

HARDLY THE *TADIĆ* OF TARGETING: MISSED OPPORTUNITIES IN THE ICTY'S *GOTOVINA* JUDGMENTS

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The Gotovina case presented the International Criminal Tribunal for the former Yugoslavia (ICTY) with a unique opportunity to adjudicate on issues connected with the law of targeting and international humanitarian law (IHL) in a criminal context. This opportunity was especially important given the fact that legal issues arising out of complex, intense combat situations have only rarely been adjudicated. Although Gotovina was not formally charged with carrying out unlawful attacks on civilians, attacks by Croatia on four towns over the course of 'Operation Storm' were the focus of the proceedings. This led both Trial and Appeal Chambers to deal with issues related to the law of targeting such as classification of military objectives, proportionality, and the intent behind an attack. This article argues that the judges failed to take full advantage of the opportunity to discuss these issues. They failed consistently to articulate the legal reasoning behind their findings; they failed to explain the branch of law on which any of their substantive determinations were based; and, perhaps most importantly, they did not explain the relationship between IHL and criminal law and how IHL is to be applied in a courtroom.

Keywords: ICTY, IHL, targeting, international criminal law, impact analysis

1. INTRODUCTION

During and after recent military operations, especially those conducted by Western states, issues regarding the law of targeting¹ have attracted a great deal of attention in academic circles, and amongst United Nations (UN) bodies and human rights non-governmental organisations

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¹ The law of targeting is part of the law regulating the conduct of hostilities under IHL. It governs the use of force by belligerents during armed conflict. The main issues regulated by this body of law are distinction in targeting, means and methods of attack, and proportionality. See, in general, Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn, Cambridge University Press 2010); APV Rogers, *Law on the Battlefield* (3rd edn, Manchester University Press 2012); Ian Henderson, *The Contemporary Law of Targeting* (Martinus Nijhoff 2009). Certain violations of this body of law may lead to individual criminal responsibility: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I), art 85; Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute), art 8.

(NGOs).² Such issues include, for example, classification of certain objects as military objectives, the principle of proportionality and the precautions which need to be taken when carrying out an attack. When an operation results in civilian casualties,³ which is unfortunately the case in many military operations, calls are often heard not only to hold the state responsible for violations of international humanitarian law (IHL), but also to investigate and impose criminal liability on individuals responsible for those deaths.⁴ In some cases, UN fact-finding missions also investigate and report on these issues with regard to specific operations; these missions often recommend a similar course of action.⁵

Nonetheless, actual criminal proceedings centring on issues of the law of targeting are extremely rare; these matters remain largely unexplored in both national and international courts.⁶ With just over half a dozen relevant cases, the International Criminal Tribunal for the former Yugoslavia (ICTY) is the international court which has adjudicated the most cases on targeting issues.⁷ Moreover, when examining anticipated cases before the ICTY, the International Criminal

² For a criticism of some inaccuracies prevalent in the discourse on the law of targeting see Michael N Schmitt and Eric W Widmar, 'On Target: Precision and Balance in the Contemporary Law of Targeting' (2014) 7 *Journal of National Security Law and Policy* 379.

³ Harm to civilians does not, in and of itself, indicate that a crime has been committed, or even that a violation of IHL has occurred. As will be explained below, the law recognises that, unfortunately, a lawful attack may result in harm to civilians and civilian objects. The law prohibits the *intentional* targeting of civilians, and the targeting of military objectives in a way that is expected to cause *excessive* civilian casualties and damage to civilian objects. See Section 3 for a more nuanced discussion.

⁴ For example, Amnesty International, 'Nato/Federal Republic of Yugoslavia "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by Nato during Operation Allied Force', 5 June 2000, EUR 70/018/2000; Human Rights Watch, 'Civilian Deaths in the NATO Air Campaign', February 2000; Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (Human Rights Watch 2003); Human Rights Watch, *Troops in Contact: Airstrikes and Civilian Deaths in Afghanistan* (Human Rights Watch 2008); Human Rights Watch, *Unacknowledged Deaths: Civilian Casualties in NATO's Air Campaign in Libya* (Human Rights Watch 2012).

⁵ For example, Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1, 23 November 2006, UN Doc No A/HRC/3/2; Report of the United Nations Fact-Finding Mission on the Gaza Conflict, 25 September 2009, UN Doc No A/HRC/12/48 (Goldstone Report); Report of the International Commission of Inquiry on Libya, 8 March 2012, UN Doc No A/HRC/19/68 (Libya Report). See also Council of the European Union, 'Report of the Independent International Fact-Finding Mission on the Conflict in Georgia', September 2009.

⁶ Carolin Wuerzner, 'Mission Impossible? Bringing Charges for the Crime of Attacking Civilians or Civilian Objects before International Criminal Tribunals' (2008) 90 *International Review of the Red Cross* 907, 908.

⁷ These include, most notably, the following: ICTY, *Prosecutor v Tihomir Blaškić*, Judgment, IT-95-14-T, Trial Chamber, 3 March 2000; ICTY, *Prosecutor v Tihomir Blaškić*, Judgment, IT-95-14-A, Appeals Chamber, 29 July 2004; ICTY, *Prosecutor v Pavle Strugar*, Judgment, IT-01-42-T, Trial Chamber II, 31 January 2005 (*Strugar* Trial Judgment); ICTY, *Prosecutor v Pavle Strugar*, Judgment, IT-01-42-A, Appeals Chamber, 17 July 2008; ICTY, *Prosecutor v Milan Martić*, Judgment, IT-95-11-T, Trial Chamber I, 12 June 2007; ICTY, *Prosecutor v Milan Martić*, Judgment, IT-95-11-A, Appeals Chamber, 8 October 2008; ICTY, *Prosecutor v Stanislav Galić*, Judgment, IT-98-29-T, Trial Chamber I, 5 December 2003 (*Galić* Trial Judgment); ICTY, *Prosecutor v Stanislav Galić*, Judgment, IT-98-29-A, Appeals Chamber, 30 November 2006; ICTY, *Prosecutor v Zoran Kupreškić and Others*, Judgment, IT-95-16-T, Trial Chamber, 14 January 2000; ICTY, *Prosecutor v Zoran Kupreškić and Others*, Judgment, IT-95-16-A, Appeals Chamber, 23 October 2001; ICTY, *Prosecutor v Dario Kordić and Mario Čerkez*, Judgment, IT-95-14/2-T, Trial Chamber, 26 February 2001; ICTY, *Prosecutor v Dario Kordić and Mario Čerkez*, Judgment, IT-95-14/2-A, Appeals Chamber, 17 December 2004 (*Kordić Appeals Judgment*); ICTY, *Prosecutor v Jadranko Prlić and Others*, Judgment, IT-04-74-T, Trial Chamber III, 29 May 2013.

Court (ICC) and other international tribunals, it appears unlikely that these issues will be the focus of international proceedings in the near future.⁸

Against this background of scarce jurisprudence, the matter of *Gotovina and Others*⁹ presented the Trial and Appeals Chambers of the ICTY with an opportunity to adjudicate on issues related to targeting.¹⁰ The *Gotovina* case revolved around events which occurred in the context of the largest and most intense combat operation to be reviewed by an international criminal tribunal since the trials which followed the Second World War.¹¹ Since the *Gotovina* proceedings dealt with issues of the law of targeting rarely discussed in international judicial fora, and since

⁸ See Fenrick's prediction about the ICTY Prosecutor's reluctance to introduce cases in the 'grey area', thus preventing the development of the law: William J Fenrick, 'Riding the Rhino: Attempting to Develop Usable Legal Standards for Combat Activities' (2007) 30 *Boston College International and Comparative Law Review* 111, 137. Currently, the ICC is investigating or prosecuting nine situations (Democratic Republic of Congo, Uganda, Kenya, Libya, Sudan, Mali, Côte d'Ivoire and two situations in the Central African Republic). None of these situations raise significant targeting issues. The situation in Libya could potentially have raised such questions had the Office of the Prosecutor (OTP) sought to investigate acts committed by NATO forces. However, the OTP is currently focusing on the actions of the former Qaddafi regime. The OTP is also conducting nine preliminary examinations: Afghanistan, Honduras, Columbia, Georgia, Guinea, Nigeria, Ukraine, Iraq and Palestine. See generally (for eight of the situations) OTP, 'Report on Preliminary Examination Activities 2014', 2 December 2014, <http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf> (OTP 2014 Report). Of these nine situations, two involve targeting issues to a certain extent, although it is unlikely that the Prosecutor will decide to conduct an investigation relating to those issues. The situation in Afghanistan could potentially have involved NATO strikes on the territory of Afghanistan, but in the OTP's 2013 report the Prosecutor indicated that she will no longer examine those strikes: OTP, 'Report on Preliminary Examination Activities 2013', November 2013, 7–14, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF (OTP 2013 Report). The situation in Georgia could potentially have included questions related to the law of targeting, given that the OTP 2013 Report listed '[u]nlawful attacks directed against the civilian population and civilian objects' as one of the alleged crimes. However, the OTP 2014 Report makes clear that only non-targeting related crimes are potentially relevant for further investigation: *ibid* 33–37. It remains to be seen whether the Prosecutor will open investigations into these situations and, if so, which cases will be selected for prosecution.

In fact, perhaps the preliminary examination most relevant for targeting issues was closed in June 2014 by the OTP: the situation in Korea involved an attack on a South Korean military ship and a single shelling event by North Korea on a South Korean island. The OTP decided to close the preliminary examination after it found no reasonable basis to believe that crimes within the jurisdiction of the ICC were committed; for the OTP's decision, see Office of the Prosecutor, 'Situation in the Republic of Korea – Article 5 Report', June 2014, <http://www.icc-cpi.int/iccdocs/otp/SAS-KOR-Article-5-Public-Report-ENG-05Jun2014.pdf> (Korea Report). Moreover, considering the pace of ICC proceedings, even if the OTP were to decide to proceed with a case involving issues of targeting, it would take years before any final judgment would be handed down.

⁹ ICTY, *Prosecutor v Ante Gotovina, Ivan Čermak and Mladen Markač*, Judgment, IT-06-90-T, Trial Chamber I, 15 April 2011 (*Gotovina* Trial Judgment); ICTY, *Prosecutor v Ante Gotovina and Mladen Markač*, Judgment, IT-06-90-A, Appeals Chamber, 16 November 2012 (*Gotovina* Appeals Judgment).

¹⁰ Walter B Huffman, 'Margin of Error: Potential Pitfalls of the Ruling in The Prosecutor v. Ante Gotovina' (2012) 211 *Military Law Review* 1, 2; Laurie Blank, 'Operational Law Experts Roundtable on the Gotovina Judgment: Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law', Emory Public Law Research Paper No 12–186: 'The case is apparently the first – and likely the only – case assessing complex targeting decisions involving the use of artillery against a range of military objectives in populated areas during a sustained assault'. Geoffrey S Corn and Gary P Corn, 'The Law of Operational Targeting: Viewing the LOAC through an Operational Lens' (2011) 47 *Texas International Law Journal* 337, 340: 'the complex nature of the targeting situations that existed during the attack on Knin and the reliance on these targeting decisions as the focal point of criminal responsibility makes this cases profoundly significant in the development of targeting law. Indeed, no other decision by the ICTY has addressed such a complex targeting situation'.

