higher value on the welfare of civilians?[260] This issue was addressed during the 2014 Gaza conflict over claims of cultural casualty aversion in Israeli society and pervasive panic that Israeli soldiers would be captured to exercise leverage.[261] Schmitt and Merriam contend that these subjective cultural aspects are justifiable considerations in the proportionality equation.[262] Can readiness to release numerous prisoners in return for one soldier (or in exchange for Captain Harry) lead to the recognition of differing legal commitments for different states under a legal principle of proportionality?

A careful reading of Schmitt and Merriam suggests that the answer to this question depends on whether the kidnapper's side is aware of the other nation's cultural frailties.[263] They argue that since Hamas knows Israel's cultural sensitivities (pervasive panic about kidnapping and about using kidnapping soldiers for strategic leverage), they deliberately turn cultural sensitives into part of their military strategy.[264] Consequently, in evaluating the proportionality of its response, Schmitt and Merriam contend, Israel could take this under advisement and potentially use more force and cause higher levels of collateral damage to hinder Hamas from achieving its military objectives (irrespective of a cultural defense).[265] One should note, however, that the classic model of cultural defenses in criminal law does not apply here, since the use of force does not depend on the reasonable commander's view but on the awareness of the opposing side's use of culture as a strategic

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258. *See generally In Bello Proportionality*, *supra* note 94.

259. JOHN GRAY, ENLIGHTENMENT'S WAKE: POLITICS AND CULTURE AT THE CLOSE OF THE MODERN AGE 121–25 (1995). *See also* H.L.A. HART, THE CONCEPT OF LAW 176 (1961).

260. Robert D. Sloane, *Puzzles of Proportion and the "Reasonable Military Commander": Reflections on the Law, Ethics, and Geopolitics of Proportionality*, 6 HARV. NAT'L SEC. J. 300, 327 (2015).

261. Michael Schmitt & John Merriam, *A Legal and Operational Assessment of Israel's Targeting Practices*, JUST SEC. (Apr. 24, 2015), https://tinyurl.com/5h2s7h6y (hereinafter *Israel's Targeting Practices*); John J. Merriam & Michael N. Schmitt, *Israeli Targeting: A Legal Appraisal*, 68 NAV. WAR COLL. REV. 1, 14–15 (2015). *See also* Michael N. Schmitt & John J. Merriam, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, 37 U. PA. J. INT'L L. 53, 127 (2015).

262. Michael Schmitt, *The Relationship Between Context and Proportionality: A Reply to Cohen and Shany*, JUST SEC. (May 11, 2015), https://tinyurl.com/43d4brzr.

263. *See Israel's Targeting Practices*, *supra* note 261 (noting how Hamas uses Israeli aversion to casualties and having its citizens taken prisoner to its advantage).

264. *Id.*

265. *Id.*

military weapon.

While some scholars have supported Schmitt and Merriam's argument,[266] others have expressed harsh (and warranted) criticism.[267] For example, Amichai Cohen and Yuval Shany have rejected Schmitt and Merriam's interpretation of proportionality for two reasons.[268] First, they argue that it would require a commander to weigh broad strategic considerations, such as the impact of Hamas' missile attacks on the Israeli public's view of itself as under siege.[269] Such broad strategic considerations, Cohen and Shany contend, place too heavy a burden on military commanders and deprive them of the ability to exercise discretion in making real-time decisions.[270] Second, they argue that allowing Israel to use more fire power than other nations based on Israel's higher rate of prisoner exchange contradicts the modern thrust of IHL, namely the directing of military power to narrow and objective war aims.[271] It would also introduce the fierce debate between cultural relativism and universalism into IHL application.[272]

Linking IHL to cultural relativism is cause for alarm for many scholars since cultural considerations are inherently unreliable, flexible, and subjective, making them prone to abuse.[273] The foundation of IHL is the desire to create an efficient and effective system, which is why it has traditionally been characterized by clear rules.[274] These rules were often based on the self-interest of nations, as they provided a sense of certainty and clarity

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266. Pnina Sharvit Baruch, *The Report of the Human Rights Council Commission of Inquiry on the 2014 Operation in the Gaza Strip – A Critical Analysis*, 46 ISR. Y.B. ON HUM. RTS. 29, 50 (2016); Elad David Gil, *Trapped: Three Dilemmas in the Law of Proportionality and Asymmetric Warfare*, 18 Y.B. INT'L HUMANITARIAN L. 153, 164–65 (2016).

