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Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials

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The principle of proportionality is one of the core principles of international humanitarian law. The principle is not easy to apply on the battlefield, but is even harder to apply retrospectively, in the courtroom. This article discusses the challenges in applying the principle during international criminal trials. It discusses the principle itself, followed by an explanation of the general challenges of dealing with violations of international humanitarian law, and more specifically the rules related to the conduct of hostilities, during war crime trials. The way in which the principle has been used before the International Criminal Tribunal for the former Yugoslavia is examined, including an in-depth discussion of the recent Gotovina *case. The second part consists of an evaluation of Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court, and discusses the difficulties the International Criminal Court would face in cases dealing with violations of the principle of proportionality.*

Keywords: proportionality, armed conflict, international humanitarian law, international criminal law, International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Court (ICC)

1. Introduction

The principle of proportionality is one of the fundamental principles of international humanitarian law (IHL) – a body of law that, in recent years, has been significantly clarified and developed by international criminal tribunals and courts. Many issues have been covered in the extensive case law of the international institutions, including the International Criminal Tribunal for the former Yugoslavia (ICTY).[1] One such issue is the principle of proportionality in armed conflicts. However, as illustrated below, the ICTY, when dealing with the principle of proportionality, has

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[1] Notable examples include:

(i) the notion of armed conflict (ICTY, *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, Trial Chamber II, 2 October 1995 (*Tadić* Jurisdiction Decision), paras 66–70;

(ii) rape as a war crime (eg ICTY, *Prosecutor v Kunarac, Kovač and Vuković*, Judgment, IT-96-23-T & IT-96-23/1-T, Trial Chamber II, 22 February 2001, and ICTR, *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T, Trial Chamber I, 2 September 1998); and

(iii) the war crime of terrorising the civilian population (ICTY, *Prosecutor v Galić,* Judgment, IT-98-29-T, Trial Chamber I, 5 December 2003 (*Galić* Trial Judgment).

until quite recently merely set out the law: no evidentiary findings had been made. The law as set out was never properly applied (albeit in retrospect) to the situations on which the tribunal was to pass judgment. Whilst in cases such as *Galić* elaborate findings were made as to the state of IHL with regard to the principle of proportionality at the time the alleged crimes took place, *Gotovina* represents the first actual application of this principle by the ICTY to date.[2] However, its application by the *Gotovina* trial chamber has been subject to fierce criticism by both military lawyers and academics, and the judgment was recently overturned on appeal without further guidance by the ICTY appeals chamber on how the principle should be dealt with in the courtroom. Consequently, no case law exists to which the International Criminal Court (ICC) – which has jurisdiction over the war crime of causing excessive incidental death, injury or damage[3] – could turn were it to be seized of a case concerning alleged disproportionate attacks.

This article highlights the ways in which the principle of proportionality has been dealt with in international criminal law until now, and examines how the principle could be dealt with in the future. It does so first by discussing briefly the principle of proportionality in armed conflict itself. It then addresses some problems that are inherent in war crimes trials, in which IHL is to be applied before courts,[4] more specifically courts at the international level.[5] The article then focuses on the general challenges in applying the principle of proportionality in international criminal trials. The following section discusses the extent to which the principle of proportionality has been used before, and by, judges at the international level, the ICTY in particular. By referring to examples from the relatively few cases that concern the conduct of hostilities, this part of the article illustrates that the principle itself has not been properly applied; and thus the problems that accompany its application in the field have not been properly addressed. Discussed next is the role that the principle of proportionality can play before the ICC by focusing on some of the legal difficulties that could arise from the way in which the issue of disproportionate attacks has been included in the ICC Statute. Examined thereafter are the practical difficulties that follow from the institutional reality with which the ICC is faced, followed by some concluding remarks.

(iv) the lower threshold of non-international armed conflicts (eg ICTY, *Prosecutor v Boškoski and Tarčulovski*, Judgment, IT-04-82-T, Trial Chamber II, 10 July 2008, paras 175–206);

[2] ICTY, *Prosecutor v Gotovina, Čermak and Markač*, Judgment, IT-06-90-T, Trial Chamber I, 15 April 2011 (*Gotovina* Trial Judgment).

[3] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute), art 8(2)(b)(iv).

[4] Whilst the term 'war crimes trial' is often used to refer to all trials taking place at the international level (in the same way as the ICTY is often referred to as a 'war crimes tribunal'), also for cases concerning crimes against humanity and/or genocide charges the term is used here in a more limited way, and refers only to those cases that deal with violations of IHL.

[5] It is acknowledged that courts at the national level also face many problems when dealing with war crimes. Some of these problems are of a similar nature to those at the international level owing to the substance of the applicable law and to the situations in which the alleged crimes were committed. Also, some problems arise out of the national criminal justice systems. See, in general, Martin Witteveen, 'Closing the Gap in Truth Finding: From the Facts of the Field to the Judge's Chambers' in Alette Smeulers (ed), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (Intersentia 2010) 383.

2. THE FUNDAMENTAL PRINCIPLE OF PROPORTIONALITY

Proportionality as a concept or principle can be found in many fields of law. For example, in public international law it forms part of the law relating to self-defence. For its part, the principle of proportionality in armed conflict is one of the fundamental principles of IHL.[6] It became part of positive IHL with its codification in the First Additional Protocol to the Geneva Conventions of 1949.[7] The principle itself covers all military measures taken by belligerents, and requires these measures to be proportionate to the aim that the belligerents seek to accomplish.[8] The military advantage to be obtained by an operation must outweigh the harm to civilians and/or damage to civilian objects that is likely to result from this military action.[9] Whilst the principle covers all military actions[10] – including, for example, the institution of blockades[11] – the way in which it has been incorporated into positive law refers only to the expected results of attacks.[12] This has resulted in the principle generally being described solely as the issue

[6] See, inter alia, Marco Sassòli and Antoine A Bouvier, *How Does Law Protect in War?,* Vol I (2nd edn, Geneva 2006) 139–42; Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008) 48.

[7] 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).

[8] Kolb and Hyde (n 6) 48.

[9] eg ibid. See also APV Rogers, *Law on the Battlefield* (3rd edn, Manchester University Press 2012) 21, 23.

[10] Rogers ibid 21, 23. See, in support, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136 (*Construction of a Wall* case), Separate Opinion of Judge Kooijmans, para 34 (dealing with the Separation Barrier and applying the principle to the construction of the barrier).

[11] See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2004) 138; and Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (International Institute of Humanitarian Law 1994) rule 102(b) and the accompanying explanatory text at 179. The Turkel Commission recently assessed whether Israel's blockade of the Gaza Strip was in accordance with the IHL principle of proportionality by weighing the military advantage of the naval blockade against the harm caused to the civilian population: see Turkel Commission, *The Public Commission to Examine the Maritime Incident of 31 May 2010*, 2011, 90–102, http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf.

[12] Additional Protocol I (n 7) arts 51(5)(b) and 57(2). Art 51 reads in relevant part:

> Article 51 – Protection of the civilian population
> […]
> 4. Indiscriminate attacks are prohibited. …
> 5. Among others, the following types of attacks are to be considered as indiscriminate: […]
> (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Art 57 reads in relevant part:

> Article 57 – Precautions in attack
> […]
> 2. With respect to attacks, the following precautions shall be taken:
> (a) those who plan or decide upon an attack shall:
> […]
> (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

of collateral damage to civilians and civilian objects resulting from attacks against military targets.[13]

The principle of proportionality has to be seen in close connection with the principles of distinction and precaution. The principle of distinction, as well as the principle of proportionality, are part of the same legal regime that protects civilians; as such, they articulate one another.[14] Proportionality only comes into play if the principle of distinction is adhered to. When deciding to launch an attack, it must first have been determined that the object of the attack was a legitimate target. Indeed, there would be no relevance for the principle of distinction if no precautions were to be taken in the identification of which objects were to be targeted.[15] The principles of proportionality and precaution are similarly related. Precautions must be taken in order to limit the expected incidental damage to civilian objects. An attack must be aborted or suspended if it becomes apparent to the attacker that the attack may be expected to cause incidental damage that would be excessive in relation to the concrete and direct military advantage anticipated.[16] Furthermore, precautions must be taken with regard to the manner in which the strike is going to be conducted, which includes the choice of weapons used to carry out the attack. Where there is a choice of different means or methods of attack, the attacker should choose the option that would avoid or minimise incidental damage.[17] Arguably, then, an attack that would

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; […]

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

[13] Dinstein (n 11) 59.

[14] Jann K Kleffner and Théo Boutruche, 'The Use of Depleted Uranium and the Principles of Distinction, Proportionality and Precautions' in Avril McDonald, Brigit CA Toebes, Jann K Kleffner (eds), *Depleted Uranium Weapons and International Law: A Precautionary Approach* (TMC Asser Press 2008) 142.

[15] See William Fenrick, 'The Law Applicable to Targeting and Proportionality after Operation Allied Force: A View from the Outside' (2000) 3 *Yearbook of International Humanitarian Law* 57.

[16] Additional Protocol I (n 7) art 57(2)(b).

[17] ibid art 57(2)(a)(ii). Yoram Dinstein explains in this light that having recourse to advanced weaponry, such as precision-guided missiles, does not always constitute an advantage: '[I]f a spread-out enemy military base is attacked by a missile, there is a great difference between the use of a ballistic missile and a guided missile. A ballistic missile can be fired from far away: as long as it is directed at the military objective, the attacker has done its duty and is not at fault if – in the event – the missile struck by chance a children's day-care centre located inside the military base for the benefit of civilian employees and dependants. With a guided missile the situation is different. If the "man in the loop" is capable of identifying the day-care centre, it is incumbent on him to direct the missile elsewhere within the military base': Yoram Dinstein, 'Air and Missile Warfare' in Willem JM van Genugten, Michael P Scharf and Sasha E Radin (eds), *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference: 2007 Hague Joint Conference on Contemporary Issues of International Law* (TMC Asser Press 2009) 339. George Aldrich considers in this regard that 'if the objectives are sufficiently separated so that they can feasibly be attacked separately with the weapons available and if this degree of separation is evident to the attacker, then they must be attacked separately in order to reduce the risks to the civilian population': George Aldrich, 'New Life for the Laws of War' (1981) 75 *American Journal of International Law* 764, 780.

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otherwise have resulted in proportionate collateral damage may be considered disproportionate if other means were available to the attackers that would have provided the same military advantage, yet resulted in less collateral damage.[18] In other words, failing to take precautions may determine the outcome of the analysis as to whether an attack complied with the principle of proportionality. Notwithstanding the foregoing, as a consequence of the way in which the principle of proportionality is framed in Articles 51 and 57 of Additional Protocol I, a violation of the principle will also be a violation of the principles of distinction and precaution. The principle of proportionality, as included in the Protocol, is thus framed as a subsidiary principle.

The aspects that require balancing on either side of the equation, namely military advantage and expected incidental damage, are hard to compare and difficult to assess – not least because it is an assessment of their future effects – and raise many questions.[19] The imprecise wording of the prohibition to cause incidental damage that would be 'excessive in relation to the concrete and direct military advantage anticipated' is a result of the compromise needed for the delegates negotiating the Additional Protocols to reach a consensus.[20] Different opinions also existed amongst the drafters of Article 57,[21]

> mainly related to the very heavy burden of responsibility imposed by this article on military commanders, particularly as the various provisions are relatively imprecise and are open to a fairly broad margin of judgment. These concerns were reinforced by the fact that, according to Article 85 …, failure to comply with the rules of Article 57 may constitute a grave breach and may be prosecuted as such. Those who favoured a greater degree of precision argued that in the field of penal law it is necessary to be precise, so that anyone violating the provisions would know that he was committing a grave breach.

Indeed, as W Hays Parks has observed, the principle of proportionality would by 'American domestic law standards … be constitutionally void for vagueness'.[22]

As was held by William Fenrick – as well as in the (in)famous *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia* – the problem is not whether or not the principle exists, 'but what it

[18] An opposing view is that the amount of incidental damage that would not be considered excessive in light of the expected military advantage cannot change. If a certain number of civilian casualties would be proportionate to achieve a certain military advantage, then this number would stay the same, irrespective of, eg, the weapon used. However, the present author is of the view that arts 57(2)(a)(ii) and (iii) should be read in conjunction. See, in support, Yves Sandoz, 'Commentary' in Andru E Wall (ed), *Legal and Ethical Lessons of NATO's Kosovo Campaign* (International Law Studies, Vol 78, Naval War College 2002) 273, 278.

[19] See, eg, Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I* (Martinus Nijhoff 2009) 197–220.

[20] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) paras 1976–78 (*Commentary on AP I*). See further William Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare' (1982) 98 *Military Law Review* 91, 102–04.

[21] *Commentary on API*, ibid para 2187.

[22] W Hays Parks, 'Air War and the Law of War' (1990) 32 *Air Force Law Review* 1, 173.

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means and how it is to be applied'.[23] The principle is therefore 'more easily stated than applied in practice'.[24] Both Fenrick and the Report refer to the problematic application of the principle of proportionality during combat operations.[25] A proportionality test for combat operations must be made on a case-by-case basis because the relative elements that must be balanced may differ in each situation. Legal evaluations may lead to different conclusions as to the proportionality of an attack, depending on the interpretation or weight given to each of the values at stake.

Objective standards for the appraisal of the intended military advantage and the expected collateral damage are nearly non-existent,[26] making the question of what constitutes incidental damage one of the most controversial issues when assessing the legality of possible disproportionate attacks.[27] Notwithstanding the problems of applying the principle in the field, it is also very difficult to apply the principle in retrospect: to prosecute alleged violations of the principle and to judge whether, in certain operations, the principle was, or was not, adhered to. These difficulties are compounded by the general challenges when dealing with alleged violations of the laws of armed conflict in the courtroom. These difficulties and challenges are discussed next: first generally, and then specifically in relation to the ICTY and to the ICC, respectively.