¹¹ Corn and Corn, *ibid* 364; Huffman, *ibid* 6.

they did so in the context of a large-scale, intense military operation, a unique opportunity arose to clarify and develop the law of targeting in general, and its applicability in a criminal context in particular. As a group of eminent scholars noted while the case was still pending, ‘the “*Gotovina*” judgment has the potential to become the “*Tadić*” of targeting law’.¹²

This contribution explores how the *Gotovina* judgments dealt with issues related to the law of targeting in a criminal context, and inquires whether the Trial and Appeals judgments met the above mentioned high expectations. It is not intended to address all of the legal issues that arise from the two *Gotovina* judgments; instead, the article focuses on some of the questions most pertinent to the law of targeting. Section 2 presents a short historical background of ‘Operation Storm’, the military operation at the heart of these proceedings, and a short summary of the relevant findings of the Trial and Appeal Judgments. It focuses on the method of ‘impact analysis’, which was central to both judgments. Section 3 briefly presents background on the law of targeting, and on the interaction between IHL and international criminal law (ICL). Section 4 examines specific incidents and issues related to the law of targeting that arose in the context of the proceedings: the concept of military objectives; the principle of distinction and insufficient information during an attack; issues related to proportionality analysis and analysing the intent behind an attack. The article concludes that both the Trial and Appeals Chambers failed to explain their conclusions regarding those questions. Moreover, they failed to address the relationship between IHL and ICL, and the tensions that arise between these two branches of law in the context of the law of targeting. Thus, it appears that the opportunity to create the ‘*Tadić* judgment of targeting’ was missed.

2. BACKGROUND

2.1. OPERATION STORM

At a very early stage during the break-up of Yugoslavia, in December 1990, the Serb community in Croatia established an autonomous region on approximately one-third of the territory of what is now Croatia. In December 1991 this region declared independence and became known as the Republic of Serbian Krajina.¹³ Following Croatia’s declaration of independence in 1991, it attempted to regain control over that territory.¹⁴

¹² ICTY, *Prosecutor v Ante Gotovina and Mladen Markač*, Application and Proposed Amicus Curiae Brief concerning the 15 April 2011 Trial Chamber Judgment and Requesting that the Appeals Chamber Reconsider the Findings of Unlawful Artillery Attacks during Operation Storm, IT-06-90-A, Appeals Chamber, 13 January 2012 (*Amicus Curiae* Brief). It appears that the experts referred to *Tadić* since it is considered to be one of the most important judgments ever given by the ICTY. It is perhaps the ICTY case that has had the most effect on the development of international law: Mia Swart, ‘*Tadić* Revisited: Some Critical Comments on the Legacy and the Legitimacy of the ICTY’ (2011) 3 *Goettingen Journal of International Law* 986, 987.

¹³ *Gotovina* Trial Judgment (n 9) [2]; Corn and Corn (n 10) 346.

¹⁴ Huffman (n 10) 5.

On 4 August 1995, just weeks after the Srebrenica genocide,¹⁵ Croatia launched a massive military campaign code-named ‘Operation Storm’, with the goal of taking over the territory controlled by the Serbs.¹⁶ By 7 August, major combat operations ended in a decisive Croatian victory: Croatia took over the Republic of Serbian Krajina and drove back the Serbian army.¹⁷ The commander of Operation Storm in the southern region of Krajina was General Ante Gotovina.

According to the Trial Chamber (TC), the operation led to ‘526 Serb casualties, including 116 civilians, in addition to 211 casualties among Croatian soldiers and policemen and 42 Croatian civilian casualties’,¹⁸ and to the deportation of (at least) 20,000 Serbs.¹⁹ These events, and especially the artillery attacks on several towns in Krajina²⁰ and the deportation of tens of thousands of Serbs, were at the heart of the proceedings against Gotovina before the ICTY.

2.2. THE TRIAL JUDGMENT AND THE IMPACT ANALYSIS

In 2005, after being at large for several years, Gotovina was captured and transferred to the custody of the ICTY.²¹ He was accused, along with two others,²² of bearing responsibility for crimes against humanity and war crimes committed between July and September 1995 against the Serb population in the Krajina region. The prosecution alleged that before, during and after Operation Storm, the three defendants took part in a joint criminal enterprise (JCE) which was designed to permanently remove the Serb population ‘from the Krajina region by force, fear or threat of force, persecution, forced displacement, transfer and deportation, as well as appropriation and destruction of property’.²³

While Gotovina was never formally charged with any war crime to which the law of targeting is relevant,²⁴ the artillery attacks carried out over the course of the operation were one of the key

¹⁵ ICTY, *Prosecutor v Radislav Krstić*, Judgment, IT-98-33-T, Trial Chamber, 2 August 2001. For a suggestion that the Srebrenica genocide is linked to Operation Storm, see an interview with Phayam Akvan, one of Gotovina’s defence counsellors: BBC Hard Talk, ‘Interview with Phayam Akvan’, 26 September 2013 from 17:00, <https://www.youtube.com/watch?v=msJfpy3kkpY>.

¹⁶ R Craig Nation, *War in the Balkans, 1991–2002* (Strategic Studies Institute 2003) 189–91.

¹⁷ Huffman (n 10) 7; Corn and Corn (n 10) 346.

¹⁸ *Gotovina* Trial Judgment (n 9) [1711]. These numbers are surprisingly low considering the scale of Operation Storm.

¹⁹ *ibid* [1710]. Some have quoted much higher numbers: Corn and Corn (n 10) 347, for example, refer to 150,000 or more.

²⁰ Knin, the capital of the Republic of Serbian Krajina, located in the southern part of the Republic, was the town most heavily attacked during the first stages of the operation: see *Gotovina* Trial Judgment (n 9) [1909], [1916], [1928], [1939] establishing that no fewer than 900 shells were fired at Knin, 150 on Benkovac, 150 on Gračac and at least five on Obrovac.

²¹ ICTY Press Release, ‘Transfer of Ante Gotovina to the Tribunal’, CVO/MO/1034e, 10 December 2005, <http://www.icty.org/sid/8497>.

²² Ivan Čermak (Commander of the Knin Garrison) and Mladen Markač (Assistant Minister of the Interior and Commander of the Special Police of the Ministry of the Interior of Croatia during the relevant period). This article focuses on Gotovina because he was the person most responsible for targeting decisions during the operation.

²³ *Gotovina* Trial Judgment (n 9) [7].

²⁴ These crimes are the intentional directing of an attack against the civilian population, and indiscriminate attacks against the civilian population. The ICTY refers to them as ‘unlawful attacks on civilian objects’ constituting a serious violation of the laws and customs of war under art 3 of the ICTY Statute: Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704

issues discussed in the judgment. In order to prove that the elements of the crime of deportation had been fulfilled,²⁵ the prosecution argued that the shelling of civilian objects was the coercing factor that drove the Serb population out of Krajina. Thus, indiscriminate artillery fire²⁶ constituted the alleged *actus reus* of the crime against humanity of deportation. As stated earlier, Gotovina was accused of taking part in a JCE, the purpose of which was the deportation of the Serb population from Krajina. The prosecution's perception of the JCE resulted in the crime of deportation being presented as central to establishing the mode of liability upon which all of the crimes in the case were based. Since the artillery attacks were presented as the *actus reus* of the crime of deportation, and since the deportation was a key element of the alleged JCE, they became a crucial element in establishing the main mode of Gotovina's liability.²⁷

In examining the legality of the artillery attacks, the TC reviewed experts' reports, witness statements, transcripts of meetings in which Gotovina had participated, artillery logs and official orders given by Gotovina before and during Operation Storm. Based on all of these sources, the TC could not conclude beyond reasonable doubt that the artillery attacks were intended to target military or civilian objects.²⁸ While the TC regarded some evidence as indicating an intent to attack civilian targets, it also found evidence which indicated that there was no such intent.²⁹

(3 May 1993), adopted by the Security Council in Resolution 827 (25 May 1993); Fenrick (n 8) 126–27, 134; William J Fenrick, 'Attacking the Enemy Civilian as a Punishable Offense' (1996) 7 *Duke Journal of Comparative and International Law* 539, 561; Hector Olásolo, *Unlawful Attacks in Combat Situations* (Martinus Nijhoff 2008).

²⁵ According to the TC the crime of deportation is 'the forcible displacement of persons from the area in which they are lawfully present, without grounds permitted under international law': *Gotovina* Trial Judgment (n 9) [1738].

²⁶ ICTY, *Prosecutor v Ante Gotovina, Ivan Čerman and Mladen Markač*, Prosecution's Public Redacted Final Trial Brief, IT-06-90-T, Trial Chamber, 2 August 2010, [124], [483]. The crime of deportation is included in the ICTY Statute (n 24) art 5(d). During the appeal proceedings, the prosecution argued that it was artillery attacks in general that were the *actus reus* of deportation, whether indiscriminate or not: *Gotovina* Appeals Judgment (n 9) [111]. This was a deviation from previous positions adopted by the ICTY OTP, according to which only acts unlawful under IHL may be considered as elements of crimes against humanity: Fenrick (n 8) 134; William J Fenrick, 'The Prosecution of Unlawful Attack Cases before the ICTY' (2004) 7 *Yearbook of International Humanitarian Law* 157; Rogier Bartels, 'Discrepancies between International Humanitarian Law on the Battlefield and in the Courtroom: The Challenges of Applying International Humanitarian Law during International Criminal Trials' in Mariëlle Matthee, Brigit Toebes and Marcel Brus (eds), *Armed Conflict and International Law: In Search of the Human Face* (Asser Press 2013) 366.

²⁷ *Gotovina* Appeals Judgment (n 9) [81]–[82].

²⁸ *ibid* [83]. See also *Gotovina* Trial Judgment (n 9) [1894]–[98] reviewing other evidence and ending with: 'The Trial Chamber will further evaluate these reports in light of its findings on the locations of impacts in Knin'. Perhaps the main source of uncertainty and contention was Gotovina's order to his artillery forces at the beginning of Operation Storm to 'focus on providing artillery support to the main forces in the offensive operation through powerful strikes against the enemy's front line, command posts, communications centres, artillery firing positions and by putting the towns of ... Knin, Benkovac, Obrovac and Gračac under artillery fire': *Gotovina* Appeals Judgment (n 9) [70]. According to the Trial Chamber, this order could refer either to indiscriminate attacks against civilians, treating the towns as a whole as targets (*Gotovina* Trial Judgment (n 9) [1172], [1893]) or to attacks against pre-approved military targets within those Four Towns (*ibid* [1173], [1188], [1893]).

²⁹ *Gotovina* Trial Judgment (n 9) [1181]–[83]: 'At the meeting, Gotovina emphasized that the operation was aimed only at enemy soldiers ... He further stressed that there was a shortage of ammunition, so the artillery needed to be as precise as possible and could only target the military objectives that provided the highest military advantages'.