267. Amichai Cohen & Yuval Shany, *Contextualizing Proportionality Analysis? A Response to Schmitt and Merriam on Israel's Targeting Practices*, JUST SEC. (May 7, 2015), https://tinyurl.com/y3svehcn. *See also* Shereshevsky, *supra* note 245, at 286–87; Porat & Bohrer, *supra* note 236, at 154–58; Ziv Bohrer & Mark Osiel, *Proportionality in War: Protecting Soldiers from Enemy Captivity, and Israel's Operation Cast Lead—"The Soldiers Are Everyone's Children"*, 22 U. S. CAL. INTERDISC. L.J. 637 (2013); *and* Ziv Bohrer, *Protecting State Soldiers, Compatriot Civilians or Foreign Civilians: Proportionality's Meanings at the Tactical, Operational and Strategic Levels of War*, 46 ISR. Y.B. ON HUM. RTS. 171 (2016).

268. Cohen & Shany, *supra* note 267.

269. *Id.*

270. *Id.*

271. *Id.* The deal to secure the release of Gilad Shalit, a soldier held captive by Hamas in Gaza for five years, involved the release of 1,027 Palestinian prisoners held by Israel. Ronen Bergman, *Gilad Shalit and the Rising Price of an Israeli Life*, N.Y. TIMES (Nov. 9, 2011), https://www.nytimes.com/2011/11/13/magazine/gilad-shalit-and-the-cost-of-an-israeli-life.html. Their release was controversial and generated significant debate within Israeli society considering reports that the majority of released prisoners have returned to committing acts of terrorism. *See* Nir Barkan Nagar, *Negotiations with Terrorist Organizations for the Release of Abductees: Between Declarations and Practice. The Israeli Case*, 3 POL. SCI. REV. (POLAND) 41 (2018); Bohrer & Osiel, *supra* note 267, at 653; *News in Brief II*, HAARETZ (Dec. 4, 2007), https://www.haaretz.com/2007-12-04/ty-article/news-in-brief-ii/0000017f-e4d1-d9aa-afff-fdd9a99b0000. Another example is Elhanan Tannenbaum, an Israeli businessman, who was abducted by Hezbollah in 2000 and held captive in Lebanon for three years. Amir Rappaport, *2,101 Day*, MA'ARIV (Jan. 29, 2001), http://www.mia.org.il/archive/040129mah.html. In 2004, he was released in return for 435 Palestinian and Lebanese prisoners. *Id.*

272. Cohen & Shany, *supra* note 267; AMICHAI COHEN & DAVID ZLOTOGORSKI, PROPORTIONALITY IN INTERNATIONAL HUMANITARIAN LAW: CONSEQUENCES, PRECAUTIONS, AND PROCEDURES 132–33 (Michael N. Schmitt ed., 2021).

273. Yishai Schwartz, *Defining Anticipated Military Advantage: The Importance of Certainty*, LAWFARE (May 22, 2015), https://www.lawfareblog.com/defining-anticipated-military-advantage-importance-certainty; COHEN & ZLOTOGORSKI, *supra* note 272, at 123.

274. *Id.*

in the chaotic and uncertain environment of armed conflict.[275] To make effective decisions during such times, it is important to prioritize following the rules of IHL.[276] By doing so, parties can avoid abuse, take advantage of flexible principles for personal gain, and ensure that their actions align with the goals of efficiency and effectiveness.[277]

A state's claim that its population possesses a cultural sensitivity to a certain type of attack or that an enemy has targeted a location because of its cultural significance would be difficult, if not impossible, to confirm empirically. Moreover, while states that place a high value on the lives of their soldiers may receive added protection if cultural considerations are taken under advisement, it could also reduce protection for soldiers in states where less value is assigned to their lives.[278] The result would be an asymmetrical application of IHL.[279]

Indeed, tailoring the standard to one culture places the fragile project of civilizing war at risk. IHL cannot possibly incorporate all cultural particularities because doing so will eliminate the necessary shared standard. Theoretically, however, we should strive to develop standards that can fit different circumstances and have the potential to be universalized over time.