3. Applying International Humanitarian Law in the Courtroom

3.1 International Humanitarian Law and International Criminal Law

When states first drafted rules to regulate warfare, these rules were not envisioned to be applied in a courtroom. IHL *was* not, and still *is* not, intended to be the international equivalent of a comprehensive national criminal code.[28] It has a rather different purpose from that of a criminal code. IHL aims to protect those who are not, or are no longer, taking part in hostilities: the sick and wounded, prisoners of war and civilians. In fulfilling this aim of protection, the drafters of the rules of IHL placed certain restrictions on warring parties, while at the same time acknowledging the realities of war. Moreover, it is a body of preventive law that in practice – on the battlefield – is usually applied by non-lawyers.[29] Its application thus requires the content to be of a certain

[23] William Fenrick, 'Attacking the Enemy Civilian as a Punishable Offence' (1997) 7 *Duke Journal of Comparative and International Law* 539, 545; ICTY, 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (2000) (Final Report to the Prosecutor) paras 19 and 48 (Fenrick was one of the drafters of this Report).
[24] Final Report to the Prosecutor, ibid para 19.
[25] Fenrick (n 23) 546; Final Report to the Prosecutor (n 23) para 50.
[26] Stefan Oeter, 'Methods and Means of Combat' in Dieter Fleck (ed), *Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press 1995) 119, 120.
[27] Kleffner and Boutruche (n 14) 144.
[28] William Fenrick, 'International Humanitarian Law and Criminal Trials' (1997) 7 *Transnational Law and Contemporary Problems* 23, 26.
[29] ibid. In situations of targeting, however, military lawyers will normally be involved in the target selection process. See, eg, Leonardo Tricarico, 'Identification of Targets and Precautions in Attacks in Air Warfare: Operation Allied Force as a Case Study' in Mireille Hector and Marine Jellema (eds), *Protecting Civilians in 21st Century Warfare: Target Selection, Proportionality and Precautionary Measures in Law and Practice* (Wolf Legal Productions 2001) 39–44.

simplicity. The rules of IHL, such as those dealing with conduct of hostilities, therefore differ significantly from the types of provision that are usually included in a criminal code. By way of example, the former, as opposed to the latter, do not include elements of crimes.

In addition to having been created to guide warring states in their conduct of hostilities, IHL also serves to determine state responsibility for the way in which the states conducted their military operations. Conversely, it was not created for evaluating the individual criminal responsibility of the commanders for unlawful conduct. This also explains why the rules of IHL include highly subjective notions, such as 'military necessity', 'excessive damage' and 'military advantage'.[30] While such notions are already difficult to apply correctly during combat, the fact that they are hard both to qualify and to quantify provides the flexibility required to enable their use during hostilities. However, applying them after the fact, in a courtroom, is a struggle because these notions involve value-based and individual judgements made at the time of the attack.[31]

On the battlefield, the conduct of the fighting parties is best governed by rules that are simple and allow the commander a certain level of discretion. However, fair criminal proceedings demand, first and foremost, that the parties in a criminal trial have recourse to clear rules that describe criminal conduct in a strict manner.[32] For a conviction to be entered, assessment must be made as to whether the elements of an alleged crime have been met. In the ad hoc tribunals, the judges themselves had to develop the elements for the alleged crimes on which they were tasked to pronounce, albeit aided by the parties who made proposals in each case where a 'new' violation was addressed. By contrast, because the states that negotiated the ICC Statute did not want to give the judges of the ICC the same freedom in establishing the elements of crimes for the crimes within the court's jurisdiction, the parties before the ICC, as well as its judges, have recourse to elements of crimes that were drafted by a special working group, and were subsequently adopted by the Assembly of States Parties.[33]

As noted above, international criminal law (ICL) has, through the numerous judgments of the international tribunals and courts, contributed to the development and clarification of the substance of IHL.[34] Fenrick has aptly described that the judgments of the ad hoc tribunals have

[30] See 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, 929 (Issue 872).

[31] ibid.

[32] In the Final Report to the Prosecutor ((n 23) para 90), the Office of the Prosecutor of the ICTY acknowledged that sometimes IHL is not clear enough to start an investigation into alleged crimes. See also the discussion at Section 5.3.5 below.

[33] However, the elements of crimes merely serve to 'assist' the judges and are not binding on the chambers: ICC Statute (n 3) art 9(1).

[34] See on this issue, eg, Shane Darcy, 'Bridging the Gaps in the Laws of Armed Conflict? International Criminal Tribunals and the Development of Humanitarian Law' in Noëlle NR Quénivet and Shilan Shah-Davis (eds), *International Law and Armed Conflict: Challenges in the 21st Century* (TMC Asser Press 2010) 319; Robert Heinsch, *Die Weiterentwicklung des Humanitären Völkenrechts durch die Strafgerichtshöfe für das ehemalige Jugoslawien und Ruanda* (BWV Verlag 2007); Theodor Meron, 'The Hague Tribunal: Working to Clarify International Humanitarian Law' (1998) 13 *American University International Law Review* 1511, 1511–17.

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added 'flesh to the bare bones of treaty provisions or to skeletal legal concepts' of IHL.[35] Among the rules of IHL that were clarified are those that relate to the principle of proportionality.

The findings in these ad hoc tribunal judgments are not binding on states, however, but are nevertheless of great influence for the interpretation of IHL.[36] This is demonstrated by references made by states, as well as national courts, to the international case law, and by the impact that this case law has had on the negotiations of international treaties, including the ICC Statute.[37] Perhaps the best examples of the impact of the tribunals on IHL are the extensive references made to their case law in the study on customary IHL by the International Committee of the Red Cross (ICRC Study).[38]

Nevertheless, ICL is not an autonomous body of law that happens to be based on IHL, but is instead accessorial to the latter. War crimes law should therefore logically be interpreted in line with IHL, the very law upon which the violations are based.[39] Be that as it may, as IHL and ICL have different objectives, this is not always easy: the former aims to regulate warfare and thereby mitigate the suffering resulting from it,[40] whilst the latter seeks to counter impunity of those who have violated the rules of IHL in such a manner as to give rise to individual criminal responsibility.[41]

This results in a different approach to, for example, the question of who can legitimately be targeted. In striving to limit suffering in times of armed conflict, IHL has an inbuilt presumption of protection: only combatants and those who take a direct part in hostilities may be targeted. In case of doubt about the targetable status of a person or object, IHL states that the person or object concerned is to be considered as protected, and thus cannot be attacked.[42] As ICL concerns the

[35] William Fenrick, 'The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (1998) 3 *Journal of Armed Conflict Law* 197.

[36] Yves Sandoz, 'The Dynamic but Complex Relationship between International Penal Law and International Humanitarian Law' in José Doria, Hans-Peter Gasser and M Cherif Bassiouni (eds), *The Legal Regime of the ICC: Essay in Honour of Professor Igor Pavlovich Blishchenko* (Martinus Nijhoff 2009) 1049, 1061.

[37] See, eg, Thomas Graditzky, 'War Crime Issues before the Rome Diplomatic Conference on the Establishment of the International Criminal Court' (1999) 5 *UC Davis Journal of International Law and Policy* 199; Darcy (n 34) 321.

[38] 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) (ICRC Study). An online version which is regularly updated is available at http://www.icrc.org/customary-ihl/eng/docs/home. See also 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 and Security Law* 239; and Darcy (n 34) 321.

[39] See Gerhard Werle, *Principles of International Criminal Law* (2nd edn, TMC Asser Press 2009) 358 (referring to the *Tadić* Jurisdiction Decision (n 1) para 81).

[40] See, eg, Dieter Fleck, 'Introduction' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press 2008) xi, xi.

[41] See, eg, Werle (n 39) 29–36.

[42] See Additional Protocol I (n 7) art 45(1): 'Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal'; art 50(1): 'In case of doubt whether a person is a civilian, that person shall be considered to be a civilian'; and art 52(3): 'In case of doubt whether an object which is normally dedicated to civilian purposes … is being used to make an effective contribution to military action, it shall be presumed not to be so used'. These provisions are all found in Additional Protocol I (n 7). Their customary nature is therefore not undisputed. The ICRC

prosecution of persons, one of the essential principles of criminal law thus forms part of ICL, namely the presumption of innocence.[43] As a corollary of this principle, the prosecution has to prove beyond reasonable doubt that the accused has committed the crimes as charged. In doing so, another corollary of this principle, *in dubio pro reo*, requires that 'the accused is entitled to the benefit of doubt as to whether the offence has been proven'.[44] In a case dealing with unlawful attack charges, such as the crime of directing an attack at civilians, the prosecution has to prove that the alleged victims were not combatants or civilians directly participating in hostilities and therefore were, at the time of the attack, protected by IHL. The ICTY has found that in such a case the prosecution 'must show that a reasonable person could not have believed that the individual he or she attacked was a combatant'.[45] Where IHL requires an arms bearer to consider someone as protected in case of doubt, this IHL presumption of protection – for obvious and understandable reasons – works in reverse in ICL,[46] causing the IHL aim of protecting those who are not, or no longer taking part in hostilities to clash with the accused's right to a fair trial under ICL.

3.2 General Challenges in the Adjudication of Violations of IHL

Serious violations of IHL can only occur during a situation of armed conflict,[47] which is usually a situation of chaos. During an armed conflict, of course, certain war crimes may be very well planned and organised, and thus be far from 'chaotic' – the Holocaust being a case in point. However, violations of the law relating to the conduct of hostilities involve situations of actual combat, making inherently difficult the prosecution of the alleged perpetrators and the judging of their behaviour. The 'fog of war' also clouds subsequent criminal trials.

Challenges occur first with regard to the determination of the facts, and the knowledge and intent of the accused at the time of the alleged violation. Documentary evidence often does

notes in its study on customary IHL that while this presumption of protection is included in numerous military manuals, the United States and Israel do not accept this to be a rule of customary law (ICRC Study (n 38) 35–36).

[43] See, inter alia, the inclusion in art 21(3) ICTY Statute (Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808(1993), UN Doc S/25704 (3 May 1993), adopted by the Security Council in Resolution 827 (25 May 1993)); art 20(3) ICTR Statute (Statute of the International Criminal Court for Rwanda, annexed to Security Council Resolution 955(1994), UN Doc S/RES/955 (8 November 1994)); and art 66 ICC Statute (n 3).

[44] ICTY, *Prosecutor v Delalić and Others*, Judgment, IT-96-21-T, Trial Chamber, 16 November 1998, para 601. See generally Fabian Raimundo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff 2008) 110–11.

[45] *Galić* Trial Judgment (n 1) para 55.

[46] For an elaborate discussion on the issue of the civilian presumption in ICL, see Nobuo Hayashi, 'The Role of Judges in Identifying the Status of Combatants' (2006) 2 *Acta Societatis Martensis* 69, 76–84.

[47] Unless it concerns persons who remain protected by IHL, also when the conflict has ended, eg, prisoners of war or persons detained as a result of the conflict. See, for example, Geneva Convention (III) Relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135, art 5; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609, art 5.

not exist, or is difficult to obtain.[48] Indeed, states have shown themselves to be unwilling to hand over sensitive information, citing reasons of national security.[49] Moreover, whilst cases before the ICTY dealt mainly with professional armies – and were therefore document heavy – the cases currently before the ICC for the most part concern militias. Few documents, if any, exist as to decisions taken or orders given. Much of the evidence is obtained through witnesses, but witness testimony has inherent problems, partly as a result of the lapse of time between the moment the alleged crime took place and the testimony, the nature of the crimes, and various psychological reasons that influence the credibility of this type of evidence.[50]

Furthermore, individual criminal responsibility only arises when the attacker intended to engage in the conduct knowing that the outcome of an attack (or at least an outcome contrary to IHL) would occur.[51] Mistakes or faulty weaponry can result in outcomes that IHL aims to prevent, but these outcomes do not necessarily constitute violations of IHL as they were not intended by the attacker. Even though the attacker would normally know that a weapon system could fail and miss a target, he would not necessarily have known that the system would fail in this particular instance.[52] Additionally, the United States Military Tribunal in Nuremberg developed the so-called '*Rendulic* rule', according to which one should not lightly second-guess the reasonableness of battlefield decisions.[53] This rule is reflected in the declarations made by several states

[48] Obtaining documents containing, eg, the targeting decisions or orders to commit a violation is problematic because the armed forces will normally attempt to prevent these documents from falling into the hands of a third party. Furthermore, written documents by non-regular forces or militias rarely exist, if indeed at all.

[49] See, inter alia, Grant Dawson and Mieke Dixon, 'The Protection of States' National Security Interests in Cases before the ICTY: A Descriptive and Prescriptive Analysis of Rule 54 *bis* of the Rules and Procedure and Evidence' in Hirad Abtahi and Gideon Boas (eds), *The Dynamics of International Criminal Justice* (Martinus Nijhoff 2006) 95, 112–34.

[50] See, eg, Nancy A Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press 2010).

[51] See ICC Statute (n 3) art 30 and, inter alia, arts 8(2)(a)(i), (iii), (iv), and (vi), which use the wording 'wilful(ly)' and 'wantonly'; and arts 8(2)(b)(i)–(iv), (ix), which proscribe that the acts should have been carried out 'intentionally'. At the ICTY, recklessness as to the outcome of an attack would also give rise to individual criminal responsibility: see, generally, Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press 2012) 112.

[52] See, eg, Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press 2010) 276. Examples include the 7 May 1999 attack by NATO on the Chinese Embassy in Belgrade during Operation Allied Force (see Final Report to the Prosecutor (n 23) paras 80–85), as well as the attack by the US on the Amiriyah shelter/Al Firdus bunker during the 1991 Gulf War: see United States Department of Defense, 'Conduct of the Persian Gulf War', Final Report to Congress, April 1992, 615–16).