The TC then conducted an ‘impact analysis’, examining the exact place where the artillery shells landed in order to establish whether they were directed at civilian or at military targets.³⁰ Of more than 1,200 artillery shells found by the TC to have been fired at Knin, Benkovac, Obrovac and Gračac (the Four Towns),³¹ the prosecution was able to prove the impact location of only 154 (13 per cent).³² As is evident from the Trial Judgment, the TC was fully aware that it was missing a great deal of information both in terms of where the shells had landed, and of the number of shells that had hit each target.³³

At this stage, the only factor which the TC took into account in determining the intended target of a shell was the location of its actual impact. In making its determination, the TC construed an evidentiary standard according to which any shell landing within a 200-metre radius of a military objective was to be regarded as having been aimed at a military objective (the 200-metre standard).³⁴ Consequently, any shell landing more than 200 metres from a military objective was regarded by the TC as having been aimed at a civilian object, and was therefore unlawful. Certain aspects of this methodology are discussed further in Section 4.4.

After careful analysis, the TC found that a total of 74 shells³⁵ had landed more than 200 metres away from any military objective.³⁶ As a result of these findings, the TC concluded that forces under Gotovina’s command had carried out unlawful attacks during Operation Storm.³⁷ The TC then accepted the prosecution argument and determined that these unlawful attacks were the *actus reus* (the coercive element) of the crime against humanity of deportation.³⁸ In turn, this crime of deportation was found to constitute the common purpose of the JCE and the artillery attacks were the manner in which Gotovina had contributed to its execution.³⁹ Moreover,

³⁰ *ibid* [1898]. There is some disagreement as to whether the crime of intentionally directing attacks against civilian objects requires a certain result (harm to civilians). While art 85(3) of Additional Protocol I requires such a result (‘and causing death or serious injury to body or health’), the ICC Statute ((n 1) art 8(2)(b)(i)) does not. For more views, *Kordić Appeals Judgment* (n 7) [55]–[68]; Fenrick (n 8) 133; Dinstein (n 1) 125.

³¹ *Gotovina Trial Judgment* (n 9) [1909], [1916], [1928], [1939]; Huffman (n 10) 12. See, however, defence expert Corn’s claim that 1,057 shells were fired during the operation: Corn and Corn (n 10) 378.

³² Huffman (n 10) 12.

³³ *Gotovina Trial Judgment* (n 9) [1909].

³⁴ *ibid* [1898]: ‘Evaluating all of this evidence, the Trial Chamber considers it a reasonable interpretation of the evidence that those artillery projectiles which impacted within a distance of 200 metres of an identified artillery target were deliberately fired at that artillery target’.

³⁵ Of 154 shells the impact location of which was established at trial, and of over 1,200 shells fired at the Four Towns during the operation.

³⁶ Huffman (n 10) 12. Defence expert Corn claims that approximately 57 shells landed further than 200 metres from any military objective identified by the Court: Corn and Corn (n 10) 378.

³⁷ *Gotovina Trial Judgment* (n 9) [1911] for Knin; [1923] for Benkovac; [1935] for Gračac; [1943] for Obrovac.

³⁸ *ibid* [1745]–[46].

³⁹ *ibid* [2310]–[11]: ‘Based on the foregoing, the Trial Chamber finds that the crimes of deportation and forcible transfer were central to the joint criminal enterprise ... unlawful attacks against civilians and civilian objects, as the crime against humanity of persecution, were also intended and within the purpose of the joint criminal enterprise’. According to the TC, the elements of a JCE include: ‘(ii) *A common objective which amounts to or involves the commission of a crime provided for in the Statute.* The first form of the JCE exists where the common objective amounts to, or involves the commission of a crime provided for in the Statute. ... (iii) *Participation of the accused in the objective’s implementation.* ... the accused’s conduct may satisfy this element if it involved procuring or giving assistance to the execution of a crime forming part of the common objective’: *ibid* [1953].

the TC found that Gotovina's participation in and contribution to the JCE was the basis of his responsibility for other crimes that took place during and after Operation Storm. After reaching these conclusions, the TC went on to unanimously convict Gotovina of crimes against humanity and war crimes,⁴⁰ and sentenced him to 24 years' imprisonment.⁴¹

2.3. THE APPEALS JUDGMENT

The Appeals Chamber (AC) was fiercely divided over Gotovina's appeal. The majority judges – President Meron, and Judges Robinson and Güney – acquitted Gotovina on all counts, despite a very strong dissent by Judges Agius and Pocar. First, the AC decided unanimously that the 200-metre standard used by the TC was not based in law or on the evidence presented during trial. Thus, the judges agreed that the TC had erred in using the standard as part of its impact analysis.⁴² However, the judges disagreed over the significance of this error. The majority judges declined to analyse the artillery attacks without the 200-metre standard, or to set any other standard in its place. They pointed to the fact that the TC had not considered the evidence as a whole, absent the impact analysis, as proving beyond reasonable doubt that the artillery attacks were aimed at civilian objects.⁴³

The majority then noted that the unlawful attacks constituted the coercive element that was considered by the TC to be the *actus reus* of the crime of deportation. Since the majority judges could not find that any unlawful attack had been carried out, they acquitted Gotovina of the count of deportation. Furthermore, since the TC had found the deportation to be the underlying purpose and an element of the JCE – the mode of liability under which Gotovina had been convicted – the majority judges determined that following Gotovina's acquittal on the count of deportation, the existence of the JCE had not been proved.⁴⁴ Without this mode of liability, and after briefly ruling out alternative modes of liability,⁴⁵ the majority acquitted Gotovina of all counts.⁴⁶

The dissenting judges strongly rejected the reasoning of the majority. Although these judges agreed that the 200-metre standard was based neither on the law nor on the evidence, they could not accept the majority's dismissal of the entire conviction simply because this faulty evidentiary test had been rejected.⁴⁷ The dissenting judges concluded that the totality of evidence, even

⁴⁰ *ibid* [2619]–[20]. Gotovina was convicted of persecution, deportation, murder and inhumane acts as crimes against humanity, and plunder, wanton destruction, murder and cruel treatment as violations of the laws and customs of war. It should be noted that the war crimes address acts committed after Operation Storm and do not involve any targeting issues. Gotovina was acquitted of count three – inhumane acts (forcible transfer) as a crime against humanity.

⁴¹ *ibid*.

⁴² *Gotovina Appeals Judgment* (n 9) [61].

⁴³ *ibid* [77], [82].

⁴⁴ *ibid* [91]–[92], [96]–[97].

⁴⁵ *ibid* [105]–[10].

⁴⁶ *ibid* [158].

⁴⁷ *ibid*, Dissenting Opinion of Judge Carmel Agius, [45]–[46] (Agius Dissent); Dissenting Opinion of Judge Fausto Pocar, [15]–[18] (Pocar Dissent).

without the impact analysis, established beyond reasonable doubt that Gotovina had deliberately directed attacks against civilian objects.⁴⁸

3. GENERAL TARGETING ISSUES AND THE APPLICATION OF IHL IN A CRIMINAL CONTEXT

The *Gotovina* case has raised several questions with regard to the law of targeting, in addition to the 200-metre evidentiary standard described above. Before turning to several of the targeting issues that were discussed in *Gotovina*, primarily in the Trial Judgment,⁴⁹ an overview of the general principles and rules of IHL and the manner in which they are applied in a criminal context is in order.

IHL imposes restrictions on the types of person and object that a party to a conflict may lawfully attack, and also on the means and methods that may be used against those lawful targets.⁵⁰ These restrictions date back as far as the first IHL treaties, and may be traced back to the 1868 St Petersburg Declaration.⁵¹ The most fundamental targeting principles are distinction, precautions and proportionality.⁵²

The principle of distinction is enshrined in Articles 48 (basic rule), 51 (persons) and 52 (objects) of Additional Protocol I, and is considered to reflect customary international law.⁵³ Certain violations of this principle may amount to international crimes entailing individual

⁴⁸ *ibid* [39]; Agius Dissent, *ibid* [91]. It is important to note that the TC judges did not feel that they could convict Gotovina without the impact analysis.

⁴⁹ Although the Trial Judgment was overturned on appeal, it is still extremely valuable from a law of targeting perspective because of the aforementioned paucity of relevant jurisprudence on some of the issues. Moreover, the AC did not address all of the issues contained in the Trial Judgment; therefore, some of the Trial Judgment's findings remain unchanged even after the appeal.

⁵⁰ For a thorough overview see Dinstein (n 1) 33–263.

⁵¹ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St Petersburg, 1868, 138 CTS (St Petersburg Declaration).

⁵² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1966] ICJ Rep 226, [78]; Fenrick (n 24) 541.

⁵³ Dinstein (n 1) 89–90, 124; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol I: Rules* (International Committee of the Red Cross and Cambridge University Press 2005, revised 2009) (ICRC Study) rr 1, 7. It is important to remember that the ICRC Study, while a very impressive and important scholarly work, has been criticised both for its methodology and regarding specific rules within the Study; thus, one cannot simply assume that the ICRC Study is always an accurate reflection of customary law: William H Boothby, *The Law of Targeting* (Oxford University Press 2012) 40; John B Bellinger III and William J Haynes II, 'A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*' (2007) 89 *International Review of the Red Cross* 443; Yoram Dinstein, 'The ICRC Customary International Humanitarian Law Study' (2006) 82 *International Law Studies US Naval War College* 99; W Hays Parks, 'The ICRC Customary Law Study: A Preliminary Assessment' (2005) 99 *American Society of International Law Proceedings* 208; Tamás Hoffmann, Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007); Robert Cryer, 'Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study' (2006) 11 *Journal of Conflict & Security Law* 239. This article will refer to the ICRC Study only in connection with rules regarding which its determinations are beyond dispute.

criminal responsibility.⁵⁴ These articles address the parties' obligation to direct their attacks only at military objectives, combatants and persons taking direct part in hostilities;⁵⁵ parties to a conflict must never intentionally target civilians or civilian objects. The principle of distinction prohibits only the intentional targeting of civilian objects; it does not completely prohibit all damage to such objects as the result of an attack on military objectives. Thus, the principle does not impose strict liability on commanders; nor does it require perfect results.⁵⁶ It 'only' requires that commanders should never *direct* their attacks towards civilians and civilian objects. This fact makes the intent of the attacker relevant not only for the analysis of the attack under criminal law, but also in terms of its analysis under IHL.

The definition of 'military objectives' under IHL is found in Article 52 of Additional Protocol I,⁵⁷ which is considered to reflect customary law⁵⁸ even by states not party to it.⁵⁹ It contains a two-pronged test for determining whether an object is a military objective.⁶⁰ The first aspect of this test is whether – because of its nature, location, purpose or use – the object makes an effective contribution to the adversary's military action. The second aspect of the test is whether the total or partial destruction, capture or neutralisation of the object, in the circumstances ruling at the time, offers a definite military advantage to the attacker.⁶¹ The two tests are cumulative.⁶²

⁵⁴ For example, Additional Protocol I (n 1) art 85(3); ICC Statute (n 1) art 8(2)(b)(i), 8(2)(e)(i).