The vital question in applying an international cultural defense is which cultures we will evaluate. Will the commander be subjected to a standard that is based on his national culture (i.e., "the typical British commander") or to a standard that is based on his individual culture that stems from his personal background (i.e., "the typical Christian/Muslim/Jewish commander in the British armed forces")?[280] It is our opinion that the latter is better.

Choosing a broad cultural standard poses difficulties, as the notion of culture is much more complex than a unitary vision.[281] It is a dynamic and shifting phenomenon.[282] We cannot examine all commanders based on one nation-based culture. This is a common criticism of cultural defense: it views culture as static, contrary to the reality that culture is constantly in flux.[283]

We presented the example of Prince Harry to demonstrate that culture will drive British military commanders to save the monarchy whatever the cost. However, British culture is much more complex and spans utilitarianism, the Magna Carta, and human rights.[284] Therefore, it would not be an easy task to create a nation-based cultural model.

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275. Roger Normand & Chris Jochnik, *The Legitimization of Violence: A Critical History of the Laws of War*, 35 HARV. J. INT'L L. 387 (1994).

276. *See* Amichai Cohen, *Rules and Standards in the Application of IHL*, 41 ISR. L. REV. 41 (2008) (the shift from clear rules to more flexible standards has resulted in a reduction in legal certainty, leading to significant challenges for the enforcement of criminal law).

277. *Id.*

278. *See generally* Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1 (2008); Robin Geiß, *Assymetric Conflict Structures*, 88 INT'L REV. RED CROSS 757 (2006).

279. *See generally* Geiß, *supra* note 278.

280. *See, e.g.*, Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1252 (2010) (exploring the same concept in the context of gender and battered woman syndrome).

281. *A Working Definition of "Culture"*, *supra* note 100, at 78–84.

282. *Id.*

283. *See generally Making Room for Culture*, *supra* note 98, at 7–15.

284. *See* STELLA NANGONOVÁ, BRITISH HISTORY AND CULTURE 6–7, 14–17 (2008); JAMES LOUGHLIN, THE

This problem leads to the second question of determining whether the above understanding of culture can be applied in invoking state responsibility; if a commander violates the principle of proportionality, under which cultural reasonableness standard would it be evaluated? One potential answer is that if the commander's culture conforms to the state's culture, the state will gain the cultural defense. If the commander's culture diverges from the state's culture, the state will not receive the cultural defense. This is because proving individual responsibility requires a higher threshold for violating the proportionality principle than state responsibility.[285]

Another concern is that the nation's supposed culture is often not the actual people's culture. A government's diplomats or elites may claim to represent the "culture"; yet it is often unclear whether their statements are based on cultural considerations or political expediency. For example, UN Secretary-General Kofi Annan pointed out, "It was never the people who complained of the universality of human rights, nor did the people consider human rights as a Western or Northern imposition. It was often their leaders who did so."[286] This potential of elites to manipulate culture is also captured in Robert Sloane's diagnosis of what led to the 1994 Rwandan genocide: "it was not culture per se, but a political elite's manipulation and exacerbation of preexisting socio-cultural divisions within Rwandan society that caused the systematic slaughter of Tutsi."[287]

VIII. CURRENT CONSIDERATIONS IN PROPORTIONALITY AND THE WAY FORWARD

Accounting for cultural considerations within the proportionality analysis is complex, leaving many questions open for future debate.[288] The two subsequent sections explore the expanding considerations of the proportionality principle in practice and discuss the framework in a normative and descriptive theory of IHL.

A. Force Protection

How does a state quantify the lives of its soldiers or civilians in the proportionality calculus? While IHL regulates the harm a state can inflict on the other side, there are fewer rules dealing with the amount of harm it can impose on its soldiers or civilians.[289]

Consider the targeted killing of a state's own population or the evacuation of a state's civilian population away from the threat of an armed conflict. While these examples do

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BRITISH MONARCHY AND IRELAND: 1800 TO THE PRESENT (2007); *and* Derek Stanford, *The Problem of the British Royal House, Bagehot and the Monarchy*, 3 MOD. AGE 33, 37, 39 (1958).