[53] See *United States of America v Wilhelm List and Others*, in Trials of War Crimes before the Nuremberg Military Tribunals under Control Council No 10, Vol XI TWC (1948) 1297. In this case, the military tribunal held that

> [t]he course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions. These things when considered on his own military situation provided the facts or want thereof which furnished the basis for the defendant's decision … [T]he conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgement but he was guilty of no criminal act.

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to Additional Protocol I. For example, Canada's statement of understanding in relation to provisions dealing with the general protection against the effects of hostilities, highlights[54] that

> [i]t is the understanding of Canada that, in relation to Articles 48, 51 to 60 inclusive, 62 and 67, military commanders and others responsible for planning, deciding upon or executing attacks have to reach decisions on the basis of their assessment of the information reasonably available to them at the relevant time and that such decisions cannot be judged on the basis of information which has subsequently come to light.

That the information reasonably available at the time should be considered in reviewing decisions to engage a certain target was also stated by the ICTY in *Galić*,[55] and was referred to as being indicative of state practice in the ICRC Study.[56]

Moreover, not everyone working in international criminal justice is an experienced military or IHL lawyer, which makes prosecuting and adjudicating war crimes all the more daunting. This is especially so when dealing with conduct of hostilities cases, which require an understanding of military operations.[57] As Nobuo Hayashi has observed, while judges need not have been soldiers themselves, some degree of familiarity with, and sensitivity to, the nature of the military profession is essential for realistic judicial decisions.[58]

Furthermore, successfully prosecuting international crimes requires the actors to have a different set of skills from that of a military lawyer. International criminal lawyers have to be able to deal with very large amounts of evidence, a vast volume of procedural rules and obtaining evidence through the examination of witnesses, as opposed to the military lawyer who has to deliver quick advice that takes into account the situation on the battlefield as it was at the time, or the military commander who has to decide on launching an attack or refraining from doing so. The parties involved in international criminal justice cannot rely solely on expert witnesses for their own information on military issues, such as weapon systems,[59] for the simple reason that

[54] Canada, Reservations and Statements of Understanding Made upon Ratification of Additional Protocol I, 20 November 1990, para 7. Similar statements have been made by, eg, Austria, the Netherlands and the United Kingdom: see the reservations/declarations to Additional Protocol I at http://www.icrc.org/ihl.

[55] *Galić* Trial Judgment (n 1) 58.

[56] ICRC Study (n 38) rules 24, 15. Since 2005, the Study is updated and available at http://www.icrc.org/customary-ihl/eng/docs/home.

[57] The trial chamber of the ICTY (in *Prosecutor v Martić*, IT-95-11), which was seized of a case involving conduct of hostility issues, has been questioned for its (lack of) understanding of military operations: see Beth Van Schaack and Ronald C Slye, *International Criminal Law and Its Enforcement: Cases and Materials* (Foundation Press 2007) 252–53.

[58] Hayashi (n 46) 87–88.

[59] The ad hoc tribunals and the ICC have often made use of expert witnesses, called by both the prosecution and the defence. An example is the *Gotovina* case before the ICTY, where Lieutenant Colonel Harry Konings, an artillery expert in the Royal Netherlands Army called by the prosecution, and Professor Geoffrey Corn, a former US army officer called by the defence, testified on issues such as the feasibility to take precautions and targeting with artillery: see *Gotovina* Trial Judgment (n 2) paras 36, 1163–75. See further ICTY, *Prosecutor v Martić*, Judgment, IT-95-11-T, Trial Chamber I, 12 June 2007, para 29; and ICTY, *Prosecutor v Strugar*, Judgment, IT-01-42-T, Trial Chamber II, 31 January 2005 (*Strugar* Trial Judgment), paras 130–31, 203–04.

these witnesses must also be asked relevant questions, and the correct legal analysis should be made based on the evidence given.[60]

Of note, in particular, with regard to understanding military operations for conduct of hostilities cases is the *Gotovina* trial judgment. A group of military and academic experts has said that it includes legal conclusions that 'lack the appropriate measure of operational sophistication that is necessary for understanding both how to apply the law and the consequences of that legal application to the implementation of IHL in future operations',[61] conflating the criminal standard with the operational standard in IHL.[62] These and other aspects of this judgment will be dealt with in more detail below.

4. The Principle of Proportionality as Applied before the ICTY

4.1 Background

A search for 'principle of proportionality' or 'proportionality' (or related search terms, such as '(dis)proportionate', 'excessive' and 'proportional') in the digital database of the ICTY[63] will result in numerous hits. Upon closer examination, however, one can see that the majority of these hits relate to proportionality of prison sentences, issues dealing with provisional release, and the question of to what extent pre-trial (or pre-judgment) detention may be considered proportionate. The humanitarian law principle of proportionality is dealt with in only a few cases.[64]

This is due in part to the relatively limited number of cases dealing with conduct of hostilities and the ICTY's subject matter jurisdiction. The ICTY Statute lists war crimes as 'grave breaches of the Geneva Conventions of 1949' (Article 2) and 'violations of the laws or customs of war' (Article 3). As the regulation of conduct of hostilities was not yet included in 1949, and as the grave breaches regime of the four Geneva Conventions of 1949 is made up of an exhaustive list in Articles 50, 51, 130 and 147 respectively of the Conventions,[65] it may be clear that a violation of the principle of proportionality would not fall under Article 2 of the ICTY Statute. The crimes under Article 3 of the Statute are limited to serious violations of those norms of IHL that, at the

[60] This is also true for the testimony of crime-based witnesses.

[61] Laurie R 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', International Humanitarian Law Clinic at Emory University School of Law, 2012 (Emory Report) 12. The group of military and academic experts (from Canada, the UK and the US) who wrote the report, attempted to submit it as an *amicus curiae* brief to the ICTY appeals chamber, but its request was denied: see ICTY, *Prosecutor v Gotovina, Čermak and Markač*, Decision on Application and Proposed Amicus Curiae Brief, IT-06-90-A, Appeals Chamber, 14 February 2012, para 7.

[62] Emory Report, ibid 7.

[63] The so-called 'juridical database', or the 'ICTY Court Records database' as the public version is called: see http://icr.icty.org.

[64] In many cases the wording used when dealing with proportionality is 'excessive'.

[65] That the grave breaches regime is exhaustive is also reflected by the fact that art 2 of the ICTY Statute lists the acts that are considered a violation of the article, as opposed to art 3 of the ICTY Statute, which mentions specifically that the violations subject to that article are 'not limited to' the listed acts.

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time of the conflict in the former Yugoslavia, had beyond any doubt reached the status of customary international law.[66] As such, the tribunal has not considered serious violations of the principle of proportionality to constitute a separate crime. Quite the contrary, in fact: within its case law, such violations merely serve as evidence of attacks directed against civilians or against civilian objects.[67]

The ways in which the principle of proportionality has been addressed in the ICTY's case law can be divided into three types:

(i) those cases in which a legal analysis of what constitutes the principle was made, but – because of the facts of the case – the principle was not actually applied to the evidence[68] to determine whether a disproportionate attack had taken place;

(ii) the cases that make reference to disproportionate or excessive use of force, but contain no explanation of how the chamber arrived at this conclusion or, where a finding was made, do not appear to have appropriately balanced the expected military advantage against the expected collateral damage;

(iii) the *Gotovina* case, in which the trial chamber applied the principle to the evidence and in which a form of evaluation of the balancing test was carried out, but which judgment was then quashed by the appeals chamber. These three types of case are discussed next.

4.2 Stating and Clarifying the Principle, but not Applying It

The ICTY first addressed the principle of proportionality in *Kupreškić*, a case that concerned an attack on the village of Ahmići,[69] when the trial chamber held that 'any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack'.[70] A few years later, in 2003, when assessing the responsibility of General Galić for crimes committed by the Bosnian-Serb forces during the siege of Sarajevo, the trial chamber concerned held[71] that

[66] United Nations Security Council, Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808, 3 May 1993, UN Doc S/25704, para 34.

[67] See Héctor Olásolo, *Unlawful Attacks in Combat Situations: From the ICTY's Case Law to the Rome Statute* (Martinus Nijhoff 2008) 157.

[68] As is explained below, when referring to the principle of proportionality as not being 'applied', the author means that the balancing test (between the military advantage and the expected incidental damage) that is inherent to the principle is not considered by the judges in the discussion of the attack concerned.

[69] ICTY, *Prosecutor v Kupreškić and Others*, Judgment, IT-95-16-T, Trial Chamber, 14 January 2000. Prior to the *Kupreškić* Trial Judgment, the *Martić* trial chamber had already mentioned the inclusion of the principle in Additional Protocol I in its decision on the indictment: ICTY, *Prosecutor v Martić*, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, IT-95-11-R61, Trial Chamber, 8 March 1996 (*Martić* Decision).

[70] *Kupreškić* Trial Judgment, ibid para 524.

[71] *Galić* Trial Judgment (n 1) 58. The appeals chamber affirmed the trial chamber's legal findings in respect of the principle of proportionality: ICTY, *Prosecutor v Galić,* Judgment, IT-98-29-A, Appeals Chamber, 30 November 2006 (*Galić* Appeals Judgment), paras 190–192.

> [o]nce the military character of a target has been ascertained, commanders must consider whether striking this target is 'expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'. If such casualties are expected to result, the attack should not be pursued. The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack.

The customary status of the principle, and what it entails, was thus set out correctly and clearly in the aforementioned case, as well as in several subsequent cases, such as *Strugar*,[72] *Martić*,[73] and *Dragomir Milošević*.[74] The ICRC Study, which in general relies heavily on the case law of the ad hoc tribunals, carefully lists all the statements by the ICTY on the principle of proportionality.[75] As such, the tribunal's authoritative findings on the law have been valuable; this is especially so when they concern clarifications, such as the fact that[76]

> [i]n determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.

Be that as it may, as shown below, the majority of these findings are no more than obiter dicta, as hardly any of the chambers concerned actually applied this balancing test to the facts of the case. In *Strugar*, for example, the trial chamber clearly sets out that the principle of proportionality did not arise in that case as no military objects were located in the old town of Dubrovnik, which was attacked by Serbian forces.[77]

4.3 Making Findings without Applying the Principle

Another case that concerned, inter alia, the attack on Ahmići, was *Blaškić*. General Blaškić was held to have ordered the use of heavy weapons to seize villages inhabited mainly by civilians. The trial chamber found that 'the devastation visited upon the town was out of all proportion with military necessity' and that Blaškić's orders 'had consequences out of all proportion to the military necessity and [he] knew that many civilians would inevitably be killed and their

[72] *Strugar* Trial Judgment (n 59) paras 281, 295; ICTY, *Prosecutor v Strugar*, Judgment, IT-01-42-A, Appeals Chamber, 17 July 2008, para 179.
[73] See, eg, *Martić* Decision (n 69), para 69.
[74] See ICTY, *Prosecutor v Dragomir Milošević*, Judgment, IT-98-29/1, Trial Chamber III, 12 December 2007, para 949.
[75] See the practice accompanying rule 14 of the ICRC Study (n 38) at 'X. International and Mixed Judicial and Quasi-Judicial Bodies'.
[76] *Galić* Trial Judgment (n 1) para 58. Since 'in the circumstances of the actual perpetrator' includes the position of the accused as a commander, this finding is similar to what is suggested in the Final Report to the Prosecutor, namely to use the standard of the 'reasonable military commander': Final Report to the Prosecutor (n 23) para 50.
[77] *Strugar* Trial Judgment (n 59) paras 214, 281, 295.

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homes destroyed'.[78] It did so, however, after first having found that there 'was no military installation, fortification or trench in the town on that day', nor were there reports of 'the presence of soldiers from the Bosnia-Herzegovina army'.[79] In such a situation without military objects, clearly, there would have been no need to refer to the proportionality of the attack.[80]

Similarly, in two cases involving crimes committed by Serbian forces in Kosovo – *Milutinović and Others* and *Đorđević* – the trial chambers refer on numerous occasions to the use of disproportionate and excessive force.[81] Yet none of these findings appear to follow from a proportionality analysis as elucidated by the *Galić* trial chamber. Understandably so, because these cases do not concern charges of unlawful attack, but rather deal with the murder of detained persons and the deliberate destruction of civilian houses. The reference to disproportionate and excessive use of force, albeit somewhat confusing, should thus be understood as generically referring to the way in which the Serbian forces used force and not its legal meaning pursuant to Articles 51 and 57 of Additional Protocol I.

The *Đorđević* trial chamber did discuss the principle of proportionality in reaction to submissions made by Đorđević's defence team. After setting out the law, the trial chamber simply noted[82] that the Serbian forces had used force

> in a way that produced grossly excessive civilian casualties including women and children, destroyed homes, crops and livestock, entire villages, and religiously and culturally significant property, and forced the displacement of hundreds of thousands of Kosovo Albanians over a period of less than three months.

Besides referring to the resulting damage of the overall Kosovo campaign rather than any anticipated damage, the trial chamber did not try to balance the casualties and damage to civilian objects against a possible military advantage. It made clear that it did not need to do so as '[t]he evidence weighs convincingly against a finding that these attacks were either proportionate or militarily necessary, even in those areas where there was a KLA presence'.[83] As such, in its view, no actual proportionality analysis needed to be made in this case.

As mentioned earlier, the *Galić* trial chamber extensively discussed the law relating to the principle of proportionality. Nevertheless, it applied the principle only once to the facts. It is suggested here, however, that this application was erroneous since in that situation the issue

[78] ICTY, *Prosecutor v Blaškić*, Judgment, IT-95-14-T, Trial Chamber, 3 March 2000 (*Blaškić* Trial Judgment) para 651. The defence claimed that the Bosnian-Croat troops 'attacked military targets and were always acting in response to an ABiH attack, thus meeting the requirement of proportionality'. It thus showed (para 514) a misunderstanding of what the principle of proportionality entails.
[79] ibid para 509.
[80] ibid para 507: the trial chamber does link the number of civilians killed to the alleged attack against the Bosnian Muslim military forces – ie, a military object – but appears to base itself only on the numbers of actual victims and refers to information known 'after the 16 April attack'.
[81] See, eg, ICTY, *Prosecutor v Milutinović and Others*, Judgment, IT-05-87-T, Trial Chamber, 26 February 2009, para 920; ICTY, *Prosecutor v Đorđević*, IT-05-87/1-T, Trial Chamber, 23 February 2011, paras 980, 2063–65, 2069.
[82] ibid para 2065.
[83] ibid.