⁵⁵ This article will focus mainly on the targeting of objects. Regarding persons, there are several other categories of person who may be lawfully attacked: eg, militias or volunteer corps under some conditions, and *levée en masse*: Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135, art 4. For further elaboration regarding some of the questions connected with the targeting of persons see Neils Meltzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross 2009); Michael N Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 *Harvard National Security Journal* 5; Michael N Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42 *New York Journal of International Law and Politics* 697; Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 *New York Journal of International Law and Politics* 641.

⁵⁶ Michael N Schmitt, 'Targeting in Operational Law' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press 2011) para 16.027: 'it is the intent to attack civilians that is the *sine qua non* of the rule, not the fact that civilians are actually harmed'.

⁵⁷ Additional Protocol I (n 1) art 52(2): 'military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'.

⁵⁸ Fenrick (n 24) 542–43; Fenrick (n 8) 121; Boothby (n 53) 70–71.

⁵⁹ State of Israel, 'The Operation in Gaza 27 December 2008–18 January 2009: Factual and Legal Aspects', July 2009, para 101 (Israel Gaza Report). The United States (US) agrees that every object that fulfils the art 52 criteria is a military objective. However, it supports a broader definition and views additional objects which form part of the 'war-sustaining' effort as military objectives: see W Hays Parks, 'Air War and the Law of War' (1990) 32 *Air Force Law Review* 1, 135; Fenrick (n 8) 121; Dinstein (n 1) 95; Schmitt and Widmar (n 2) 394.

⁶⁰ Dinstein (n 1) 91.

⁶¹ Wuerzner (n 6) 916; Fenrick (n 24) 543; Fenrick (n 8) 121–22; Jason D Wright, "'Excessive' Ambiguity: Analysing and Refining the Proportionality Standard' (2012) 94 *International Review of the Red Cross* 819, 822.

⁶² However, it is often noted that fulfilling one of the tests is almost always an indication that the other test is fulfilled as well: Dinstein (n 1) 91; Schmitt and Widmar (n 2) 392.

A further set of obligations imposed on an attacker is found in Article 57 of Additional Protocol I,⁶³ which lists several precautions that should be taken. These precautions include, but are not limited to, giving warnings before an attack unless the circumstances do not permit, choice of the means and methods of attack, and the timing of an attack.

After identifying the target being attacked and after taking relevant and feasible precautions, the principle of proportionality comes into play. This principle is enshrined in Article 57(a)(iii) of Additional Protocol I, and is also considered to reflect customary international law.⁶⁴ It restricts, to a degree, a party's ability to attack military objectives: the attacker must weigh the anticipated military advantage against the expected harm to civilians, and must not go through with the attack if anticipated harm is excessive in relation to the military advantage. Under the ICC Statute, certain violations of this principle amount to war crimes entailing individual criminal responsibility.⁶⁵ Moreover, IHL obliges parties to 'take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, damage to civilians and civilian objects'.⁶⁶ It should be noted that this obligation is more demanding than merely verifying that an attack is proportional.

In accordance with these basic principles, every attack should be analysed first in light of the principle of distinction; then, and only if it was directed against a military objective, in light of the precautions taken by the attacker; and finally in accordance with the principle of proportionality.

IHL and ICL share certain features. They both apply during armed conflict, and it may be said that they are both intended to advance similar overarching goals, although they do so by different means. However, the two branches of law are not identical. IHL focuses on the state and is meant to guide and control its behaviour during armed conflict, *ex ante*. It is a regulative branch of law, intended to be applied in the battlefield by non-lawyers. ICL, on the other hand, applies *ex post*, and focuses on individuals and their criminal responsibility. It is intended to be applied by lawyers and judges in a courtroom. Because of these fundamental differences between the two branches of law, in conjunction with their parallel applicability in times of armed conflict, the interaction between them is complex.⁶⁷

IHL is the normative basis of certain aspects of ICL; war crimes are violations of these norms.⁶⁸ Thus, what is legal under IHL can never be a war crime under ICL.⁶⁹ The opposite

⁶³ Additional Protocol I (n 1) art 57. Generally speaking, the obligation to take precautions before an attack is considered to be part of customary international law: ICRC Study (n 53) r 15; Boothby (n 53) 72. However, certain disagreements exist over the exact scope and details of the specific precautions required; for the ICRC's position, see ICRC Study (n 53) rr 16–21 and Boothby's comments in Boothby (n 53) 72–75.

⁶⁴ ICRC Study (n 53) r 14.

⁶⁵ ICC Statute (n 1) art 8(2)(b)(iv). See, however, Bartels' argument that violations of the principle of proportionality are not considered to be a customary war crime, or at least were not considered to be so at the time of the Yugoslavian conflict: Rogier Bartels, 'Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials' (2013) 46 *Israel Law Review* 271, 282–83. It is also worth noting that the ICC Statute recognises this war crime only in the context of international armed conflict.

⁶⁶ Additional Protocol I (n 1) art 57(a)(ii).

⁶⁷ Bartels (n 26) 340–55.

⁶⁸ *ibid* 341.

⁶⁹ Fenrick (n 8) 134; Bartels (n 26) 366.

is not true: not all violations of IHL are considered war crimes.⁷⁰ Moreover, it appears that the ICTY OTP traditionally applies the same logic in relation to crimes against humanity committed during armed conflict. Since what is punishable under ICL is narrower than what is prohibited under IHL, it is important not to confuse the two; this would result in reducing the scope of protection afforded under IHL.

The opposite, confusing ICL with IHL, is also disturbing; it would unjustifiably narrow the scope of what is permitted under IHL in a way that does not really reflect IHL but rather other branches of law. In this case, IHL might become irrelevant and practically inapplicable during fighting, ultimately leading to a rejection of the law altogether. In turn, rejection of the law would create greater suffering for civilians and combatants alike.⁷¹ These risks require judges and practitioners to be explicit about the branch of law that they apply in any given determination or argument. This issue was of some relevance in the *Gotovina* proceedings.

Despite the fact that some aspects of ICL are based on IHL, IHL rules cannot be automatically applied in a criminal context. Because of the different logical basis of each branch of law,⁷² caution and prudence are required when applying IHL in a criminal context. Moreover, various rules of IHL may require some adjustment before they can be used properly in a criminal context.⁷³ Unfortunately, the lack of jurisprudence and scholarly work on this matter hinders a better understanding of the proper way in which to apply IHL in a criminal context.

A good illustration of the complex relationship between IHL and ICL, and the need to make certain adjustments in situations where they are mutually applicable, can be found in the *Galić* case in the ICTY. This case concerns, among other aspects, attacks on persons. In this case, the judges noted the IHL rule that clearly states '[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian'.⁷⁴ In accordance with this rule, the state is required to conclude positively that a person is not protected from attack. Despite that, the ICTY determined that in a criminal context the burden is reversed and 'the prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant'.⁷⁵ The *Gotovina* judgments triggered, or should have triggered, similar questions regarding the proper parallel application of IHL and ICL. The following section will examine the way in which the TC and AC dealt with several such questions.

⁷⁰ Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 272. As early as 1944, Lauterpacht criticised the notion that every violation of IHL should be considered a war crime: Hersch Lauterpacht, 'The Law of Nations and the Punishment of War Crimes' (1944) 21 *British Yearbook of International Law* 58, 77.

⁷¹ Bartels (n 26) 346.

⁷² *ibid* 345.

⁷³ For a more comprehensive analysis of this point see Bartels (n 26) 345–49.

⁷⁴ Additional Protocol I (n 1) art 50(1).

⁷⁵ *Galić* Trial Judgment (n 7) [55].

4. TARGETING ISSUES IN THE TWO *GOTOVINA* JUDGMENTS

4.1. DEFINITION OF ‘MILITARY OBJECTIVES’: FAILURE TO ARTICULATE CRITERIA FOR CLASSIFICATION

The indictment against Gotovina did not formally contain any count of unlawful attack against civilians; nevertheless, the TC addressed the legality of the artillery attacks conducted during the operation. The TC implicitly adopted the ICTY’s traditional approach – also evident in the way in which the prosecution argued the case⁷⁶ – that only unlawful attacks could constitute the *actus reus* of crimes against humanity, in this case deportation.⁷⁷

As part of analysing the legality of the attack, the TC treated a rather large variety of objects as military objectives. These include dual-use objects⁷⁸ (such as fuel stations,⁷⁹ post offices and railway stations);⁸⁰ objects that have been considered controversial in other contexts (such as police stations);⁸¹ and various locations that have been considered to be targets in and of themselves (such as open fields⁸² and intersections).⁸³

The TC’s willingness to regard these objects as military objectives is especially noteworthy considering that it ultimately held that Gotovina did intentionally attack civilian objects. However, the TC did not explicitly refer to the definition found in Article 52 of Additional Protocol I, or to any other definition of ‘military objectives’. Rather, it only briefly mentioned

⁷⁶ See Section 2.2.

⁷⁷ *Gotovina* Trial Judgment (n 9) [1755]; *Gotovina* Appeals Judgment (n 9) [114]. Traditionally, the ICTY would not accept that acts lawful under one branch of law could constitute international crimes under a different branch of law. Note that this is not a factual determination, stating that lawful artillery attacks cannot factually compel people to leave their homes, but rather a legal-policy determination that the law will not recognise the effects of lawful acts as constituting elements of a crime: Fenrick (n 8) 134; Bartels (n 26) 366. However, note the footnote in the Appeals Judgment stating that ‘[t]he Appeals Chamber notes that this analysis is limited to the specific factual findings of the Trial Chamber, and does not address the broader question of whether attacks on lawful military targets could ever constitute a basis for ascribing criminal liability’: *Gotovina* Appeals Judgement (n 9) fn 330.

⁷⁸ For a general overview of the concept of dual-use targets, see ICTY, ‘Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia’, 13 June 2000, paras 51, 72 (NATO Bombings Report); Marco Sassòli, ‘Legitimate Targets of Attacks under International Humanitarian Law’, Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, MA (US), 27–29 January 2003, 7, <http://hpcrresearch.org/sites/default/files/publications/Session1.pdf>.

⁷⁹ *Gotovina* Trial Judgment (n 9) [1182].

⁸⁰ *ibid* [1899].

⁸¹ *ibid*: ‘the Trial Chamber is satisfied that firing at the police station in Knin offered a definite military advantage’. See also *ibid* [1175], [1213], [1380], [1381], [1918], [1929], [1939]. The discussion in other contexts addressed the policemen themselves, as opposed to police stations: Goldstone Report (n 5) paras 393–438; Israel Gaza Report (n 59) 238–48.

⁸² *Gotovina* Trial Judgment (n 9) [1902]: ‘the HV may have determined in good faith that firing at this field would have offered a definite military advantage’.