285. Beth Van Schaack, *Evaluating Proportionality and Long-Term Civilian Harm under the Laws of War*, JUST SEC. (Aug. 29, 2016, 08:30 AM), https://tinyurl.com/2w99tffp (note that art. 8(2)(b)(iv) of the Rome Statute, unlike art. 51(5)(b) of the First Additional Protocol, required that the humanitarian consequences of a reviewed attack be "clearly excessive").

286. Jose A. Lindgren Alves, *The Declaration of Human Rights in Postmodernity*, 22 HUM. RTS. Q. 478, 498 (2000).

287. Sloane, *supra* note 143, at 587.

288. *See generally* PROPORTIONALITY IN ACTION: COMPARATIVE AND EMPIRICAL PERSPECTIVES ON THE JUDICIAL PRACTICE (Mordechai Kremnitzer et al. eds., 2020) (on how the proportionality principle is being applied in different countries, such as Canada, Germany, India, Israel, Poland, and South Africa).

289. Jessica Joly Hébert, States' Obligations Toward their Own Civilian Population and Military Forces in Times of Armed Conflict according to International Humanitarian and Human Rights Law 88 (2015) (LL.M. dissertation, McGill University) (McGill University Libraries).

not seem to emanate from the same problem, they are different manifestations stemming from the same issue: providing significant attention to obligations that a state owes to its people in times of war is missing within IHL.[290] Indeed, this is a very under-regulated part of the equation and perhaps not IHL's primary concern. Since a state's soldiers are, in the end, its nationals, International Human Rights Law may be the proper tool to apply[291] for the state's obligations vis-à-vis its soldiers.[292]

However, due to the under-theorization of certain aspects of IHL, no specific norms guide how to care for them. Some argue that soldiers must bear an enhanced risk of harm to reduce the peril to civilians on their side of the conflict, regardless of their national identity.[293] Others challenge the common perception that combatants give up their right to life by joining combat forces during a conflict.[294] They contend that, in certain circumstances, a state can protect its soldiers even at the expense of harm to civilians.[295] Nevertheless, under the International Human Rights Law paradigm, the state still owes a duty to the civilians on the other side and cannot only privilege its soldiers.[296]

The legitimacy of force protection was demonstrated when the UN Security Council authorized NATO forces to bomb from high above the target to avoid risking their pilots during operations in the former Yugoslavia.[297] While the council stated that NATO had the technology to uphold the relevant rules, in practice, it noted bombings took the lives of eighty-seven civilians in a single attack.[298] Another example of the legitimacy of force protection is evident in President Obama's policy to use more drones than boots on the ground after the U.S. experience in Iraq.[299] While the assumption that force protection helps limit or minimize harm is questionable, boots on the ground would have caused more

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290. *Id.*

291. *Id.*

292. Smith v. The Ministry of Defense [2013] UKSC 41, [2014] AC 52 (Smith's wife claimed that the tanks weren't properly equipped as a "Duty of care").

293. Porat & Bohrer, *supra* note 236, at 100. *See generally* Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 J. MIL. ETHICS 3 (2005); Asa Kasher, *The Principle of Distinction*, 6 J. MIL. ETHICS 152, 166 (2007).

294. Ido Rosenzweig, The Humanization of Combatants: The Right to Life of Combatants under International Law (2022) (Ph.D. dissertation, The Hebrew University of Jerusalem). *See* Michael W. Lewis & Dale Stephens, *Law of Armed Conflict: A Contemporary Critique*, 6 MELB. J. INT'L L. 55, 72 (2005); Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 J. MIL. ETHICS 3 (2010); *Smith*, [2013] U.K.S.C. 41, ¶ 76 (Lord Hope SCJ); *and* Public Committee against Torture in Israel v. Israel, HCJ 769/02 ¶ 46 (Isr. S. Ct. Dec. 14, 2006).

295. *See, e.g.*, Reuven Ruvi Ziegler & Shai Otzari, *Do Soldiers' Lives Matter? A View from Proportionality*, 45 ISR. L. REV. 53, 63 (2012).