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of proportionality could not in fact have arisen. The incident concerned a recreational football match in Sarajevo, held on a parking lot surrounded by tall buildings. The match, in which some members of the Bosnian Muslim forces took part, was watched by a crowd of approximately 200, consisting of both civilians and soldiers. Evidently, neither the soldiers nor the civilians were at the time directly participating in hostilities. Naturally, the soldiers themselves remained legitimate targets but, owing to the circumstances, it was not possible to see who was and who was not targetable. The trial chamber noted that none of the evidence suggested that the Serbian forces knew that soldiers were amongst the players and spectators at the football match, but went on to consider[84] that

> had the SRK troops been informed of this gathering and of the presence of ABiH soldiers there, and had [they] intended to target these soldiers, this attack would nevertheless be unlawful. Although the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, would clearly be expected to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete military advantage anticipated.

It would not have been necessary to make this observation. The Bosnian-Serb forces were not able to make a distinction between civilians and the soldiers, first, because they could not see the location that was being targeted[85] and, second, because of the means used.[86] Therefore, the group consisting of spectators and football players was targeted as a whole. The attack in itself was thus indiscriminate on that basis, irrespective of the anticipated incidental damage.

4.4 The Case of *Gotovina*

The first occasion on which the principle of proportionality formed – and, given the impending closure of the tribunal, the only time it will form – a key issue in a case before the ICTY was in *Gotovina*. However, the trial chamber's findings on targeting proved to be such a vital part of the case that on appeal, after quashing the trial chamber's finding on the indiscriminate nature of the attacks in question, the appeals chamber fully acquitted the two remaining accused. General Gotovina and his two co-accused were charged with having committed crimes during Operation Storm, a military campaign that took place in the summer of 1995. During this summer the Croatian army, Hrvatska Vojska (HV), in a matter of a few days, reclaimed the Krajina region of its territory from the self-proclaimed Republic of Serbian Krajina. The accused were charged with having orchestrated a campaign to drive the Serbs from the Krajina region. Part of that campaign formed attacks on Knin, Benkovac, Obrovac and Gracac (referred to in the judgment as

[84] *Galić* Trial Judgment (n 1) para 387.
[85] ibid.
[86] Namely, artillery firing mortar shells of 'at least 81 mm': ibid para 377.

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'the Four Towns'), which were charged as 'the shelling of civilians and cruel treatment [and] unlawful attacks on civilians and civilian objects'.[87]

4.4.1 THE 200-METRE RULE

The trial chamber was tasked with assessing the legality of the artillery attacks on the Four Towns. In discharging this task, it noted that it was well aware of the difficulties with which it was faced in assessing retrospectively these attacks.[88] It devised what has been referred to as the '200-metre rule' for assessing whether attacks were directed against military objects. The trial chamber also made a proportionality analysis in dealing with the attack on the supreme commander of Serbian Krajina. Unfortunately, however (at least in the view of the author), the trial chamber applied the proportionality balancing test only to consider the legality of this particular strike, and not necessarily in the best way possible.

Setting a standard?

In relation to the artillery campaign against Knin alone, the HV was found to have fired at least 900 rockets and shells on the city within two days.[89] Naturally, the accused claimed that all these projectiles were fired at legitimate targets. With regard to moving military objects, such as military personnel and tanks,[90] the trial chamber found that certain attacks could not be justified by reference to those objects.[91] At the same time, it was clear that military objects, which could be legitimately attacked, existed within the city.

Because the evidence indicated that the HV had prepared targeting lists that mentioned many of these objects and it thus appeared (at least prima facie) that the various strikes were directed at military objects, the trial chamber could therefore have assessed the legality of the strikes with reference to the principle of proportionality. However, it chose instead to evaluate whether the artillery had been aimed at legitimate targets. Doing this by reviewing the factual evidence of the actual impact of the strikes is obviously very difficult. Not every civilian building that was hit would need to have been a deliberate target. The trial chamber therefore reviewed the expert evidence about the accuracy of the artillery used by the HV and it 'consider[ed] it a reasonable interpretation of the evidence that those artillery projectiles which impacted within

[87] See ICTY, *Prosecutor v Gotovina, Čermak and Markač*, Judgment, IT-06-90-A, Appeals Chamber, 16 November 2012 (*Gotovina* Appeals Judgment) para 2.
[88] See, eg, *Gotovina* Trial Judgment (n 2) para 12, in which the trial chamber observed: 'In the context of a criminal trial, and the chaotic picture of the events on the ground, the trial chamber was necessarily cautious in drawing conclusions with regard to specific incidents based on any general impression'.
[89] ibid paras 1247–65, 1899.
[90] Referred to as 'opportunistic' or 'tactical' targets: ibid para 1907.
[91] The trial chamber considered that the HV could not reasonably have determined that attacking the area in which the moving objects were located would have offered a definite military advantage. The military object test contained in art 52(2) of Additional Protocol I therefore seems to have been conducted with respect to where the opportunistic targets would allegedly be located. It was thus not said that, eg, the Srpska Vojska Krajine (Serbian Army of Krajina) trucks and tanks themselves were not military objects: ibid paras 1907–08.

a distance of 200-metres of an identified artillery target were deliberately fired at that artillery target'.[92]

Applying this 200-metre rule to the evidence, the trial chamber found that too many shells and rockets had landed outside the 'legal' parameters. Consequently, the trial chamber found that the HV's shelling of Knin 'constituted an indiscriminate attack on the town and thus an unlawful attack on civilians and civilian objects'.[93] These findings have been heavily criticised by academics and by military lawyers[94] because 'Gotovina could not have known that his indirect fires would be judged after the fact by this impossibly stringent standard of accuracy'.[95] Moreover, it would upset the IHL framework 'by creating incentives for both attackers and defenders to choose means and methods of warfare that inevitably will increase the dangers of war for noncombatants in towns and cities'.[96] On appeal, the appeals chamber concluded that the trial chamber had erred in using the 200-metre rule as this standard was not based on the evidence it received.[97]

The critiques are not all justified, however. First, the trial chamber did not apply the 200-metre assessment to all situations. It had found in favour of the accused that certain locations could be considered military objects, even in some situations where it would be questionable whether the requirements for a military object were fulfilled. Furthermore, in situations where no evidence was available as to the objects being attacked, it had held that no review could be conducted.[98] Second, the critics consider the potential effect that the judgment could have on future military operations, whereas a trial chamber of the ICTY is required to determine the individual criminal responsibility of the accused in a particular case (for alleged crimes

[92] ibid para 1898. None of the experts, however, specifically referred to a 200-metre rule.
[93] ibid para 1911. Similar findings were made with regard to the attacks on Benkovac, Gracac and Obrovac: see ibid paras 1923–24, 1935–36, 1944, respectively.
[94] See, eg, Major General (ret) Walter Huffman, who holds that 'in the interests of justice, the coherent development of international humanitarian law, and the protection of innocent civilians in future wars, the Gotovina judgment should be set aside': Walter B Huffman, 'Margin of Error: Potential Pitfalls of the Ruling in The Prosecutor v Ante Gotovina' (2012) 211 *Military Law Review* 1, 2; and Emory Report (n 61).
[95] Huffman, ibid 5. Interestingly, one of the HV's targets, Milan Martić, was convicted by the tribunal for his ordering of the use of non-guided ammunition. Rather than being criticised for finding that cluster bombs constitute an indiscriminate weapon when used in cities, the *Martić* Trial Judgment was subsequently incorporated into the ICRC Study (n 38) and used to strengthen the call in favour of a ban on cluster munitions – a treaty which has since been concluded.
[96] Huffman, ibid 5.
[97] *Gotovina* Appeals Judgment (n 87) paras 60–61.
[98] For example, in relation to some towns and hamlets other than the 'Four Towns', as well as Donji Lapac, the trial chamber considered that even though the towns were not mentioned in the HV artillery orders – which appears to indicate that no (pre-determined) targets were present – it could not assess the lawfulness of these strikes as there was not enough evidence to show what the HV was firing at: see *Gotovina* Trial Judgment (n 2) para 1162. Also, with regard to certain strikes on Gracac, which were directed at some road intersections, the trial chamber considered the intersection a military object, presumably based on its location. Even though it observed that attacking the intersections, which could not be destroyed, would result in a minimal chance of offering any military advantage, the trial chamber was willing to find that the HV would have determined in good faith that firing at the intersections would have offered a definite military advantage: *Gotovina* Trial Judgment (n 2) paras 1931, 1946–47.

that took place in the past). Its findings do not have any binding effect – not even on other chambers within the same tribunal, let alone on other international and/or national courts.[99] States may give standing to the judgments and transfer certain findings, previously not part of treaty law or custom, into treaties or, by including it in their doctrine and acting accordingly, to the realm of customary international law. Unless this happens, the use of a 200-metre standard to consider the culpability of a Croatian general for his actions in a 1995 military operation will not, and should not, affect any current military operation involving the use of artillery.

It appears that the trial chamber, faced with evidence that suggested a campaign to evict the Serbian population from the Four Towns,[100] merely sought to find a way to determine retrospectively the intention of the attackers.[101] That the trial chamber never meant to relate exactly the 200 metres to the accuracy of the weapons used follows from the fact that artillery has a fault margin in the shape of an ellipse, and not a circle.

Be that as it may, this author also disagrees with the 200-metre rule, but mainly because he is not in favour of the assigning of *any* 'metre standard'. Mistakes are possible and shells may thus accidentally land outside a certain 'legitimate area'.[102] The assessment of the lawfulness of the strikes should be made instead on the basis of the information available to the attacker at the time, as well as the intent of the attacker. If, at the time of targeting, a 200- (or 400-) metre radius were to be applied, it would effectively create a free fire zone around targets in built-up civilian areas. In a small city such as Knin, stretching out over only a couple of square kilometres, the existence of a number of military objects within the city would effectively allow for the city to be targeted as a whole. Such an approach would be contrary to Article 51(5)(a) of Additional Protocol I, which lists as indiscriminate an attack 'which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects'. More importantly for the present discussion, creating a 'zone' of 200 metres around all military objects disregards the attacker's obligation to take proportionality into account. It essentially makes void any analysis of the expected incidental damage.

[99] See, eg, ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Trial Chamber, 30 November 2007, para 44; and ICC, *Prosecutor v Francis Kirimi Muthuara and Uhuru Muigai Kenyatta*, ICC-01/09-02/11, Decision on the appeal of Mr Francis Kirimi Muthuara and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 67(7)(a) and (b) of the Rome Statute', Appeals Chamber, 24 May 2012, para 37.

[100] Such as the Brioni meeting and the order to put Knin under fire: see *Gotovina* Trial Judgment (n 2) paras 1994 and 1893, respectively.

[101] In doing so, the expert evidence was not exactly incorporated in the 'method' applied. However, this could be compared with the situation where two coroners cannot agree on the time of death (and in any event cannot determine the exact moment when conducting their autopsy some time after the victim was killed) and whereby the time suggested by one coroner would lead to a conclusion that the accused could have been the murderer, whilst the time proposed by the other coroner would give the accused a valid alibi. It would then be in the discretion of the chamber to rely only on one of the two experts, or for itself to pick a time between the two suggested times of death; also if this time, albeit somewhat favourable to the accused, would not exonerate him based on his alibi.

[102] Just as shells that would be purposely fired at civilians can land in such an area surrounding a military object.

Consequently, this case provides a good example of the challenges involved in the adjudication of (alleged) conduct of hostilities violations, discussed above.[103] Rather than attempting to determine the accused's intent to attack civilians by looking at where the projectiles impacted, the trial chamber could have assessed the likelihood that the shells and rockets would impact on objects other than the legitimate targets. Using the reasonable commander standard as described in *Galić*, the trial chamber could then have considered whether the risk of causing excessive collateral damage was too high compared with the anticipated military advantage. But, as will now be discussed, the trial chamber made only one proportionality determination.

4.4.2 Finding on Proportionality: Attacks on Martić

The only occasion on which the trial chamber discussed whether an attack had been proportionate was in dealing with the attack on the political leader and supreme commander of the Serbian Army of Krajina, Milan Martić. It was satisfied that 'firing at his 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'.[104] In addition, the HV had also fired at a different location where it believed Martić to be present, referred to as 'R'. However, Martić's residence was located within a civilian apartment building, which was designated by the HV as a target as a whole.[105] Moreover, both locations were situated in a civilian residential area.[106] The trial chamber considered the expert evidence on accuracy, and on the blast and fragmentation radius of artillery weapons,[107] and held[108] that

> [a]t the times of firing, namely between 7:30 and 8 a.m. and in the evening on 4 August 1995, civilians could have reasonably been expected to be present on the streets of Knin near Martić's apartment and in the area marked R on P2337. Firing twelve shells of 130 millimetres at Martić's apartment and an unknown number of shells of the same calibre at the area marked R on P2337, from a distance of approximately 25 kilometres, created a significant risk of a high number of civilian casualties and injuries, as well as of damage to civilian objects. The trial chamber considers that this risk was excessive in relation to the anticipated military advantage of firing at the two locations where the HV believed Martić to have been present.

Curiously, as mentioned above, this was the only proportionality analysis of the attacks on the Four Towns made by the trial chamber, whilst the circumstances regarding the rest of the strikes were not substantially different. It merely used this finding as an 'indicative example' to support its conclusion that 'the HV paid little or no regard to the risk of civilian casualties and injuries

[103] See Section 3 above.
[104] *Gotovina* Trial Judgment (n 2) para 1899. In the view of the trial chamber, Martić's residence thus fulfilled the military object test pursuant to Additional Protocol I (n 7) art 52(2).
[105] ibid para 1193.
[106] ibid paras 1191, 1198, 1910.
[107] ibid para 1910.
[108] ibid para 1910. The trial chamber added (in a footnote) that its 'analysis in respect of the proportionality of the attack is informed by the relevant testimony of experts Konings and Corn and Additional Protocol I, Article 51'. However, neither expert's testimony dealt with the attacks on Martić.