⁸³ *ibid* [1931]: ‘Kronings and Corn testified that while firing artillery projectiles at an intersection would not destroy it so as to render it unusable, it could damage it and, at least temporarily, deny the opposing military forces use of the area. ... Disrupting or denying the SVK’s ability to make use of these intersections and move through Gračac could offer a definite military advantage. Under these circumstances ... the Croatian forces may have determined in good faith that firing at these intersections would have offered a definite military advantage’.

that certain objects are considered to be military objectives or that they provide a ‘definite military advantage’,⁸⁴ without providing any real analysis. The TC’s failure to explain the reasoning behind its conclusions is regrettable for several reasons. To begin with, most of the scholarly discussion on the principle of distinction thus far has focused largely on persons; the exact scope of the concept of military objectives requires further development and refinement even in IHL, and far more so in a criminal context.⁸⁵ Even if one were to concede that the definition of ‘military objectives’ is almost undisputed, its application to specific circumstances tends to be highly complex. This disagreement on the application of the law may result, at least partly, from the scarcity of judicial rulings that have actually applied the law to a specific set of facts. While there are ICTY judgments that address similar questions,⁸⁶ none of them dealt with intense combat situations similar to that in *Gotovina*.

Another area in which questions were left unanswered by the TC is in respect of the burden of proof. It is uncertain which party, in a criminal trial, must prove that the conditions for lawful attack under Article 52 of Additional Protocol I have been fulfilled. For example, it is unclear whether the prosecution is required to prove beyond reasonable doubt that an object could not possibly be used, in the future, in a manner that would make an effective contribution to military action.⁸⁷ As mentioned above, the ICTY’s jurisprudence had already addressed this question in the context of targeting persons, but no such determination had been made in relation to targeting objects. While it is reasonable to assume that the same logic – that is, which led the AC in *Galić* to place on the prosecution the burden of proving beyond reasonable doubt that a person was a civilian – should apply also to objects, the TC should have explicitly stated this. Moreover, the TC should have been explicit as to the branch of law it applied: were its determinations based on its interpretation of IHL or of ICL?

4.2. THE ATTACK ON MARTIĆ’S RESIDENCE – PRIVATE HOMES AS MILITARY OBJECTIVES AND ATTACKING IN SITUATIONS WHERE INSUFFICIENT INFORMATION IS AVAILABLE

The TC treated one attack, involving Milan Martić, differently from all of the other attacks and targets mentioned in its judgment. As is explained below, the TC’s analysis of this attack encompassed issues of both distinction and proportionality.⁸⁸ This section deals with the classification of military targets in the context of this attack, and with issues relating to launching an attack in cases where insufficient information is available.

⁸⁴ eg, *ibid* [1899], [1939].

⁸⁵ Françoise Hampson, ‘The Mystery of Tests and Triggers: Does It All Boil Down to the Standard of Proof?’, speech given at the 8th Annual Minerva/ICRC International Conference on International Humanitarian Law, 24 November 2013, https://www.youtube.com/watch?v=nCIWEfGb_CI#t=1045.

⁸⁶ See, eg, *Strugar* Trial Judgment (n 7).

⁸⁷ In some parts of the *Gotovina* Trial Judgment, it appears that the TC lays the burden of proving whether an object is a military object on the prosecution. However, it does so only implicitly and inconsistently, and without any discussion: see, eg, *Gotovina* Trial Judgment (n 9) [1931].

⁸⁸ *Gotovina* Trial Judgment (n 9) [1910].

Martić was Commander-in-Chief of the Serb forces and President of the Republic of Serbian Krajina. According to the TC, early on the morning of 4 August 1995 (the first day of Operation Storm), Croatian forces fired 12 shells at Martić's apartment. Later that day, they fired an unknown number of shells at a different location, referred to as 'area marked R'.⁸⁹ As in the case of other targets, the TC began by analysing whether the target attacked was a military objective. It noted Martić's high rank in the Serb forces and found that the purpose of the attack was not to kill him, but rather to harass him and to disrupt his ability to command and control Serbian forces.⁹⁰ The TC went on to determine that 'firing at [Martić's] residence could disrupt his ability to move, communicate, and command and so offered a definite military advantage, such that *his residence constituted a military target*'.⁹¹

While the TC concluded that the attack was directed at a military objective, it is not clear from the judgment whether the target was Martić himself or his residence. The statement above explicitly and clearly refers to Martić's residence as the military objective.⁹² Moreover, when the TC reviewed artillery logs and target lists prepared by the Croatian forces, it noted that they listed as a military target, among others, 'Martić's residence'.⁹³ However, other parts of the judgment imply that the target of the attack was Martić himself, and not his residence.⁹⁴ This confusion was not resolved in the Appeals Judgment. The majority judges did not address this question; they merely commented on the TC's proportionality analysis. The dissenting judges similarly did not present any coherent position on this issue. For example, one of the dissenting judges stated that Martić was the object of attack but that his location was not known to the Croatians. He referred to the attack as 'firing at two locations where the HV believed Martić could be found'.⁹⁵ However, the same judge later seemed to regard Martić's residence as the military objective when he stated that '[a]t no time did the Trial Chamber doubt the legitimacy of targeting Martić's residence'.⁹⁶

In light of the ambiguity in the TC's analysis,⁹⁷ the following section discusses questions that arise from each possibility: the classification of Martić's residence as the military objective attacked, and the classification of Martić himself as the object of attack.

⁸⁹ *ibid.* It is not clear from the Trial Judgment exactly what this second location is, but it is analysed as part of the attack on Martić's residence.

⁹⁰ *ibid.*; Corn and Corn (n 10) 379.

⁹¹ *Gotovina* Trial Judgment (n 9) [1899] (emphasis added).

⁹² *ibid.*

⁹³ *ibid.* [1193]. This reference to Martić's residence is also echoed in an article by defence expert Corn: Corn and Corn (n 10) 377–78.

⁹⁴ *Gotovina* Trial Judgment (n 9) [1907]. At least some evidence presented at the trial indicates that Martić was indeed in his apartment when it was attacked; in fact, Martić himself said so in an interview given after the war. Interestingly, Martić claimed in that interview that two projectiles passed near his apartment, and that he survived the attack only by chance: *ibid.* [1315].

⁹⁵ Agius Dissent (n 47) [36]. The Trial Judgment contains a similar reference: *ibid.* [1910].

⁹⁶ Agius Dissent (n 47) [44].

⁹⁷ This ambiguity is reflected even in the writings of knowledgeable scholars like Bartels, who refers in the same paragraph to both Martić and his residence as the military targets. Bartels even explains in a footnote that Martić's residence meets the criteria listed in art 52: Bartels (n 65) 290 (including fn 104).

4.2.1. MARTIĆ'S RESIDENCE AS A MILITARY OBJECTIVE

If the military objective attacked was Martić's residence, then the Trial Judgment failed to properly substantiate this conclusion. The TC did not explain how the residence satisfied the first prong of the test found in Article 52 of Additional Protocol I. Did the apartment, by its nature, make an effective contribution to military action by the Serb forces? Or was it used, or was it intended to be used in the future, to make an effective contribution? As for the second prong of the test, during its brief discussion of the attack the TC explicitly referred to the definite military advantage that the Croats sought to achieve: to harass Martić and to disrupt his ability to command and control. However, the TC does not explain how the residence's destruction, neutralisation or capture promoted this military advantage.⁹⁸ To this end, the judgment should have provided more information regarding Martić's residence. Was the residence actually used by Martić to command the Serbian forces? If not, was it prepared and equipped for such use in the future? For example, did it contain communications equipment that would potentially enable Martić to exert command and control from his apartment? As it stands, this part of the judgment is not factually substantiated.

Attacking the personal residences of high-profile military or political leaders is not a new or unique phenomenon. The most well-known attacks of this kind include the NATO bombardment of Slobodan Milošević's house,⁹⁹ the attack by NATO on Muammar Al Qaddafi's presidential palace,¹⁰⁰ and an attack on the residence of Ivory Coast president, Laurent Gbagbo.¹⁰¹ Indeed, some of these attacks, such as that on Milošević's house, have been justified in light of the use or potential use of the residence as a command and control centre. However, it is not entirely clear exactly which features of Milošević's residence led to this conclusion or what was the reasoning behind the other attacks mentioned.¹⁰²

⁹⁸ *Gotovina* Trial Judgment (n 9) [1174]–[1175]: 'Although the presence of the RSK commander in chief could make his residence a military target, the likelihood of killing the commander by artillery was very low ... Nonetheless, assuming that the commander was in Knin, the HV artillery attack will have excluded most of his movements, having a suppressing effect'.

⁹⁹ 'Nato Hits Milosevic's House', *BBC News*, 22 April 1999, <http://news.bbc.co.uk/2/hi/europe/325596.stm>; 'Milosevic Home a Legitimate Target, British Say' *CNN*, 22 April 1999, <http://edition.cnn.com/WORLD/europe/9904/22/kosovo.02>.

¹⁰⁰ 'Libya: NATO Planes Target Gaddafi's Tripoli Compound', *BBC News*, 25 May 2011, <http://www.bbc.co.uk/news/world-africa-13538436>; Harriet Sherwood, 'Gaddafi Compound Hit in NATO Attack', *The Guardian*, 25 April 2011, <http://www.theguardian.com/world/2011/apr/25/gaddafi-compound-hit-nato-attack>.

¹⁰¹ Scott Stearns, 'Ouattara Forces Attack Gbagbo Home in Ivory Coast', *Voice of America*, 5 April 2011, <http://www.voanews.com/content/ouattara-forces-attack-gbagbo-home-in-ivory-coast-119313329/137560.html>; 'Ivory Coast: Ouattara Forces Storm Gbagbo Residence', *BCC News*, 6 April 2011, <http://www.bbc.co.uk/news/world-europe-12985638>.

¹⁰² An attack in such circumstances raises a number of legal questions that will not be discussed further in this article. For example, does the military advantage sought require that Martić actually be in his apartment during the attack? Does the mere fact of an attack on the apartment suffice to harass Martić even if he is not present at the time of the attack? Moreover, this practice of attacking the residence of the most senior leaders of the opposing belligerent raises the question of whether the same legal justification would apply also to lower-ranked commanders.

If the TC did classify Martić's residence as a military target, it should have explained exactly the basis on which this branch of law was adopted. Such an explanation could have shed light on some aspects of the law, especially on the interpretation of some of the components of the definition of 'military objectives'. Moreover, an explanation could have clarified whether the TC made its determination based on IHL and established that this was indeed a military target, or whether the conclusion was based on ICL and was the result of the prosecution's failure to prove the opposite beyond reasonable doubt.

4.2.2. TARGETING MARTIĆ – ATTACKS IN SITUATIONS WHERE INSUFFICIENT INFORMATION IS AVAILABLE

If the target was in fact Martić, rather than his apartment, there is no dispute that he was a lawful target because of his role in the Serb armed forces. However, it is significant that his location was not known to the attacking forces either when his apartment was shelled or when, later the same day, the 'area marked R' was attacked.¹⁰³ Consequently, the question arises as to the level of certainty required before ordering an attack.¹⁰⁴ In an age in which targeted killings are increasingly common, allowing attacks on specific people without clarifying the level of information and certainty required could have severe ramifications.