296. *NATO Bombing*, *supra* note 36, ¶ 59; Thomas W. Smith, *Protecting Civilians. . . or Soldiers? Humanitarian Law and the Economy of Risk in Iraq*, 9 INT'L STUD. PERSPS. 144, 146–47 (2008). *See also* Sarah Sewall, *Modernizing U.S. Counterinsurgency Practice: Rethinking Risk and Developing a National Strategy*, 86 MIL. REV. 103, 104–05 (2006) (discussing the strategic value of risk tolerance in applying the U.S. Army's Counterinsurgency Field Manual); R v. Secretary of State for Defence, [2010] U.K.S.C. 29 ¶¶ 145–46 (Lord Brown SCJ); Noam Lubell, *Challenges in Applying Human Rights Law in Armed Conflict*, 87 INT'L REV. RED CROSS 737, 745, 748–49 (2005); *and* Francisco Forrest Martin, *The United Use of Force Rule: Amplifications in Light of the Comments of Professors Green and Paust*, 65 SASK. L. REV. 451, 452–53, 468 (2002).

297. *NATO Bombing*, *supra* note 36, ¶ 56.

298. *Id.* ¶ 86.

299. The Obama White House, *The President Provides an Update on Our Campaign to Degrade and Destroy ISIL*, YOUTUBE (July 6, 2015), https://www.youtube.com/watch?v=YkJs3XU0rr4.

escalations with the domestic population.[300]

Indeed, allowing states too much leeway to consider force protection can lead to a slippery slope, because a state has a vested interest in saving the lives of its soldiers.[301] Heuristics, such as loss aversion, will make the loss of one's soldiers worth much more than the loss of the other side's civilians.[302] This may prove problematic because it transfers risks from soldiers to civilians and can also be used to justify extensive incidental harm.[303] Consequently, force protection will have some influence on the effectiveness of the principle of proportionality.

B. Defensive Capabilities

How do defensive capabilities affect a party's expectations under the proportionality analysis? Does the fact that a state has defensive capabilities reduce the value of targeting a stock of rockets because they cannot do much harm? One could argue that if different states are not subjected to different requirements based on cultural considerations, a greater burden is still imposed on technologically advanced countries when applying the principle of proportionality.

The costs of these defensive capabilities are very high in research, development, and operational costs, but in the end—if one argues that their possession impacts the jus in bello analysis against their possessor—the IHL fails to provide incentives for a party to develop these systems and deploy them.[304] Should that be the goal under IHL for these systems? Or should the goal under IHL be to encourage the use of these systems and provide the context in which parties could develop them?

If the aim is to protect civilians, one would expect IHL to take steps to incentivize the development of these capabilities at the policy level rather than implement policies that impose penalties against their use. However, while including defensive capabilities in the legal analysis goes completely against protecting civilians, it is undeniable that they do not influence the analysis.[305] Nonetheless, many considerations in the proportionality calculus are ignored by IHL.[306] In short, cultural considerations that are inherent in the proportionality analysis have been left out of IHL.

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300. *Id.*

301. *See* Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 J. MIL. ETHICS 3, 12–14 (2005); *see also* David Luban, *Risk Taking And Force Protection* 35–36 (Geo. Pub. Law & Legal Theory, Rsch. Paper No. 11-72, 2011), https://scholarship.law.georgetown.edu/facpub/654/.

302. *See, e.g.*, Trent Lythgoe, *Our Risk-Averse Army: How We Got Here and How to Overcome It*, MOD. WAR INST. (May 9, 2019), https://mwi.usma.edu/risk-averse-army-got-overcome/.

303. One recent example is the Judaea Operation, conducted in support of Operation Protective Edge. UNHRC, *Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict*, U.N. Doc. A/HRC/29/CRP.4 (June 24, 2015) (finding that the reasonable military commander would have thought that this was disproportionate, demonstrating that the question of reasonability is always contentious).

304. Daphné Richemond-Barak & Ayal Feinberg, *The Irony of the Iron Dome: Intelligent Defense Systems, Law, and Security*, 7 HARV. NAT'L SEC J. 469, 482 (2016).