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and damage to civilian objects when firing artillery at a military target on at least three occasions on 4 August 1995'.[109]

The trial chamber referred to a significant risk of incidental damage, but did not examine what the military advantage of taking out Martić would have been at the time of the attack.[110]

The Appeals Judgment

The appeals chamber criticised the trial chamber's finding that the attacks on Martić had been disproportionate, but did not overturn it. The appeals chamber, by a majority, held that the trial chamber's analysis that 'the attacks on Martić involved a lawful military target was not based on a concrete assessment of comparative military advantage, and did not make any findings on resulting damages or casualties'.[111] The majority thus voiced criticism, but did not clarify how the proportionality assessment should have been correctly applied.

The trial chamber's finding has also been criticised by military and academic experts for failing to apply a methodology in its proportionality analysis and to take proper account of Martić's value as a target.[112] In that light, it is interesting to consider the repeated claims by the US government that, when planning the operation resulting in the death of Osama bin Laden, the United States apparently also considered running a high-altitude bombing raid from B-2 bombers or launching a 'direct shot' with cruise missiles, but had ruled out those options because of the possibility of 'too much collateral' damage.[113] Notwithstanding the discussion of whether IHL actually applied to this mission, if this was indeed the case then surely the leader of Al-Qaeda was an extremely valuable target – well beyond the value that could be attached to merely harassing Martić, someone who commands an army that is not actually defending its positions.[114] When taking into account the view of the Obama administration, the criticism of the trial chamber that it undervalued the taking out of Martić appears to be unjustified.

It is not clear whether it lies within a trial chamber's discretion to determine, without hearing experts on the matter, whether with respect to a particular attack the military advantage was such

[109] *Gotovina* Trial Judgment (n 2) para 1910 and accompanying footnote.

[110] As also criticised by the Emory expert meeting: see Emory Report (n 61) 13. The Emory Report considered that 'the judgment seems to apply a wholly retrospective approach to proportionality and failed to accord proper weight to the information about the commander's intent or analysis at the time of the attack. A second shortcoming, linking directly back to the importance of the target's value, is that the judgment does not appear to consider the operational impact of attacking a target as significantly valuable as Martić': ibid 10.

[111] *Gotovina* Appeals Judgment (n 87) para 82. The majority noted 'that it need not consider Gotovina's assertion that the trial chamber erred in finding that the attack on Martić was disproportionate'.

[112] See Emory Report (n 61) 10, referring to Martić as a target of very significant value. The report states furthermore that 'almost any military commander would consider disrupting the ability of such a commander to influence the command, control, and communication of his forces during the decisive phase of an attack to be one of the highest priority targets. In the context of Operation Storm, Martić was perhaps the most valuable target in the city of Knin': ibid 9.

[113] See, eg, an interview with the then head of the CIA, Leon Panetta, in Massimo Calabresi, 'CIA Chief: Pakistan Would Have Jeopardized Operation' *Time*, 3 May 2011.

[114] See the Dissenting Opinion of Judge Carmel Agius in the *Gotovina* Appeals Judgment (n 87) para 21, noting that 'at least 900 projectiles fell on Knin in just one and a half days, and there are no findings of any resistance coming from the town'.

that it would not outweigh the incidental damage likely to be caused. The finding by the majority in *Gotovina* appears to indicate that the trial chamber's assessment fell short of what is required. However, in other cases, the appeals chamber's compositions seized of the respective cases (and the academic and/or military community) did not consider it problematic that the judges did not really quantify, or did not explain how they quantified, a non-legal notion that forms a critical part of the legal assessment. In *Galić* and *Dragomir Milošević*, for example, it was not considered problematic that those trial chambers, without being experts on the matter, determined whether conducting certain attacks on civilians and civilian objects resulted in the population of Sarajevo experiencing the 'extreme fear' that was necessary for it to be considered terrorised.[115]

Naturally, the majority's observation that no findings were made on 'resulting damages or casualties' is correct. However, the author fails to see how any findings on resulting damage or casualties would have assisted the trial chamber in its finding. Arguably, it could have strengthened its finding that 'civilians could have reasonably been expected to be present',[116] but evaluating the resulting damage is by no means necessary for a (retrospective) assessment of the proportionality of an attack.[117]

The majority also found that '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'.[118] Indeed, the attacks on Martić could not, without more, change the nature of the operation as a whole into an indiscriminate attack. But the trial chamber could have applied a proportionality analysis to more strikes. Unfortunately, the opportunity to clarify the use of the principle of proportionality in international criminal trials was not seized by either the trial chamber or the appeals chamber. The ICTY has thus not provided any guidance for the ICC, to which the discussion now turns.

5. Applying the Principle of Proportionality before the ICC

5.1 Article 8(2)(b)(iv) of the ICC Statute

The war crimes that fall within the jurisdiction of the ICC are specified in Article 8 of the ICC Statute in a limitative list.[119] The drafters of the ICC Statute quickly agreed upon the inclusion of the grave breaches of the universally ratified 1949 Geneva Conventions, but the content of Additional Protocol I, to which a significant number of states are not parties, was subject to

[115] In *Galić* Trial Judgment (n 1) the trial chamber heard expert evidence from two psychologists on the psychological impact that, eg, sniping can have on civilians, but it still had to determine for itself whether such impact would surpass the legal threshold of 'terror': see, eg, Ben Saul, *Defining Terrorism in International Law* (Oxford University Press 2006) 303–04.
[116] *Gotovina* Trial Judgment (n 2) para 1910.
[117] The proportionality assessment should be carried out prior to the attack. Any judicial review should therefore only consider the information available at the time of the attack (see above at Section 3.2).
[118] *Gotovina* Appeals Judgment (n 87) para 82.
[119] See William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 213.

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more discussion. Therefore, despite being acknowledged as a grave breach in Article 85 of Additional Protocol I, the launching of 'an indiscriminate attack affecting the civilian population or civilian objects, in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects',[120] was not included in the list of grave breaches under Article 8(a),[121] but found its way into Article 8(2)(b) of the ICC Statute[122] as a serious violation of the laws and customs applicable in international armed conflict:

> (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

The resulting provision has been the subject of academic criticism. Robert Cryer, for example, considers that the principle of proportionality has been 'particularly badly dealt with' in the ICC Statute. He reflects that 'proportionality is a concept that is difficult to apply, but that is no excuse for raising the threshold for liability'.[123] Didier Pfirter suggests, for example, that '[t]he drafters of the Rome Statute would not have intended the crime to be impossible to prosecute, but some of those drafting the elements clearly wanted to make it as difficult as possible'.[124] That indeed appears to be the case. Whether the crime is likely to be prosecuted before the court, and the problems with which those prosecuting the crime would be faced, will be discussed next.

5.2 THE LIKELIHOOD OF THE CRIME BEING DEALT WITH BEFORE THE ICC

It has been shown above that the ICTY, in all its 161 cases, has rarely dealt with the principle of proportionality in armed conflict. One may wonder then whether it is likely that the ICC would be seized of cases concerning charges under Article 8(2)(b)(iv). Given the prerequisite that an attacker needs to actually direct the attack at a lawful military target, the principle of proportionality is mostly relevant in cases that concern hostilities conducted by an army in possession of weaponry capable of making a distinction between military targets and civilian objects, and that generally aims to strike only the armed opponent. In situations where the civilian population as such is targeted, or when fighting is conducted with, for example, machetes or

[120] Additional Protocol I (n 7) art 85.
[121] William Schabas notes that the proposals for the ICC Statute originally did not include the grave breaches listed in Additional Protocol I. As such, the crime of disproportionate attack at first was not intended to end up in the Statute: Schabas (n 119) 197.
[122] The principle of proportionality is an 'established principle of the law of armed conflict' and is as such also included in ICC Statute (n 3) art 21(1)(b).
[123] Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005) 277.
[124] Didier Pfirter, 'Article 8(2)(b)(iv)' in Roy Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational 2001) 147, 150.

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Kalashnikovs, there is no place for a proportionality assessment. It is not in those situations that Article 8(2)(b)(iv) would be of relevance.

The ICC has not yet been seized of any conduct of hostilities cases similar to those of the ICTY. The *Katanga and Ngudjolo* pre-trial chamber did find it necessary, however, to address the principle of proportionality when it explained that a 'disproportionate attack' is '[t]he situation in which an attack is launched solely against a military objective, and in which the attackers are aware that such attack will or may cause incidental loss of life or injury to civilian persons or civilian objects'.[125] It continued that 'violation of the principle of proportionality in the provision of Article 8(2)(b)(iv) … is limited to punishing the very violation of the principle of proportionality'.[126] Despite claims to the contrary by the defence for Katanga, the principle of proportionality had nothing to do with the matter under review: the attack on Bogoro.[127]

However, Article 8(2)(b)(iv) may be of relevance to some of the situations that are subject to preliminary examination by the Office of the Prosecutor – for example, those relating to the 2008 Russia–Georgia War and the ongoing conflict in Afghanistan.[128] Furthermore, in 2010, the ICC Prosecutor announced that his office had opened a preliminary examination into two actions by North Korea 'to evaluate if some incidents constitute war crimes under the jurisdiction of the Court'.[129] The examination of one of these incidents should be short as it is difficult to see how the sinking with a torpedo of a South Korean warship,[130] a legitimate military object, can be a war crime. The other incident was 'the shelling of Yeonpyeong Island on the 23 November 2010 which resulted in the killing of South Korean marines and civilians and the injury of many others'.[131] This might well be an issue of an alleged disproportionate attack.

Attacks such as some of those in Operation Cast Lead, the drone attacks by the US and certain air strikes in Afghanistan, have been criticised for causing excessive collateral damage.[132] Notwithstanding that it is unrealistic that the states concerned will ever find themselves before the ICC, it appears to be these types of situation in which Article 8(2)(b)(iv) could play a role.

[125] ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, Pre-Trial Chamber I, 30 September 2008 (*Katanga* Confirmation Decision) para 374.
[126] ibid.
[127] ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Second Corrigendum to the Defence Closing Brief (Public Redacted Version), Defence for Mr Germain Katanga, ICC-01/04-01/07, Trial Chamber II, 29 June 2012, paras 851–57.
[128] Office of the Prosecutor of the ICC Press Release, 'Georgia Preliminary Examination: OTP Concludes Second Visit to the Russian Federation', 4 February 2011, ICC-OTP-20110204-PR625, and the overview at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor, stating that the ICC's Office of the Prosecutor is conducting preliminary examinations, eg, into the situations in Georgia and Afghanistan.
[129] See Office of the Prosecutor of the ICC Press Release, 'ICC Prosecutor: Alleged War Crimes in the Territory of the Republic of Korea under Preliminary Examination', 6 December 2010, ICC-CPI-20101206-PR608, http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/pr608.
[130] ibid.
[131] ibid.
[132] See, eg, Human Rights Watch, 'White Flags Death', 13 August 2009; and Afghanistan Independent Human Rights Commission, 'From Hope to Fear: An Afghan Perspective on Operations of Pro-Government Forces', December 2008.

5.3 DIFFICULTIES RESULTING FROM THE PROVISION AS INCLUDED IN THE ICC STATUTE

To prove that an accused has violated Article 8(2)(b)(iv) of the ICC Statute requires it to be shown that all the separate elements of the crime are fulfilled. However, the wording of the provision, as well as the language of the elements of crime,[133] make this a challenging task. The problematic parts of the provision will be discussed below.

5.3.1 ONLY IN INTERNATIONAL ARMED CONFLICTS

The first and major problem is that there is only Article 8(2)(b)(iv) and no 'Article 8(2)(e) equivalent' dealing with excessive incidental damage in non-international armed conflicts. The restriction only to international armed conflicts, for obvious reasons, severely limits this war crime. Once the 2010 amendments to Article 8(2)(e) (for poisonous weapons, gas and expanding bullets) enter into force,[134] the launching of an attack causing incidental damage will be the only war crime that is not also included for non-international armed conflicts.[135] Article 22 of the ICC Statute prohibits the analogous application of crimes listed under the heading of 'international armed conflict' to situations of non-international armed conflict.[136]

When dealing with a situation of alleged crimes conducted during the conduct of hostilities in a non-international armed conflict, the prosecution will thus only be able to bring charges for

[133] The Elements for Art 8(2)(b)(iv) are:

1. The perpetrator launched an attack.
2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated [footnote 36: The expression 'concrete and direct overall military advantage' refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict].
3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated [footnote 37: As opposed to the general rule set forth in paragraph 4 of the General Introduction, this knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of that value judgement must be based on the requisite information available to the perpetrator at the time].
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

[134] RC/Res.5 Amendments to Article 8 of the ICC Statute, adopted at the 12th plenary meeting on 10 June 2010.
[135] Arts 8(2)(xiv) and (xv) do not exist for non-international armed conflicts either, but given that these articles deal with 'the nationals of the hostile party', this is obviously not possible in such conflicts.
[136] ICC Statute (n 3) art 22(2). See Machteld Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerp 2002) 607–08.

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'[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities'.[137] The question arises whether, in the case of charges under Article 8(2)(e)(i), the court may still consider disproportionate attacks to establish that an intentional attack on civilians took place in the way that the ICTY did for indiscriminate attacks or direct attacks on civilians?[138] The fact that separate crimes have been included in Article 8(2)(b) of the ICC Statute[139] – namely intentionally directing attacks against civilians and civilian objects and intentionally launching a disproportionate attack – seems to indicate that this is not possible.[140] This could mean that attacks during, for example, the Syrian conflict that are directed by government forces against rebel strongholds (or vice versa) in the middle of cities, which have caused huge numbers of civilian casualties, would fall completely outside the ambit of Article 8.