IHL treaty law contains several articles dealing with situations of doubt during attack.¹⁰⁵ While they are not directly relevant to the question at hand – what to do in cases of lack of certainty regarding the location of a target – they serve as an indication that under IHL the attacker is expected to have a high level of certainty before attacking a target.

The Trial Judgment does not establish, as a factual matter, to what extent the attacking forces knew of Martić's whereabouts at the time of the attack. This silence is especially troubling considering that the TC explicitly found that the Croats were unable to produce real-time intelligence on military targets within the Four Towns.¹⁰⁶ It is possible that before the first attack, which took place very early in the morning at the beginning of the operation, the attackers could reasonably have assumed that Martić would be in his residence.¹⁰⁷ However, it is unclear from the Trial Judgment how, why, and on the basis of what information the 'area marked R' was chosen as a target.¹⁰⁸

Moreover, as in other parts of its judgment, the TC failed to clarify upon which branch of law its analysis was based. This has great significance for the issue of the burden of proof: was the attacking force required to show that it had fulfilled the requirements of IHL, and to prove that Martić's location was known, or, as accepted in a criminal context, was the prosecution required

¹⁰³ See Section 4.2.

¹⁰⁴ Schmitt and Widmar (n 2) 401: 'The level of legal (as distinct from operational or policy) certainty necessary for target identification is unsettled'.

¹⁰⁵ Additional Protocol I (n 1) arts 50, 52(3), 57.

¹⁰⁶ *Gotovina* Trial Judgment (n 9) [1907]–[08], [1921], [1933], [1941].

¹⁰⁷ *Corn and Corn* (n 10) 379: 'Ultimately the Trial Chamber accepted the defence position that the apartment qualified as a lawful object of attack because General Gotovina expected Martić to be located there'.

¹⁰⁸ *Gotovina* Trial Judgment (n 9) [1907].

to prove the opposite beyond reasonable doubt? It appears that here, as in other contexts, there is tension between IHL, which places the burden on the attacker, and ICL, which places the burden on the prosecution. Thus, it is extremely important for the judges to be explicit and clear about what they did and why they did it. If they decided this issue based on considerations of ICL, they should have said so explicitly in order to avoid their determination affecting in any way the obligations imposed by IHL.¹⁰⁹

To conclude the discussion of the attack involving Martić, each of the possible interpretations as to what the TC regarded as the military target, and even a combination of both options, poses serious legal questions that should have been answered or at least addressed by the TC. These questions include (i) the categorisation, in certain circumstances, of private residences of senior commanders as military objectives; and (ii) situations of doubt regarding the exact location of the target. These issues are extremely relevant and important to modern-day combat operations, and both military and civilians could have benefited from a more methodological, consistent and rigorous analysis. Such analysis might have resulted in greater clarity and legal predictability in this field for the sake of guiding future behaviour. Perhaps more importantly, the TC should have clarified the way in which IHL is to be used when analysing individual criminal responsibility. Since the AC also failed to address any of these questions, both Chambers missed an opportunity to clarify the law.

4.3. THE NON-EXISTENT PROPORTIONALITY ANALYSIS

This section briefly presents the decisions of both Chambers regarding the proportionality of the attack on Martić's residence. It then focuses on the proportionality analysis that should have taken place, but which was not in fact conducted by either Chamber. As mentioned earlier, the TC only analysed the proportionality of the attack on Martić's residence and concluded that this attack was disproportionate.¹¹⁰ According to the TC, the attack created a risk to civilians that was excessive in relation to the anticipated military advantage.¹¹¹ The majority of the AC criticised the TC's finding, stating that it 'was not based on a concrete assessment of comparative military advantage, and did not make any findings on resulting damages or casualties'.¹¹² Based on this alone, it is not clear whether the AC majority judges actually overturned the TC's decision on this point.¹¹³

Various commentators have thoroughly discussed the proportionality analysis of the Martić attack conducted by the TC;¹¹⁴ it is not necessary, therefore, for this article to further address that issue. Rather, it will discuss the proportionality analysis that was *not* conducted by the Chambers.

¹⁰⁹ Bartels (n 26) 365.

¹¹⁰ *Gotovina* Trial Judgment (n 9) [1910] fn 935.

¹¹¹ *ibid* [1910].

¹¹² *Gotovina* Appeals Judgment (n 9) [82].

¹¹³ Note the relevant part of the AC analysis on this point: 'Especially when considered in the context of the Trial Chamber's errors with respect to the Impact Analysis, this finding of a disproportionate attack was thus of limited value in demonstrating a broader indiscriminate attack on civilians in Knin': *ibid*; see also Bartels (n 65) 291.

¹¹⁴ *Amicus Curiae* Brief (n 12) [24]–[27]; Bartels (n 65).

The analysis of whether an attack was lawful under IHL must include, *inter alia*, the consideration of two cumulative requirements: (i) it must be directed against military objectives, and (ii) the expected damage to civilians must not be excessive in relation to the concrete and direct military advantage anticipated from the attack.¹¹⁵ While the TC discussed the principle of distinction – and meticulously examined whether the attacks were aimed at military objectives (albeit with all the shortcomings described in this article) – it never even mentioned the issue of proportionality regarding the vast majority of the attacks other than the attack on Martić’s residence.¹¹⁶ The TC stated explicitly that it would not pronounce on the proportionality of the attacks on targets other than that specific incident.¹¹⁷ The AC, similarly, did not examine the proportionality of any other incident or target. From an IHL perspective, this led to perhaps the greatest legal mistake made by the both Chambers – the complete lack of proportionality analysis of the attack on the Four Towns.

As the TC found that some attacks were directed against civilian objects, no proportionality analysis was required in order to decide upon their illegality. However, it also regarded a considerable number of the attacks to have been directed at military objectives. As mentioned above, this determination does not suffice to conclude that these attacks are legal.¹¹⁸ Since Gotovina was not formally charged with unlawful attacks, the TC perhaps believed that its finding that civilian targets were intentionally attacked in some instances was sufficient to establish the *actus reus* necessary to establish the charge of deportation. From a criminal law point of view, this may excuse the TC’s avoidance of a proportionality analysis. The AC’s avoidance cannot be justified in this manner, as it found that no attack had been proved to be directed at civilian objects. Its lack of proportionality analysis is especially striking since it went on to acquit Gotovina without examining the mandatory factor of the proportionality of the attacks.

The AC’s reluctance to decide the case based on proportionality may, nonetheless, be understandable.¹¹⁹ First, as is often mentioned, there has never been any conviction, international or domestic, for the crime of disproportionate attack.¹²⁰ Furthermore, the questionable customary

¹¹⁵ Additional Protocol I (n 1) art 57; Dinstein (n 1) 130.

¹¹⁶ In the oral hearing during the appeal, the prosecution argued that the entire artillery campaign was disproportionate. Since this claim did not appear in the written submission, it was not discussed by the AC: *Gotovina* Appeals Judgment (n 9) [20].

¹¹⁷ *Gotovina* Trial Judgment (n 9) [1910] fn 935: ‘The Trial Chamber has considered the targeting of the two locations where the HV believed Martić to have been present as an indicative example of a disproportionate attack during the shelling of Knin. The Trial Chamber does not pronounce on the proportionality of the HV’s use of artillery against other targets in Knin on 4 and 5 August 1995’. Bartels considers this decision by the TC to be ‘curious’: Rogier Bartels, ‘Prlić et al.: The Destruction of the Old Bridge of Mostar and Proportionality’, *EJIL:Talk!*, 31 July 2013, <http://www.ejiltalk.org/prlic-et-al-the-destruction-of-the-old-bridge-of-mostar-and-proportionality>.

¹¹⁸ Korea Report (n 8).

¹¹⁹ For an acknowledgement of the difficulties involved in conducting a criminal trial on proportionality see *ibid* 21–24.

¹²⁰ Fenrick (n 8) 125; Olásolo (n 24) 159; Bartels (n 65) 271–72. Jens David Ohlin, ‘Why the Gotovina Appeal Matters’, *EJIL:Talk!*, 21 December 2012, <http://www.ejiltalk.org/why-the-gotovina-appeals-judgment-matters>. After the *Gotovina* judgment, the *Prlić* judgment concluded that some attacks were disproportionate and therefore illegal. Similar to the *Gotovina* judgments, the proportionality analysis was not made in the context of a specific and explicit count of disproportionate attack but rather as part of the discussion of other counts. In *Prlić*, it was a

status of the crime of disproportionate attack, at least at the time of the Yugoslavian conflict, contributes to the difficulties of relying on lack of proportionality to substantiate a conviction.¹²¹

Both Chambers would have had to decide difficult legal questions if they had discussed proportionality. Were they required to analyse every single military target attacked separately – as the TC did concerning the dozen shells directed at Martić’s residence – or should they have treated the entire use of artillery in the context of Operation Storm (over 1,200 shells in total) as an overall attack, the proportionality of which required assessment?¹²² Should the focus have been somewhere in between, perhaps analysing each of the Four Towns separately?¹²³ How should have the military advantage sought been described? May an attacker legally take into account the fact that the civilians have fled the conflict zone when analysing anticipated civilian damage? Would the answer be any different if, rather than civilians fleeing voluntarily, the attacker had deported them?

In addition to these questions, the Chambers would have been faced with the question of the weight, under the proportionality test, that is to be ascribed to the actual damage to civilians and civilian objects during an attack.¹²⁴ The AC majority judges criticised the TC for failing to address this factor as part of its proportionality analysis.¹²⁵ As mentioned earlier, Operation Storm – especially when taking into account its wide scope – caused relatively few civilian casualties and little damage to civilian objects.¹²⁶ Yet, if the anticipated military advantage is extremely low – which cannot be said to be the case with Operation Storm – even very little civilian damage may be excessive in comparison. Conversely, it is possible that the attacker launched the attack anticipating much greater damage than that which actually occurred, in a way that could potentially make the decision to launch the attack illegal even though the actual damage was relatively minor. Finally, it is important to remember that the law refers to anticipated damage, and not the damage that was actually caused. The actual damage may perhaps serve as an indication of what was anticipated, but it has no legal meaning in and of itself.¹²⁷

Perhaps the relatively small amount of actual damage makes *Gotovina* a bad case for a groundbreaking judgment on issues of proportionality.¹²⁸ This is especially true considering

war crime of ‘extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly’: *Prlić* (n 7) [1583], [1587]. At the time of writing, the *Prlić* case is pending appeal.

¹²¹ Bartels (n 65) 282–83. It is interesting to note in this regard that during negotiations for the ICC Statute (n 1), states could only agree to establish a crime of disproportionate attack in international armed conflict. The absence of a crime of disproportionate attack in non-international armed conflict has already had practical implications: it led the ICC Prosecutor to close part of a preliminary examination into attacks carried out by international forces in Afghanistan: OTP 2013 Report (n 8) 47.

¹²² Fenrick (n 26) 176; NATO Bombings Report (n 78) paras 52, 78.

¹²³ Fenrick (n 24) 547–48.

¹²⁴ Fenrick (n 8) 124: ‘the actual results of the attack may assist in inferring the intent of the attacker, but what counts is what was in the mind of the decision maker when the attack was launched’.