305. *See* COHEN & ZLOTOGORSKI, *supra* note 272, at 132–33; *see also* Beth Van Schaack, *Evaluating Proportionality and Long-Term Civilian Harm under the Laws of War*, JUST SECURITY (Aug. 29, 2016, 08:30 AM), https://tinyurl.com/2w99tffp.

306. *Id.*

C. Watershed Moments in IHL

Should the principle of proportionality in IHL be open to different considerations, such as cultural differences? Would this then make the analysis too broad, rendering it too all-inclusive? The creation of law in this field was a reaction to the emergence of the total war paradigm,[307] under which the ends were defined in a constantly expanding manner to include almost any means.[308] States could invoke military necessity, and there was no cap on incidental harm.[309]

The Saint Petersburg Declaration of 1868 was the first serious attempt by states to limit military necessity as an overriding principle.[310] States could decide when and how to apply force, but within that straitjacket.[311] Although this nineteenth-century project collapsed in the twentieth century, both world wars' gruesome realities gave birth to the 1949 Geneva Conventions and the Additional Protocols of 1977, representing an ambitious attempt to recreate that straitjacket.[312]

In shifting IHL to protect civilians and to include human rights, policymakers did not want to give commanders in the field open-ended discretion which would justify any act of violence.[313] With this in mind, the temptation to include cultural considerations should be resisted because extant law deliberately defined military necessity in a very narrow fashion.[314]

On the other hand, there is justification for including cultural considerations in light of the American Civil War.[315] In an attempt to go beyond existing laws, the Lieber Code of 1863[316] was created as a platform for political reconciliation and reconstruction.[317] In other words, while the law in this field was created to restrict violence, there were some cases where complying with the law did not decrease violence, and states went beyond

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307. *See generally* CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret eds., 1976) (1832) (being the most well-known attempt to grapple with the emergence of modern war following the Napoleonic wars).

308. *Id.* at 75–77 (noting the trend in modern war towards the maximum exertion of effort by a given belligerent). Any means here includes deterrence, engraving in consciousness, regime change, revenge, correction of historical wrongs, maintaining balance of power, and policies of containment.

309. *Id.* at 77 ("war is an act of force, and there is no logical limit to the application of that force.").

310. *See* Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297 (hereinafter St. Petersburg Declaration); Nicole Barrett, *Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos*, 32 COLUM. HUM. RTS. L. REV. 429, 445 (2001).

311. *See* St. Petersburg Declaration, *supra* note 310.

312. *See* Rome Statute, *supra* note 119, art. 8; *see, e.g.*, PROTOCOL I, *supra* note 42.

313. *See* sources cited *supra* note 312.

314. *See* Talya Steiner et al., *Necessity or Balancing: The Protection of Rights under Different Proportionality Tests – Experimental Evidence*, 20 INT'L J. CONST. L. 642, 644, 647–48, 662 (2022) (finding that, based on experimental analysis, applying proportionality in terms of the necessity test enhances the protection of rights in policy decisions more so than balancing benefit against harm).

315. *See generally* General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, War Department, Adjutant General's Office (Apr. 24, 1863), https://bit.ly/3LmsRN2.

316. Patryk I Labuda, *Lieber Code*, *in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 303–04 (Anne Peters & Margret Solveigardottir eds., 2015); Robert Kolb, *The Main Epochs of Modern International Law Since 1864 and Their Related Dominant Legal Constructions*, *in* SEARCHING FOR A "PRINCIPLE OF HUMANITY" IN INTERNATIONAL HUMANITARIAN LAW 23, 25, 28 (Kjetil Muzenović Larsen ed., 2013).

317. Labuda, *supra* note 316, at 303–04.

their legal obligations.

To explain this contradiction, one must pry open the black box, seeing beneath the veil in which politics constrains violence beyond the law. Even if a state strictly complies with the law, it could still create more violence than its political goals accommodate. The state would have to go beyond its legal restrictions when they conflict with its policy to obtain its political goals.[318]

Indeed, war has always, in part, been about projecting an image of moral superiority over one's enemies.[319] Each side wants to emerge victorious and, in the process, compromises the political and moral standing of their opponent.[320] Increasingly, these goals have become blurred, as instant media coverage of battles has required nations to win the battle and win the media war, so that they do not lose international or domestic support for their cause.[321]

It may be that international shaming[322] in the media will erode the pessimistic outlook of the international cultural defense.[323] States will turn to cultural defense only when it is a prominent aspect of their culture.[324] In so far as it is not, however, states should withhold from abusing the cultural defense in order to preserve global moral image.