Another interesting question would arise in the case of a requalification of the character of the armed conflict. In both *Lubanga* and *Katanga and Ngudjolo*, the pre-trial chambers initially qualified the armed conflicts concerned as being international in character and confirmed the charges accordingly – that is, under Article 8(2)(b) only. The trial chamber in *Lubanga* then requalified the situation in Ituri, at the time, as a non-international armed conflict.[141] In *Katanga and Ngudjolo*, the prosecution also sought recharacterisation under Regulation 55.[142] In these cases, the trial chamber and prosecution, respectively, considered requalification as non-problematic as the crimes charged also existed in respect of non-international armed conflicts.[143] However, if charges under Article 8(2)(b)(iv) were to have been confirmed, a problem would clearly arise. In addition, it could be problematic if a situation were to be requalified as an international armed conflict. No charges under Article 8(2)(b)(iv) would then have been brought. Although the language relating to attacks on civilians (Articles 8(2)(e)(i) for non-international armed conflicts and 8(2)(b)(i) for international armed conflicts) is identical, it is submitted here that in the case of a requalification no evidence of disproportionate attacks could be used to substantiate a charge under Article 8(2)(b)(i) since there would be a separate, more specific, crime that would cover such attacks.

[137] ICC Statute (n 3) art 8(2)(e)(i).
[138] See *Galić* Appeals Judgment (n 71) paras 133–34.
[139] In the case of international armed conflicts, now that the ICC Statute includes specific separate provisions as arts 8(2)(b)(i) (and arguably (iii)), and (iv), it is impossible to bring disproportionate attacks within indiscriminate attacks. The latter will generally be seen as more grave than the former, however. For a contrary view, see Olásolo (n 67) 87.
[140] On the other hand, ICC Statute (n 3) art 21(1)(b) allows the court to look at the principles of IHL.
[141] ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras 566–67.
[142] ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Prosecution's Closing Brief, 1 June 2011, paras 30, 59–60. The trial chamber has since severed the cases against Ngudjolo and Katanga and delivered its judgment in the case against Ngudjolo. However, in the *Ngudjolo* judgment, no findings (on the character of the armed conflict) are made because the acquittal was based on a lack of credible evidence.
[143] See, however, Natalie Wagner, 'A Critical Assessment of Using Children to Participate Actively in Hostilities in *Lubanga*: Child Soldiers and Direct Participation' (2013) 24 *Criminal Law Forum* (forthcoming).

5.3.2 'INTENTIONALLY LAUNCHING … IN THE KNOWLEDGE THAT …'

In *Galić*, the trial chamber stated that '[t]o establish the *mens rea* of a disproportionate attack the prosecution must prove … that the attack was launched wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties'.[144] However, as the *mens rea* standard of the ICTY diverges from that of the ICC,[145] this clarification need not be applicable. The attempts made in the Elements of Crimes to clarify the mental element for launching a disproportionate attack appear to have obscured rather than clarified the issue.[146] The third element states[147] that

> [t]he perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

A footnote adds that '[a]s opposed to the general rule set forth in paragraph 4 of the General Introduction, this knowledge element requires that the perpetrator make the value judgement as described therein'.

This element has been heavily criticised.[148] Michael Bothe considers the 'clarification' in the footnote to be 'highly problematic' as it 'would make the perpetrator, in a way, the judge in his own cause'.[149] If the attacker errs in the evaluation of the excessiveness of the damage or if an evaluation is absent, such a mistake would exclude the necessary intent.[150] The judges' evaluation would then become irrelevant. Moreover, the commander is usually the one who takes the ultimate decision to strike a certain target, but often he is advised by a targeting cell which consists, amongst others, of military lawyers, intelligence officers and planners, who make the evaluations.[151] Would this then exclude the liability of the commander? Not

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[144] *Galić* Trial Judgment (n 1) para 59.
[145] The ICTY, eg, includes recklessness, whereas there is disagreement about whether ICC Statute, art 30, includes the concepts of recklessness and/or *dolus eventualis*: see, generally, van Sliedregt (n 51) 112 and further.
[146] Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press 2003) 164–65.
[147] Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002, United Nations, Sales No E03V2 and corrigendum, Part IIB, 19.
[148] See, eg, Otto Triffterer, 'Can the "Elements of Crimes" Narrow or Broaden Responsibility for Criminal Behaviour Defined in the Rome Statute?' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Koninklijke Brill 2009) 394–97.
[149] Michael Bothe, 'War Crimes' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 400.
[150] See Triffterer (n 148) 396–97; see also Mark A Drumbl, 'Waging War against the World: The Need to Move from War Crimes to Environmental Crimes' (1998) 22 *Fordham International Law Journal* 120, 127–28, who notes that '[t]here is no liability for negligently or carelessly inflicting' excessive damage under art 8(2)(b)(iv).
[151] For a description of the process see, for example, the part of the US Army Field Manual that relates to targeting: Department of the Army, 'The Targeting Process', FM 3-60 (FM-6-20-10), November 2010, 7–10, http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm3_60.pdf.

surprisingly, Bothe views this part of the Elements of Crimes as a 'flawed interpretation of the notions of mistake of law and intent'.[152]

Knowledge and anticipating

In his expert report in the *Gotovina* case, Corn suggested that the criminal application of the proportionality rule could be compared to the common law concept of implied malice in murder.[153] Common law allows for the imputation of malice to a defendant who acts without the (express) intent to kill, but whose actions show a wanton disregard for the lives of others as the result of the risk created. Similarly, the proportionality rule attributes an improper purpose to an otherwise lawful attack based on the commander's disregard for the consequences of the risk created by the attack: the law imputes to the commander (implied) intent to engage in an indiscriminate attack.[154]

Corn formulated his analysis for a case before the ICTY, but the analysis assists in understanding criminal responsibility for violating the principle of proportionality in general. Causing excessive incidental damage is indeed a form of recklessness when attacking a lawful target. As Corn explains, the difference with a direct attack on civilians is in the intent. When translated into civil law terminology: *dolus directus* for the causing of civilian casualties vis-à-vis *dolus eventualis* for accepting that the casualties are likely to be excessive.[155] If the ICC Statute includes recklessness or *dolus eventualis*,[156] it appears that an attack that is launched against a military object within a civilian area, without having taken proper precautions, could also be brought as a crime of directly attacking civilians (Article 8(2)(b)(i)) with the attacker acting with *dolus eventualis*,[157] as well as under Article 8(2)(b)(iv). If it might be considered that holding someone accountable for such conduct under Article 8(2)(b)(i) would stretch the required

[152] Bothe (n 149) 400.
[153] ICTY, *Prosecutor v Gotovina, Čermak and Markač*, Defendant Ante Gotovina's Submission of Expert Report of Professor Corn pursuant to Rule 94 *bis*, IT-06-90-T, 30 June 2009, 7.
[154] ibid 12.
[155] Although recklessness or implied intent cannot be directly translated into *dolus eventualis*. See, generally, Kai Ambos, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 *Criminal Law Forum* 1, 21–22; and John D Van de Vyver, 'The International Criminal Court and the Concept of Mens Rea in International Criminal Law' (2004) 12 *Miami International and Comparative Law Review* 54, 57–64.
[156] Cassese criticises the drafters of the Rome Statute for not including recklessness, whilst Triffterer holds that art 30 includes *dolus eventualis*: see, respectively, Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *European Journal of International Law* 144, 153–54; and Otto Triffterer, 'The New International Criminal Law: Its General Principles Establishing Individual Criminal Responsibility' in Kalliopi Koufa (ed), *The New International Criminal Law* (Sakkoulas Publications 2003) 706. The ICC's case law has until now been ambiguous in its reasoning. The *Lubanga* pre-trial chamber included *dolus eventualis*, but rejected recklessness, whilst the *Bemba* pre-trial chamber rejected both (ICC, *Prosecutor v Thomas Lubanga Dyilo*, Decision sur la confirmation des charges, ICC-01/04-01/06, Pre-Trial Chamber, 29 January 2007, para 352; and ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Pre-Trial Chamber, 15 June 2009, para 363).
[157] The Commentary on Additional Protocol I observes that the grave breach included in art 85(3)(a) is committed when the attacker acted 'wilfully' and that 'this encompasses the concepts of "wrongful intent" or "recklessness"': *Commentary on API* (n 20) paras 3474 and 3476.

intent too far, surely it should fall within Article 8(2)(b)(iv); also in the event that the attacker does not possess *dolus directus* and is merely negligent, or accepts that excessive damage *may* occur.

5.3.3 '… AN ATTACK …'

What is to be considered an attack for the purposes of IHL, and more specifically for the purposes of the civilian population's 'general protection against effects of hostilities' – namely the section of Additional Protocol I that incorporates the principle of proportionality – is explained in Article 49 of Additional Protocol I. 'Attacks' are defined therein as 'acts of violence against the adversary, whether in offence or in defence'.[158] As explained above, this principle, as included in Additional Protocol I, deals solely with the conduct of hostilities. Blockades might qualify as an 'armed attack' for the purposes of the *jus ad bellum*, but – without more – cannot be considered an 'attack' under Article 49 of Additional Protocol I. Even if a blockade would have a disproportionate effect on the civilian population, it could not be prosecuted under Article 8(2)(b)(iv). Since collective punishments were not included in the list of war crimes,[159] this could result in limited options to bring war crime charges in a situation involving a (naval) blockade. Judge Kooijmans considered in his separate opinion of the Advisory Opinion of the ICJ in the *Construction of a Wall* case[160] that

> the construction of the wall should also have been put to the proportionality test, in particular since the concepts of military necessity and proportionality have always been intimately linked in international humanitarian law. And in my view it is of decisive importance that, even if the construction of the wall and its associated régime could be justified as measures necessary to protect the legitimate rights of Israeli citizens, these measures would not pass the proportionality test.

The foregoing makes clear, however, that the balancing as proposed by Judge Kooijmans is not the proportionality test as codified in Additional Protocol I and, without the use of violence, could not qualify as an attack for the purposes of Article 8(2)(b)(iv). This is another example of a situation that would be covered by the principle of proportionality in its broad scope, but would not fit into the format in which the principle has been incorporated in Additional Protocol I and the ICC Statute.

According to Article 49 of Additional Protocol I, the attacks referred to in the relevant section of the Protocol are attacks that take place on land, as well as those conducted from the air or the sea onto the land.[161] For the crime of causing excessive damage to civilians or to the natural

[158] Additional Protocol I (n 7) art 49(1).
[159] On collective punishments and the omission to include this crime in the ICC Statute, see Shane Darcy, 'Prosecuting the War Crime of Collective Punishment: Is It Time to Amend the Rome Statute?' (2010) 8 *Journal of International Criminal Justice* 29.
[160] (n 10) Separate Opinion by Judge Kooijmans, para 34.
[161] Additional Protocol I (n 7) art 49(3) reads: 'The provisions of this section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all

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environment, as included in the ICC Statute, it is not specified whether this crime can also be committed in the course of fighting that takes place between ships at sea or between aircraft in the skies. However, anyone accused of this crime would have a strong point when arguing that Article 8(2)(b)(iv) does not apply to such attacks. This is particularly relevant when considering the enormous damage that sea warfare can cause to the (marine) environment, such as oil spills.[162] This might therefore amount to a serious gap in the options to sanction such conduct as a war crime.[163]

5.3.4 '… WILL CAUSE …': IS THERE A RESULT REQUIREMENT?

The language of the ICC Statute is slightly ambiguous on this point. Its use of the wording 'will cause' appears to indicate that this crime requires a result, in the same way that Additional Protocol I criminalises an attack that 'will cause' a certain prohibited level of damage in Article 85. Any attack that would not lead to incidental damage could then only be charged as an attempt pursuant to Article 25(3)(f) of the ICC Statute. Indeed, this was the understanding of part of the Preparatory Commission that drafted the Elements of Crimes.[164]

However, the Preparatory Commission's negotiations resulted in Elements of Crimes that use the phrase 'the attack was such that it would cause' rather than 'will cause'. According to commentators such as Knut Dörmann, this is intended to reflect the majority view of the Commission that a particular result is not a prerequisite to the crime.[165] An attack that was 'launched', but because of, for example, a weapon failure did not result in the expected excessive incidental damage would fulfil the crime as it is included in the ICC Statute.[166] Be that as it may, as discussed above, the wording of the statute should prevail and it thus remains to be seen how the court would deal with the result requirement when seized of a case concerning charges under Article 8(2)(b)(iv).).

attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air'.

[162] Arguably, attacks from the air on objects at sea also do not fall within the definition of Additional Protocol I, art 49.

[163] Naturally, if a large oil spill affects the civilian population on land, the attack causing it would fall within Additional Protocol I, art 49, although such an effect on the civilian population would have to be proved in addition to the other elements. It means also that protection of the environment would again be linked to protection of the civilian population, whereas art 8(2)(b)(iv) in principle gives the environment a status that is not dependent on any damage to the civilian population (see further below at Section 5.3.6).

[164] Dörmann (n 146) 162.

[165] ibid.

[166] See, however, the *Katanga* pre-trial chamber which held: 'The Rome Statute includes such a violation of the principle of proportionality in the provision of 8(2)(b)(iv), which is limited to punishing the very violation of the principle of proportionality. In such a situation, the awareness of the perpetrators of the consequences of the attack is an objective element of the crime. … Conversely, the crime described in 8(2)(b)(i) of the Statute, with which Germain Katanga and Mathieu Ngudjolo Chui are charged, is a crime of mere action that does not require any factual consequences or any awareness of the perpetrators of the consequences of the attack': *Katanga* Confirmation Decision (n 125) para 374.

What level of result?