¹²⁵ *Gotovina* Appeals Judgment (n 9) [82].

¹²⁶ *Gotovina* Trial Judgment (n 9) [1366].

¹²⁷ Dinstein (n 1) 132.

¹²⁸ Fenrick (n 8) 131. Fenrick is making a similar argument concerning an intentional attack on civilian objects that caused no actual damage. As a purely practical matter, however, it is unlikely that this violation would ever be prosecuted.

the uncertain customary status of the criminal prohibition on disproportionate attacks, the precedential nature of any potential determination that a crime of disproportionate attack was committed, and the difficulty of conducting a criminal trial on issues of proportionality. Thus, it is conceivable that both Chambers completely avoided the issue for policy reasons. They did not want to state explicitly that firing 1,200 shells into urban areas, even if those shells are directed at military targets, is proportionate. On the other hand, they felt unable to determine that Gotovina had conducted unlawful attacks solely on the basis of a proportionality analysis.

The law of targeting could have benefited from more clarity regarding such important and complex legal questions, and the Chambers' failure to address them, while somewhat understandable, is legally incorrect. More importantly, the Chambers failed to state explicitly which branch of law formed the basis of their decisions. Even after reading both judgments, it is not clear whether Gotovina violated the principles of proportionality under IHL but was nonetheless acquitted based on considerations of ICL, or whether his actions were not even a violation of IHL. Thus, both judgments have failed to guide future actions of military commanders and have created ambiguity that may potentially endanger civilians in future conflicts.

4.4. HOW TO ESTABLISH THE INTENT BEHIND AN ATTACK?

4.4.1. THE IMPACT ANALYSIS

Though the issues discussed above raise very interesting and important questions relating to the law of targeting, they attracted very little, if any, attention during the appeal. The main area of contention was the impact analysis conducted by the TC. As described earlier, after reviewing the evidence the TC could not establish Gotovina's intent beyond reasonable doubt. At that point, it chose to analyse the locations of the impact of the shells in order to assess the intended targets of those shells. It did so using the 200-metre standard, regarding every shell that landed less than 200 metres from a military objective as having been directed at that target, and every shell landing more than 200 metres from a recognised military objective as having been directed at civilian objects.

During the appeal, the AC discussed the specific 200-metre standard established by the TC. As mentioned above, all five judges agreed that the standard was not based on either evidence presented at the trial or on the law, and that it should therefore be rejected.¹²⁹ The majority judges declined to set a different standard and to re-analyse the evidence accordingly, a position heavily criticised by the minority judges¹³⁰ and by various commentators.¹³¹ One reason given for the majority's determination was that a single standard is not sensitive enough to operational reality,

¹²⁹ *Gotovina Appeals Judgment* (n 9) [61].

¹³⁰ *Agius Dissent* (n 47) [11]; *Pocar Dissent* (n 47) [10]–[11].

¹³¹ Marko Milanovic, 'The Gotovina Omnishambles', *EJIL:Talk!*, 18 November 2012, <http://www.ejiltalk.org/the-gotovina-omnishambles>; Ohlin (n 120).

and that it fails to take into consideration factors that were deemed by the TC itself as affecting the accuracy of the weapons used.¹³²

The AC majority judges were obviously correct on this point. As convincingly argued by prominent IHL scholars in their *amicus curiae* brief submitted during the appeal,¹³³ in establishing the *mens rea* for acts committed during intense fighting, any court should take into account the specific operational considerations and the technical aspects associated with the weapons used by the attacker.¹³⁴ This is all the more true when attempting to establish the intent of an attacker by looking only at the results of an attack.

However, it remains doubtful whether any single standard, even one sensitive to operational considerations, could be used to establish beyond reasonable doubt the intent of the person physically carrying out an actual attack, let alone the intent of the person ordering or commanding the attack.¹³⁵ Artillery experts have submitted that ‘outliers’ (shells that, for some reason, fall very far from their intended and probable area of impact) are technically inevitable.¹³⁶ These outliers may be the result of technical problems in the shell itself or in other components of the firing process (such as the explosives used for firing);¹³⁷ or they may be the result of human error made by someone involved in the long, complex process of planning and conducting the attack.¹³⁸ Since none of these factors reflect the intent of the attacker, it is doubtful whether any single standard, as sensitive to operational concerns as it may be, could properly reflect the *mens rea* of the attacker.¹³⁹

If one nevertheless chooses to use this sort of standard to analyse an attack, despite its inherent incapability of establishing an attacker’s intent at the time of the attack, such use raises another set of problems and difficulties. What is the exact percentage of missed shells that justifies a conclusion beyond reasonable doubt regarding the attacker’s *mens rea*? Intuitively, if one

¹³² These include such factors as the distance of the attacking forces from the targets, the weather at the time of the attack, and so on. See the TC’s contention that it is missing relevant factors: *Gotovina* Trial Judgment (n 9) [1898]. In this regard see also *Amicus Curiae* Brief (n 12) [22] and annexed Statements of Artillery Experts.

¹³³ This brief was rejected by the AC on technical grounds because one of the *amici* was a defence expert during trial: ICTY, *Prosecutor v Ante Gotovina and Mladen Markač*, Application and Decision on Application and Proposed *Amicus Curiae* Brief, IT-06-90-A, Appeals Chamber, 14 February 2012 [12].

¹³⁴ *Amicus Curiae* Brief (n 12) [16A].

¹³⁵ Under international law, a court usually attempts to learn about A’s intent by looking at the consequences of the acts of B and C, who are somehow related to A (eg A’s subordinates). This is radically different from most proceedings in domestic courts. Thus, while domestic courts are willing to determine intent behind an act solely on the basis of the results of that act (such as when it is the natural and predictable consequence of an action), it is highly doubtful that this domestic logic is applicable in international proceedings on the law of targeting.

¹³⁶ Fenrick (n 24) 565: ‘Every weapon has a Circular Error Probable (or CEP). When a weapon system is targeted on a specific objective, 50 percent of the projectiles launched will land inside the CEP. Obviously, 50 per cent will also land outside the CEP’. See also *Amicus Curiae* Brief (n 12) annexed Statements of Artillery Experts; Michael N Schmitt, ‘Precision Attack and International Humanitarian Law’ (2005) 87 *International Review of the Red Cross* 445, 446; Huffman (n 10) 41.

¹³⁷ *Amicus Curiae* Brief (n 12) annexed Statements of Artillery Experts.

¹³⁸ See Section 4.4.2.

¹³⁹ Wuerzner (n 6) 925. Note that Wuerzner stipulates that in the case of precision weapons, such as snipers, it may be reasonable to deduce the intent from the result; the same is not necessarily true for other weapons. See also Fenrick (n 24) 565.

shell out of a thousand were to fall outside the determined standard, it would surely not be convincing beyond reasonable doubt that the attack as a whole was directed at civilian objects. However, if 999 out of the thousand shells fired were to fall outside the properly determined standard, it would be easy to conclude that the attack was directed at civilian objects. It appears that the percentage of shells impacting outside the determined standard is a relevant factor in establishing the intent behind an attack.¹⁴⁰

The Trial and Appeals Chambers did not specifically address this question. In some instances, the TC hinted that the large number of shells falling outside the determined standard was a factor in its conclusion regarding the unlawfulness of the attacks.¹⁴¹ For its part, the *amicus curiae* brief submitted by IHL scholars¹⁴² stressed the relatively *low* percentage of shells (4 per cent)¹⁴³ that landed outside the impact zone as a key factor in establishing the legality of the attacks. How is it possible to settle the difference between the TC's reference to 'too many' shells¹⁴⁴ and the experts' reliance on the low percentage of shells falling outside the impact standard?

One way is to understand the TC as suggesting that 4 per cent of the shells falling outside the determined standard is high enough to justify an affirmative conclusion regarding the attacker's *mens rea*. Intuitively, this seems unreasonable. There is, perhaps, a better way to understand the difference between the TC and the experts. The Trial Judgment could be understood as relying on the number of shells landing outside the determined standard: not compared with the total number of the shells fired, but calculated *out of the total number of shells, the impact location of which had been established*.¹⁴⁵ As mentioned earlier, the TC could only establish the impact location of a relatively small percentage of shells.¹⁴⁶ Of those 154 shells, 74 (almost half) fell outside the impact zone.¹⁴⁷ This reasoning seems to be the most compelling means of explaining the TC's view that too many shells landed very far from military objectives.¹⁴⁸

However, this approach merits criticism, because it contradicts one of the most basic tenets of ICL: the presumption of innocence.¹⁴⁹ According to this presumption, the burden of proof lies with the prosecution to prove its case beyond reasonable doubt.¹⁵⁰ The TC was not entitled to

¹⁴⁰ For a similar approach, Fenrick (n 8) 135–36. See also Korea Report (n 8) 67–70.

¹⁴¹ *Gotovina* Trial Judgment (n 9) [1906].

¹⁴² *Amicus Curiae* Brief (n 12) [18]–[19].

¹⁴³ The *amici* explicitly state the figure of 4 per cent, though how they arrived at this figure is unclear: *ibid* [19]. According to the author's calculations, the TC found that 74 shells out of more than 1,200 shells fell outside the 200-metre standard – that is, 6 per cent. For consistency, the article will continue to use the figure of 4 per cent, since that is the figure mentioned in the *Amicus Curiae* Brief, *ibid*.

¹⁴⁴ *Gotovina* Trial Judgment (n 9) [1906].

¹⁴⁵ *ibid* [1922]: 'The Trial Chamber recalls that it was able to conclusively determine the precise locations of impact of only some of these 150 projectiles. Of the locations of impact which the Trial Chamber was able to establish, a considerable portion are civilian objects or areas. Further, while the Trial Chamber was not able to establish exactly how many projectiles impacted on these civilian objects or areas, the Trial Chamber considers that even a small number of artillery projectiles can have great effects on nearby civilians'. See also the almost identical statements at *ibid* [1934], [1942].

¹⁴⁶ In that context, see the words of caution voiced by Wuerzner (n 6) 923–24.

¹⁴⁷ Huffman (n 10) 12.

¹⁴⁸ *Gotovina* Trial Judgment (n 9) [1906].

¹⁴⁹ ICTY Statute (n 24) art 21(3).

¹⁵⁰ Huffman (n 10) 12.

disregard the shells in the many instances where their impact location was not established, and instead to rely only on the impact locations that the prosecution was able to prove.¹⁵¹ The impact location of more than 1,000 shells was not unknown; it was simply not proved by the prosecution.¹⁵² In considering only the shells in respect of which the impact location had been established, the TC infringed Gotovina's presumption of innocence.