It is important to distinguish between legitimacy considerations and legal ones. Therefore, while the legal analysis in cultural defense cases should not be affected—for that would deny the essence of IHL—cultural dictates could influence the "beyond the law" type of considerations and would impact the strategic decision or its legitimacy. We assume the price for saving Prince Harry would be considered legitimate by most European countries and the sixteen countries of the Commonwealth. We are not suggesting the answer is a blanket recognition of cultural factors; however, we cannot ignore that culture already plays a role in proportionality assessments and in the judicial review of those assessments.[325] IHL must find ways to mitigate or regulate culture's influence equitably so that accountability does not depend on geography.

IX. CONCLUSION

This article offers a preliminary discussion of an uncharted question: should cultural considerations be included as a normative benchmark for the "reasonable military commander" analysis? Given the imperialist baggage that burdens IHL to this day, at a minimum it will be necessary to engage in a more constructive debate to tackle this problem. As this article has demonstrated, different considerations, such as force

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318. CLAUSEWITZ, *supra* note 307, at 184.

319. *Id.*

320. For example, by Ruses of war, disinformation, etc.

321. *See* Peter Suciu, *Social Media Is Impacting Military Performance And Changing The Nature Of War*, FORBES (June 7, 2022, 7:01 PM), https://bit.ly/41G7E5Y.

322. *See* Lesley Wexler, *The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 ARIZ. J. INT'L & COMPAR. L. 561, 563–65 (2003); Sandeep Gopalan & Roslyn Fuller, *Enforcing International Law: States, IOs, and Courts as Shaming Reference Groups*, 39 BROOK. J. INT'L L. 73, 158 (2014).

323. THOMAS RISSE ET AL., THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE 20–22, 108–14, 142 (Thomas Risse et al. eds., 2013).

324. *Id.* at 20–21.

325. *See* discussion *supra* Part IV.

protection and defensive capabilities, influence the proportionality analysis, and there are similar justifications to include cultural considerations.[326]

Certain scholars question the ICC's ability to handle culturally complex cases, and advocate for expert culture-based analyses and other transnational justice alternatives—e.g., national courts and truth and reconciliation commissions.[327] Nevertheless, if cautiously included, the doctrine of cultural defense may promote IHL rather than hinder it. IHL is a body of law which must continue to reflect current and evolving thought and analysis within international law. On a normative and practical level, it would be valuable for international judges to gain some exposure to classic works in anthropology, folklore, and cultural studies.[328] Familiarity with the social sciences will enable them to both understand the culture of the military commander they seek to judge and address the problem of hindsight bias.[329]

This article argues that states should be subjected to a culturally informed reasonableness standard — one which will not result in utopian idealism or create perverse incentives, but will reflect the proper balance between humanitarian and cultural considerations. If IHL is perceived as overlooking its cultural norms, it could undercut its legitimacy.[330] Allowing a cultural defense has its drawbacks: it could undermine states' vested interest in upholding their global moral image and hamper IHL's ability to check military aggression.[331] Nevertheless, incorporating some level of cultural sensitivity is necessary to preserve IHL's reputation and defang charges of imperialist hegemonic application.[332]

326. *See* discussion *supra* Part VIII.

327. D'hondt, *supra* note 199.

328. *See generally* ILENIA RUGGIU, CULTURE AND THE JUDICIARY: THE ANTHROPOLOGIST JUDGE (2018).

329. *See generally* D'hondt, *supra* note 199.

330. Cheah, *supra* note 117, at 749, 763–67.

331. *See* discussion *supra* Part VII.

332. *See generally* Eliav Lieblich, *The Facilitative Function of Jus In Bello*, 30 EUR. J. INT'L LAW 321 (2019); Brown, *supra* note 95, at 147–54.