If a result is to be required, the next question would be what kind of result? Additional Protocol I requires that the attack should cause 'death, or serious injury to body or health', which is the same threshold as that required by the ICTY for an act to be a violation of the law and customs of war for the purposes of the ICTY Statute.[167] A grave breach, as included in Additional Protocol I, thus takes place also in those situations where only a few civilians are killed or seriously injured. The damage as a whole does not need to reach the level of the anticipated 'excessive' damage.

The ICC Statute contains no such clarification as to the required level of damage. It thus leaves open the argument that not only must injury or damage to the civilian population occur, but that it must also be 'clearly excessive'.[168] The use of the wording 'will cause' appears to indicate that the crime requires a result of some injury or damage.

Whereas the ad hoc tribunals mostly dealt only with events that occurred well in the past (some 10 to 15 years after the relevant events), the ICC, as a result of its statutory restrictions, may only consider relatively recent events. If a result requirement is needed, a quick investigation could have difficulty in determining the existence of incidental damage resulting from certain attacks. After all, it is certainly possible that the damage may only materialise after a certain time, particularly when dealing with an alleged clearly excessive attack on the environment.

5.3.5 '… LOSS OF LIFE OR INJURY TO CIVILIANS OR DAMAGE TO CIVILIAN OBJECTS …': WHAT COUNTS AS INCIDENTAL DAMAGE?

Modern technology not only allows for making a distinction between military and civilian objects, for example by means of using precision guided missiles, but it also allows for elaborate computer models and tests to calculate the expected collateral damage.[169] However, besides the fact that not all armed forces possess this technology, for a correct calculation of the collateral damage, it is necessary to know what should be counted as such damage. Some problems relating to the wording of the provision in the ICC Statute and the definition of, for example, civilians, will be discussed next.

Civilians

The ICC Statute does not specify who or what is to be considered as 'civilian' for the purposes of Article 8(2)(b)(iv). This term was discussed by the pre-trial chamber in *Katanga and Ngudjolo*,

[167] See *Tadić* Jurisdiction Decision (n 1) para 94.
[168] See Judith Gardam, 'Crimes Involving Disproportionate Means and Methods of Warfare under the Statute of the International Criminal Court' in Jose Doria, Hans-Peter Gasser and M Cherif Bassiouni, *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff 2009) 546.
[169] See Michael N Schmitt, 'Green War: An Assessment of the Environmental Law of International Armed Conflict' (1997) 22 *Yale Journal of International Law* 1, 59; for such models, see, eg, Amanda Humphrey, Judi See and David Faulkner, 'A Methodology to Assess Lethality and Collateral Damage for Nonfragmenting Precision-Guided Weapons' (2008) 29 *International Test and Evaluation Association Journal* 411, 411–19.

when dealing with alleged violations of Article 8(2)(b)(i) of the ICC Statute, which criminalises 'intentionally directing attacks against the civilian population as such or against individual civilians, not taking direct part in hostilities'. Although here, the additional specification is given that the victims should not have been directly participating in hostilities at the time of the attack, it does not, as with Article 8(2)(b)(iv), explain what is to be understood as '(a) civilian'. As the Elements of Crimes are also silent on this issue, the pre-trial chamber, in accordance with Article 21(1)(b), turned to IHL in determining who was to fall within the category of 'civilians'. The pre-trial chamber concluded that 'civilians' for the purposes of this article meant 'civilians not taking an active part in hostilities, or … a civilian population whose allegiance is with a party to the conflict that is enemy or hostile to that of the perpetrator'.[170]

This is a problematic finding. Clearly, a party to an armed conflict can violate IHL in its dealings with civilians whose allegiance is to the said party, or who could be regarded as neutral. Similarly, for the purpose of proportionality, the warring parties must take into account their 'own' civilians. If, for example, the ICC were to be seized of a case dealing with alleged disproportionate airstrikes as part of the International Security Assistance Force (ISAF) or Operation Enduring Freedom in Afghanistan, or if it were to consider actions by NATO as part of Operation Unified Protector in Libya,[171] and the trial chamber concerned were to apply the same view as the pre-trial chamber in *Katanga and Ngudjolo*, this would have far-reaching consequences. The civilian population in Afghanistan, which – mostly – does not support the Taliban, or the Libyans who were not in favour of Gaddafi, would not be included within the meaning of the word 'civilian' for the purposes of an indiscriminate or disproportionate attack. 'Neutral civilians', such as the personnel of (international) humanitarian or non-governmental organisations, should also be protected and considered within the determination of incidental damage, even though these persons are not aligned with any party to the conflict.

Similar problems with this finding could also arise in another case before the ICC. Notwithstanding the discussion of whether or not peacekeepers are civilians,[172] peacekeepers who are not engaged in any form of enforcement action, if protected, should be considered as civilians for the purposes of a proportionality assessment. *Banda and Jerbo* concerns an attack on the Haskinita camp of the African Union Mission to Sudan (AMIS).[173] The accused allegedly

[170] *Katanga* Confirmation Decision (n 125) para 266 (footnotes omitted). It could be argued that the pre-trial chamber's use of 'or' allows for the inclusion of individual civilians who are not taking a direct part and are not aligned to the adverse party. However, the wording of the rest of para 266 and the discussion by the pre-trial chamber at paras 267–69 shows that the chamber considers the allegiance requirement to be applicable also to such individual civilians.

[171] See, however, the limitation set by UNSC Res 1970(2011), 26 February 2011, UN Doc S/RES/1970 (2011), para 6.

[172] See, eg, Marco Sassòli, 'International Humanitarian Law and Peace Operations, Scope of Application Ratione Materiae' in Gian Luca Beruto (ed), *International Humanitarian Law, Human Rights and Peace Operations: Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law* (Institute of International Humanitarian Law 2009) 100.

[173] See ICC, *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-79-Red, Document Containing the Charges Submitted Pursuant to Article 61(3) of the Statute, 11 November 2010. The AMIS camp was situated in Darfur.

carried out an unlawful attack on personnel involved in a UN-mandated peacekeeping mission, for which a finding of guilt requires that the AMIS soldiers were neutral – that is, they showed no allegiance to, nor were aligned with a party to the conflict in Sudan. If, in another situation, the Office of the Prosecutor wanted to charge a person with launching a disproportionate attack that caused excessive incidental damage among peacekeepers, the *Katanga and Ngudjolo* pre-trial chamber reasoning would therefore be problematic indeed, as the peacekeepers would not be aligned to the opposing party.

Are all civilians equal?

Are all civilians equal when it comes to collateral damage estimates or are some civilians 'more equal than others'? As noted above, 'friendly' and 'neutral' civilians should also be taken into account when deciding on an attack. Whereas one would assume that all persons who are not combatants and do not, or no longer, take a direct part in hostilities would equally qualify as civilians, there are calls to consider certain individuals as counting less for the purposes of collateral damage, or – despite qualifying as civilians – not to be counted at all. Such individuals would, for example, be persons acting either voluntarily, but also involuntarily, as human shields,[174] and civilians who find themselves inside a military object such as a weapons factory.[175]

While certain activities may have the result that the civilians concerned are taking a direct part in hostilities, and for that reason do not have to be taken into account for the balancing test, the mere presence in a factory as a worker there does not constitute direct participation. It would reverse the development in IHL shortly after the Second World War that a general contribution to the war effort does not make the civilian population targetable as such. The presence of civilians does not prevent the targeting of (high-profile) military objects, but the risk to the lives of these civilians should nevertheless be taken into account when planning the attack. Failing to consider such civilians in the proportionality analysis would have the absurd consequence that no precautions would have to be taken that could prevent the death of these persons, which might be wholly unnecessary. This includes, by way of example, considering whether a strike can be carried out at a time when no workers are present.[176]

[174] See Amnon Rubinstein and Yaniv Roznai, 'Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality' (2011) 22 *Stanford Law & Policy Review* 93.

[175] The US Commander's Handbook on the Law of Naval Operations, for example, states that voluntary human shields and employees of an ammunition factory 'may be excluded from the proportionality analysis': US Department of the Navy and others, 'The Commander's Handbook on the Law of Naval Operations', NWP I-14, July 2007, para 8.3.2. See *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (Program on Humanitarian Policy and Conflict Research, 2009) 93, which explains that the majority of the experts participating in the drafting of the manual hold a contrary view and consider that such civilians should be part of the proportionality analysis, like any other civilian.

[176] For a similar view, see Christine Byron, 'International Humanitarian Law and Bombing Campaigns: Legitimate Military Objectives and Excessive Damage' (2010) 13 *Yearbook of International Humanitarian Law* 195.

Persons hors de combat

The incidental damage that would have to be proved to be clearly excessive is only damage to *civilians* and/or to civilian structures. It is submitted here that the principle of proportionality is broader than the rules that codified the principle in Additional Protocol I. The principle underlying Articles 52 and 57 of Additional Protocol I would include prohibited attacks on military objects that would cause excessive damage to any person who cannot be targeted directly under IHL: not only civilians but also persons *hors de combat*.

However, such attacks would not fall within Article 8(2)(b)(iv) of the ICC Statute. Although members of the armed forces may assume that they should not cause excessive collateral damage to enemy combatants *hors de combat* when taking targeting decisions, the prosecution of an act that had caused considerable casualties amongst persons *hors de combat*, that were foreseeable to the attacker, would be impossible before the ICC, as long as the object of the attack was a legitimate military target. This is so because the principle of proportionality, as codified in Articles 51(5)(b) and 57(2) of Additional Protocol I, requires commanders to make an assessment as to whether the military advantage to be obtained by an operation outweighs the possible damage to civilians and/or civilian objects that could result from this military action.[177]

The law is very strict on this issue. It is only *civilian* damage that has to be balanced against the military advantage.[178] Persons *hors de combat*, such as prisoners of war (POW) or wounded soldiers, have protected status under IHL; this does not mean, however, that they are civilians.[179] They therefore do not benefit from the 'protection' of the principle of proportionality. Imagine, for example, the following situation. A high-value military object, such as a commander of the opposing forces whose elimination would result in a significant military advantage, is in the direct vicinity of a POW-camp or field hospital. In such a situation, the number of persons *hors de combat* who possibly would be killed or (further) injured as a result of a strike would, based on the language of Additional Protocol I and the ICC Statute, not have to be taken into consideration by the attacking party.

The same applies to an attack on a building or location that would qualify as a military object which, at the moment of the attack, housed persons *hors de combat*. In both situations, even if the number of persons *hors de combat* are killed that, had the same number of civilians

[177] See, eg, Kolb and Hyde (n 6) 48; Dinstein (n 11) 59.

[178] Additional Protocol I (n 7) arts 51(5)(b) and 57(2) refer only to 'civilian life, injury to civilians, damage to civilian objects, or a combination thereof' that would be 'excessive in relation to the concrete and direct military advantage anticipated'.

[179] The *Strugar* trial chamber held, in relation to alleged war crimes, that persons *hors de combat* are 'members of the civilian population'. Its reference to the *Akayesu* (n 1) and *Blaškić* (n 78) Trial Judgments relates to the civilian population for the purposes of crimes against humanity: *Strugar* Trial Judgment (n 59) para 282. As noted by the trial chamber, the presence of, eg, persons *hors de combat* does not change the civilian nature of the civilian population, but in case of an attack that affects a group that is made up only, or mostly, of persons *hors de combat*, this argument does not apply.

been killed, would appear to be clearly excessive, no war crime charges could be brought under Article 8(2)(b)(iv) for ordering or for carrying out the attacks in question.[180]

In practice, commanders and planners might well include accidental injury to and death of POWs and wounded soldiers when weighing the military advantage to be gained by taking out a military object. Nonetheless, the fact that Additional Protocol I does not include persons *hors de combat* in the proportionality balance would be relevant in criminal proceedings, as crimes need to indicate clearly the prohibited conduct;[181] it would otherwise risk violating the principle of *nullum crimen sine lege*, which – as stated in Article 22(2) of the ICC Statute – prohibits the extending of the definition of a crime by analogy.[182]

Dual-use objects

Air campaigns such as that conducted by NATO against Serbia in 1999, and more recently Operation Odyssey Dawn against Gaddafi's regime in Libya, show that the target lists in modern operations may include numerous dual-use objects. A dual-use facility, such as a power plant that supplies both a city and a military headquarters, might – depending on the circumstances – qualify as a military target. Because a dual-use object also has a civilian component, its destruction will thus have an effect on civilians or civilian objects. This raises the questions of whether, and how, such effects should be considered in the proportionality analysis. Shue and Wippman argue convincingly that for estimating the expected incidental damage the effects on civilians or civilian objects should be taken into account.[183] They use the example of an attack on a power plant supplying the military that is situated right next to a power plant that provides electricity only for civilian structures versus a situation where there is only one power plant providing electricity for both. In the former situation, it is evident that the power plant providing electricity for civilians would have to be taken into account as possible incidental damage when planning an attack. In the latter situation, it is not as clear, but it appears reasonable that the consequences for the civilian population should also be taken into account in the latter situation.

However, the issue of dual-use objects is far from settled. Paolo Benvenuti, for example, observed that, according to the Final Report to the Prosecutor, the attack on the Serbian Radio and Television building (RTS), in which 16 civilians were killed, had two intentional goals: the primary military goal, and a secondary non-military goal of influencing public opinion in Serbia. In his view, the civilian casualties that constituted 'collateral damage' thus appear to

[180] This problem does not arise with regard to other crimes within ICC Statute (n 3) art 8, that could potentially affect persons *hors de combat*. Those paragraphs refer to crimes committed against protected persons (art 8(2)(a)), persons in the power of the adversary (art 8(2)(b)(x)), or 'protected person' (art 8(2)(b)(xxiii)), and thus include POWs/persons *hors de combat*.

[181] Antonio Cassese, *International Criminal Law* (Oxford University Press 2003) 14.

[182] ICC Statute (n 3) art 22(2) states that '[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted'.