The degree of deviation required in order to reach any conclusion regarding the intent of an attacker should also be influenced by the shortcomings inherent in any *ex post* impact analysis. Such an analysis is usually conducted months or years after the occurrence of the attacks, thus hindering the collection of 'real time' evidence and increasing the reliance on secondary evidence such as NGO and news reports.¹⁵³ This often results in judges being exposed to only a partial picture of the events examined.¹⁵⁴ Furthermore, the passage of time arguably makes the collection of evidence biased towards shells that landed on civilian targets, since shells landing on military targets are presumably less recorded and draw less attention.¹⁵⁵ Moreover, there are the inherent difficulties involved in relying on witness testimonies of events that occurred under the fog of battle, including issues such as the number of shells impacting upon a certain location.¹⁵⁶

All of these practical and legal difficulties should discourage reliance on any means of impact analysis in order to establish the *mens rea* of an attacker. At the very least, they require that a very high percentage of deviation from a sensitive standard be demanded, in order to balance against the inherent conditions favouring presentation of evidence regarding hits on civilian targets.

In light of the difficulties that any impact analysis raises – and, most importantly, the inability to accurately reflect the intent of the attacker at the time of an attack – if all of the surrounding evidence fails to prove beyond a reasonable doubt the intent of the accused, he or she should be acquitted except in the most exceptional cases where the vast majority of the attacks are found to deviate from any sensitive impact standard (such as in cases previously decided by the ICTY).¹⁵⁷ Judges

¹⁵¹ *ibid* 35, stating in a different context that the 'court impermissibly placed the burden of proof on the defence, and resolved a major factual ambiguity in favor of the prosecution'.

¹⁵² For general context see Wuerzner (n 6) 917–18.

¹⁵³ For a cautious approach to the evidentiary value of NGO reports, press articles and United Nations reports in criminal proceedings, see ICC, *Prosecutor v Laurent Gbagbo*, Decision Adjourning the Hearing on the Confirmation of Charges pursuant to Article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11, Pre-Trial Chamber I, 3 June 2013, [29]–[36].

¹⁵⁴ These missing pieces were acknowledged by the TC in a somewhat apologetic paragraph, which repeated itself several times over the course of the judgment: *Gotovina* Trial Judgment (n 9) [1922].

¹⁵⁵ Wuerzner (n 6) 924.

¹⁵⁶ The Trial Judgment provided several examples of this difficulty, as witnesses gave very different accounts of the same incidents. This led the TC to state: 'The witnesses also provided estimates of how many shells fell on Knin during different periods, based on their own observations. These estimates vary widely, from 200–300 between 5 and 10 a.m. ... to almost 30,000 between 5 and 8 a.m. ... The Trial Chamber considers that it is difficult to accurately estimate high numbers of impacts while experiencing the duress of incoming artillery fire. Most of the witnesses had little or no artillery training or experience. Further, artillery projectiles which impacted outside of the town proper may have been audible within Knin': *Gotovina* Trial Judgment (n 9) [1366]. See also Bartels (n 26) 350.

¹⁵⁷ In fact, this seems to be the difference between *Gotovina* and other ICTY cases that also relied on something very similar to an impact analysis. In those cases, *inter alia*, the TC dealt with a much larger percentage of the attacks hitting 'outside the impact zone'. See, eg, *Galić* Trial Judgment (n 7) [583]–[94].

should not lose sight of the fact that what they must establish is what the attacker knew and intended before the attack. This is what the law mandates. Conducting an impact analysis entails relying on what happened after the attack. It should be used only as a means to help determine the intent and knowledge of the attacker; it should not become an end or a legal test in its own right. Although merely conducting an impact analysis cannot be ruled out completely as contrary to the law, a prudent judicial policy suggests that it should be used only on rare occasions when it can truly expose, beyond reasonable doubt, the intent and knowledge of the attacker before the attack.¹⁵⁸

4.4.2. MISTAKEN IDENTIFICATION

The article now turns to examine an incident in which the TC adopted an approach that was more sensitive to the actual intent and knowledge of the attacker. This approach is also more in line with fundamental legal concepts of IHL and ICL. The TC analysed an incident that involved a factual mistake by an attacker, a mistake which led to an attack on a civilian object. The TC, over the course of its impact analysis, discovered that one of the targets attacked by the Croatian forces was erroneously marked on the map used by the attackers as being located 150 metres away from its actual position. For the purpose of the impact analysis, the TC took as its point of reference the location marked on the map, which in reality did not represent any military objective.¹⁵⁹ Thus, when conducting the impact analysis, it reached the conclusion that the impact was less than 200 metres from the place marked on the map; it was therefore not an unlawful attack, despite the fact that in reality the shell impacted more than 200 metres from any military target.

This is a rare occasion on which a judicial decision analyses, albeit without particular thoroughness, what appears to be an honest mistake by an attacker.¹⁶⁰ The TC's analysis accurately reflects the state of mind of the attacker – who honestly believed that he was attacking a military objective because of the manner in which it was marked on the map – at the time of the attack.

The approach of the TC in this incident is a proper application of IHL and is consistent with the view of most scholars, emphasising the intent of the attacker and what he knew and believed at the time of the attack, and not the results of the attack.¹⁶¹ This is a well-known legal requirement, but is one that is often disregarded by academia, NGOs and even UN bodies that

¹⁵⁸ Fenrick (n 24) 565–66.

¹⁵⁹ *Gotovina* Trial Judgment (n 9) [1918]: ‘On 4 or 5 August 1995, artillery projectiles also impacted on a house marked X on P290 which was less than 100 metres from the location of the police station according to the “Jagoda” list. The Trial Chamber recalls that the “Jagoda” list’s coordinates of the police station placed it some 150 metres south of its actual location in Benkovac. ... The Trial Chamber considers that the evidence allows for the reasonable interpretation that the HV fired artillery projectiles at what they considered to be the location of the police station based on the coordinates provided by the “Jagoda” list, which projectiles impacted the aforementioned location as a result of errors or inaccuracies in the artillery fire’.

¹⁶⁰ The author is not familiar with any other judgment by an international tribunal which analyses the issue of an honest mistake in the context of targeting. The ICTY Prosecutor, in the NATO Bombings Report, examined one similar incident of mistake in the location of the target – the attack on the Chinese Embassy in Belgrade: NATO Bombings Report (n 78) paras 80–85.

¹⁶¹ Wuerzner (n 6) 927; Bartels (n 26) 350; Huffman (n 10) 5. Fenrick (n 24) 560, referring to a bombardment by Americans on an air raid shelter during the First Gulf War.

pronounce on targeting issues despite having little or no information about the attacker's knowledge, basing their analysis solely on the consequences of the attack.¹⁶² Ironically, this legal requirement was also, to a degree, disregarded by the TC in other parts of its impact analysis.

This part of the judgment sends a clear message that without information about an attacker's knowledge and intent at the time of the attack, no conclusion may be drawn regarding the legality of such an attack.¹⁶³ This important message went largely unnoticed because the TC failed to explicitly explain its determination. More importantly, it was lost because the reliance on the impact analysis, as explained above, was based on diametrically opposed logic and sent a contradictory message. A clearer legal position by the TC, and a more consistent approach in applying the logic of this analysis to all other targets, would have resulted in a more legally correct and positively influential Trial Judgment.

5. CONCLUSION

The *Gotovina* proceedings presented the Trial and Appeals Chambers of the ICTY with an extremely rare opportunity to adjudicate on core issues related to the law of targeting in the context of intense fighting. Though such issues are extensively discussed and analysed by academics and NGOs, the law of targeting is sadly deficient in terms of authoritative judicial clarification regarding some of its most basic concepts. Unfortunately, as demonstrated above, both Chambers missed this opportunity, which is not likely to repeat itself in the near future. They have failed to influence the law of targeting, and especially the way in which it is manifested in the context of a criminal trial.

The Chambers failed to address some of the difficult IHL questions that arose in this case. Moreover, they failed to identify and address the tensions in the application of IHL in a criminal context. Both Chambers failed to appreciate, or at least they failed to state explicitly, that the situation is governed by two branches of law: IHL and ICL. They failed to explain which branch of law controlled each determination that was made, whether the decision involved classifying an object as a military objective or conducting an impact analysis. Furthermore, despite their parallel applicability, these two branches of law are based on different foundations and attempt to achieve different, yet related, goals.¹⁶⁴ They often provide different answers to the same questions. This makes it all the more important for any court to be extremely clear and explicit about which body of law forms the basis of its analysis.

One of the main issues of divergence between these two branches of law is the burden of proof. The Chambers did not develop clear jurisprudence on this issue. It appears that basic notions of defendant's rights and the presumption of innocence demand that the burden in criminal trials should rest on the prosecution, even if IHL places the burden on the accused (usually

¹⁶² See, eg, an incident analysed in the Goldstone Report (n 5) paras 630–52. This method of analysis is repeated throughout the report.

¹⁶³ Libya Report (n 5) 89. The TC did exactly that with regard to several towns that were attacked during Operation Storm: eg *Gotovina* Trial Judgment (n 9) [1162]; Huffman (n 10) 25.

¹⁶⁴ Cryer (n 69) 273.

the attacker). The burden of proof required by ICL must prevail over that required by IHL. This notion has also been reflected, in other contexts, in previous ICTY judgments. However, before *Gotovina* it was not clear exactly which aspects of IHL are affected by this burden shift, nor how they are affected. Unfortunately, the issue is no clearer following *Gotovina*.

There are a few practical lessons which future Chambers may learn from the *Gotovina* trials. These proceedings, and mainly the TC's impact analysis, are a good example of the fundamental importance, in analysing targeting issues, of knowing what information was available to the attacker at the time of the attack. The impact analysis was an attempt by the TC to bypass this legal requirement and to establish the intent of the attacker by other means. This is a crucial shift from relying on evidence about what happened before the attack, most likely to be found only in the attacker's possession, to evidence about what happened after the attack, which is usually held by the victims of the attack. This shift was rejected unanimously by the AC, although the rejection was never set out explicitly. This rejection, as well as the analysis of the honest mistake incident, re-emphasised the importance of proving intent and analysing targeting decisions based on the information that the *attacker* had *at the time* of the decision. This is true for all analyses of targeting decisions, and it is especially true in the context of criminal proceedings.

This is an important lesson to anyone who pronounces on issues of the law of targeting without the information that is essential for any legal analysis. This information is essential not only because of notions of fairness and natural justice, but also because it is *legally* required by the two branches of law that govern targeting decisions: IHL and ICL. While taking such information into account is important for the professionalism and integrity of NGOs or academics, it is absolutely crucial with respect to judicial and other official review mechanisms. The *Gotovina* proceedings remind scholars and practitioners that it is not legally possible for them to conduct a serious analysis by relying solely on what is, from a legal perspective, the less important half of the picture.

Finally, the *Gotovina* proceedings exemplify the great difficulties inherent in conducting criminal trials revolving around events that occurred during intense fighting, including issues relating to the law of targeting. Cases involving targeting issues in actual combat situations entail, in addition to various practical difficulties, extremely difficult legal and factual questions, such as those discussed in this article. Such cases therefore pose an exceedingly difficult dilemma for international prosecutors: whether to proceed with a targeting case knowing that the prospect of success is not high, or whether instead to avoid taking the case to begin with. It is not surprising, therefore, that most prudent international prosecutors do not initiate cases on the law of targeting. The ultimate result is the very low number of cases, nationally and internationally, dealing with those issues. This fact makes *Gotovina's* missed opportunities even more regrettable.