[183] Henry Shue and David Wippman, 'Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions' (2002) 35 *Cornell International Law Journal* 559.

have been caused wilfully.[184] Ian Henderson, on the other hand, considers that as long as collateral damage is proportional, all feasible measures are taken to minimise it, and Article 57(3) of Additional Protocol I is complied with, 'there is nothing actually unlawful in that particular collateral damage [is] being considered desirable or beneficial by the attacker'. He adds that it is morally dubious to do so, and that the 'benefit' cannot be factored into the military advantage for the balancing test.[185]

Any chamber required to determine the legality of strikes against such objects will therefore have the challenging task of determining the state of the law in this respect.

Adding up?

One author 'wonders whether civilian casualties must be jointly counted with the harm caused to civilian objects'?[186] The use of 'or' could be taken to indicate the disjunctive; this would not necessarily be contrary to the general understanding of legal terminology.[187] But since Additional Protocol I, which forms the basis for this article of the ICC Statute, specifically mentions 'incidental loss of civilian life, injury to civilians, damage to civilian objects, *or a combination thereof*',[188] there appears to be a strong indication to count the wounded and dead civilians together with damage to civilian objects.[189]

However, the second part of Article 8(2)(b)(iv) is based on a separate article of Additional Protocol I, which is found in a different part of the Protocol.[190] The 'or a combination thereof' as mentioned in the Protocol therefore does not extend to this article dealing with the natural environment. Does this then mean that an attacker has to make two separate judgments: one with respect to the expected injury to and death of civilians and damage to civilian structures, and another for the expected damage to the natural environment? Similarly, would the chamber, in assessing whether a violation has taken place, have to separate the two types of collateral damage, even if an attack was expected to result in both? According to the present author, the collateral damage should be seen as a whole. After all, it is that which does not qualify as a military objective that is protected by the principle of proportionality. Any effect on entities other than those which can legitimately be targeted should be taken into account when planning the attack.

[184] Paolo Benvenuti, 'The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (2001) 12 *European Journal of International Law* 509.
[185] Henderson (n 19) 198–99.
[186] Olásolo (n 67) 158.
[187] Black's Law Dictionary notes that 'or' is a '"disjunctive" particle used to express an alternative or to give a choice of one among two or more things'. However, it also notes that '[i]n some usages, the word "or" creates a multiple rather than an alternative obligation': *Black's Law Dictionary* (6th edn, West Publishing 1990).
[188] Additional Protocol I (n 7) arts 51(5)(b) and 57(2)(b) (emphasis added).
[189] According to Christine Byron, this also follows from the *Blaškić* Trial Judgment (n 78) para 651: see Byron (n 176) 202.
[190] Art 35(3) is in 'Part III. Methods and Means of Warfare Combatant and Prisoners-of-War', whilst arts 51 and 57 are in 'Part IV. Civilian Population' of Additional Protocol I (n 7).

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5.3.6 '… OR WIDESPREAD, LONG-TERM AND SEVERE DAMAGE TO THE NATURAL ENVIRONMENT …'

Civilian objects are all those that do not qualify as military objects – those that do not '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'.[191] Although parts of the natural environment could thus potentially be seen as a military object, the natural environment itself would have to be considered as a civilian object or, at least, to be made up of civilian objects. Indeed, the ICRC Study found that the natural environment is considered to be a civilian object and that, as such, it is protected in the same way as other civilian objects.[192] Listing separately the natural environment and civil objects in Article 8(2)(b)(iv) would thus not have been necessary.

Notwithstanding the foregoing, the separate mention of the natural environment (and thus explicit recognition of the existence of individual criminal responsibility for attacks that cause excessive damage to the non-human environment) makes this the first ecocentric war crime in the otherwise anthropocentric war crimes law.[193] As such it represents a significant advance for international humanitarian and criminal law.[194] At the same time, Article 8(2)(b)(iv) is a step back from what is prohibited under customary law and under Article 35(3) of Additional Protocol I, which prohibit all attacks directed against the natural environment, and not just those that would result in excessive damage.[195]

The drafters, however, appear to have based the second part of Article 8(2)(b)(iv) on Additional Protocol I.[196] As with the Protocol, it uses the conjunctive 'and' in the phrase 'widespread, long-term and severe damage', whereas the main IHL treaty dealing with the environment – the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)[197] – refers to 'widespread, long-lasting or severe effect'.[198] The drafting history of Additional Protocol I, and the implementation of ENMOD in, for example, military manuals, indicates a very high threshold of damage. 'Long-term' as used in Additional Protocol I was envisaged as being damage measured in decades,[199] and although 'long-lasting' in ENMOD would (merely) require an effect lasting for a few months or a season,

[191] Additional Protocol I (n 7) arts 52(1) and (2); see also rules 8 and 9 of the ICRC Study (n 38).
[192] Jean-Marie Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 87 *International Review of the Red Cross* 857, 191.
[193] The International Law Commission draft actually proposed a purely anthropocentric crime as it limited the damage to the environment to what 'gravely prejudice[s] the health or survival of the population': see Jessica C Lawrence and Kevin Jon Heller, 'The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute' (2007) 20 *Georgetown International Environmental Law Review* 61, 68.
[194] ibid 72.
[195] Cryer (n 123) 272.
[196] Dörmann (n 146) 166.
[197] (entered into force 5 October 1978) 1108 UNTS 151.
[198] ENMOD, art 1(1).
[199] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, CDDH/215/Rev.1, Volume XV, 1978, 268–69; see also UN Doc A/48/269, 9.

'widespread' as contained in this treaty would be 'several hundred square kilometres'.[200] Even if ENMOD is taken as a standard, the conjunctive phrasing in Article 8(2)(b)(iv) would still require a very significant amount of damage.

Estimates of the expected environmental damage are very difficult to make, however.[201] Naturally, with regard to 'long-term', an additional challenge arises for the prosecution: when can charges be brought for causing such damage to the natural environment?

In spite of the problems highlighted above, the high threshold of Article 8(2)(b)(iv) is likely to be fulfilled when one particular means of warfare is employed: the use of nuclear weapons and the subsequent 'fall-out' would have an impact on the environment that would cover very large areas and last for many years.[202] The use of these weapons would appear to fulfil the damage requirements and, for this reason, Article 8(2)(b)(iv) could be useful in the prevention of the use of such weapons.[203]

5.3.7 '… CLEARLY EXCESSIVE …'

The ICC Statute added 'clearly' to the phrasing of Additional Protocol I, which only uses 'excessive'.[204] This raises the threshold for damage to fall within Article 8(2)(b)(iv), although – as William Boothy considers – 'the words "clearly" and "overall" may well reflect the basis on which individual states have ratified [Additional Protocol] I'.[205]

The addition appears to be intended to make sure that only obvious cases of disproportionate attacks are punished, and it has been interpreted as such by the Office of the Prosecutor when looking into alleged breaches of the proportionality principle by British forces in Iraq.[206] However, it also adds to the difficulty of bringing charges for such attacks, especially since the ICC Statute already has a certain threshold built in with respect to war crimes. Article 8 grants the court jurisdiction over war crimes 'in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes'. This phrase found its way into the ICC Statute as a compromise between the United States, who wanted to set the threshold very high for the court's jurisdiction over war crimes, and most of the other delegates at the Rome conference, who wanted no such limitation.[207] The wording 'in particular' appears to serve as guidance for the prosecutorial policy and is not an absolute

[200] See Mark A Drumbl, 'Waging War against the World: The Need to Move from War Crimes to Environmental Crimes' (1998) 22 *Fordham International Law Journal* 122, 127–28; see further Schmitt (n 169) 82.
[201] ibid 59.
[202] See, generally, Julian P Robinson, *The Effects of Weapons on Ecosystems* (United Nations Environment Programme, Pergamon Press 1979).
[203] Lawrence and Heller (n 193) 83.
[204] See Additional Protocol I (n 7) arts 51(5)(b), 57(2)(b) and 85(3). The ICRC's Commentary to Additional Protocol I substitutes the word 'excessive' for 'extensive' to indicate that extensive civilian deaths or damage to civilian objects would never be justified by a perceived military advantage. However, the Commentary's use of the word 'extensive' is criticised by, inter alia, Anthony Rogers for negating the balancing process inherent in the idea of proportionality: Rogers (n 9) 18.
[205] William H Boothby, *The Law of Targeting* (Oxford University Press 2012) 97.
[206] ICC Office of the Prosecutor, Letter to Senders concerning the Situation in Iraq, 9 February 2006, 5–7, http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.
[207] See Schabas (n 119) 259–61.

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requirement. Rightly so, as this would collapse the definition of war crimes into that of crimes against humanity and would result in the prosecution having to prove these additional elements, which are not present in the customary law based on which the jurisdiction over the offence was asserted.[208]

5.3.8 '… IN RELATION TO THE CONCRETE AND DIRECT OVERALL MILITARY ADVANTAGE …'

In *Gotovina*, the majority of the ICTY appeals chamber made clear that, in its view, the trial chamber should have assessed what the actual military advantage of taking out Martić would have been before finding that firing at locations where he was believed to be present was declared disproportionate. However, how can a court determine what the military advantage of an attack was if the question of what is to be considered a military advantage is still open to discussion? For example, no agreement exists whether force protection may be included in the equation (on the side of military advantage).[209] The judges would thus be faced with a daunting task when asked to determine whether a reasonable commander could have foreseen that the expected incidental damage would be excessive in comparison with the anticipated military advantage.

Before the ICC, the reasonable commander standard, as put forward by the *Galić* trial chamber, does not apply. Therefore, it is not the judges who need to make the determination. They need only to review whether the accused made such a determination. However, the accused would have to have known, at the time, how to calculate the military advantage.

Direct and *overall*

As mentioned above, in Henderson's view certain collateral damage may be desired by the attacker and this would not be unlawful, but this cannot be factored into the military advantage for the balancing test. The latter is, of course, true. It is only *direct* military advantage that may be considered and the influence of any public opinion, as a result of the collateral damage, would only be *indirect*.

Besides the difference between direct and indirect military advantage, a temporal difference can be made between advantage that occurs immediately – for example, because the air defence system that was targeted has been destroyed – and advantage that only materialises at a later time and/or in a different place. Whilst 'direct' appears to refer only to the former, the Elements of Crimes indicate that the latter should also be included. The Elements state in a footnote that the 'advantage may or may not be temporally or geographically related to the object of the attack'. This explains why the word 'overall' was added to the language used in Additional Protocol I.[210]

[208] See Cryer (n 123) 268.
[209] Australia, Canada and New Zealand have stated that, in their view, the term 'military advantage' includes the security of the attacking forces: see ICRC Study (n 38) commentary to 'Rule 14. Proportionality in Attack' at 'Interpretation'. Furthermore, see, eg, Fenrick (n 23) 548–49 for a view that force protection (or the security of the attacking force) should not be included; and Henderson (n 19) 203–06 for the view that this can be included in the military advantage.
[210] Dörmann (n 146) 163.

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According to the ICRC, however, the addition of 'overall' should not be seen as changing existing law and the fact that 'a particular target can have an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself' was already included in the language of Additional Protocol I.[211] After reviewing various sources, Dörmann concludes that the broader purpose of a particular military operation that consists of various individual actions may be taken into account in assessing a potential target's military value.[212] In practice, this will then require the commander to claim, afterwards, that he considered the military advantage of the operation as a whole to be such that it would allow for the expected incidental damage to arise out of the specific actions for which he was responsible.

Comparing apples and oranges

If it could be determined what the military advantage of a certain attack or operation would be, that advantage would then have to be balanced against the expected incidental damage. This is, yet again, a challenging task. No calculation model exists that equates the number of civilian casualties or destroyed houses against a certain level of military advantage. The destruction of a command and control centre would certainly offer the attacker a significant military advantage, but how many civilian casualties would amount to proportionate incidental damage? Five, ten, twenty? Is the life of a combatant worth the same as that of a civilian? And what about the value of a military object such as an air defence system? These questions illustrate the challenges that commanders and judges alike will be faced with when attempting to balance the anticipated military advantage and incidental damage.

5.4 Collection of Evidence

Establishing beyond reasonable doubt that a crime under Article 8(2)(b)(iv) has been committed requires the prosecution to bring before the judges the necessary evidence for the chamber to be able to reach such a verdict. The collection of evidence in a case of this kind, however, may be very difficult. To obtain information about the knowledge of the accused at the time of launching the attack about the possible outcome of the attack would require (internal) documents or information from data collectors or insider witnesses who were present or aware of the circumstances in which the decision to launch the attack was taken.[213] However, as opposed to, for example, the ICTY,[214]

[211] ICRC, 'Paper submitted to the Working Group on Elements of Crimes of the Preparatory Commission for the International Criminal Court', 13 July 1998, UN Doc A/CONF.183/INF/10 (1998).
[212] Dörmann (n 146) 171–73.
[213] See also Cryer (n 123) 278–79.
[214] See ICTY, *Prosecutor v Gotovina, Čermak and Markač*, Decision on Prosecution's Application for an Order pursuant to Rule 54*bis* Directing the Government of the Republic of Croatia to Produce Documents or Information, IT-06-90-T, 26 July 2010, in which the trial chamber sets out the problems that the prosecution was faced with when trying to obtain documents from the Croatian government. See also ICTY, *Prosecutor v Blaškić*, Judgment, IT-95-14-A, Appeals Chamber, 29 July 2004, para 4.

the ICC does not have subpoena powers.[215] Göran Sluiter wonders, in this regard, 'how any criminal court could function with a permanent and structural absence of subpoena powers'.[216]

The prosecution is thus faced with an enormous challenge in obtaining documentary or insider evidence. Evidence can, of course, be obtained by other means. In some of the cases before the ICTY, the prosecution was able to tender UN Protection Force (UNPROFOR) intercepts. The peace forces had collected thousands of messages sent between various parts of, for example, the Bosnian Serb Army (VRS). In *Krstić*, for example, the trial chamber established the *mens rea* of the accused on the basis of such intercepts.[217] Millions of documents have been made public by Wikileaks and many of those relate to military operations, including those in Iraq and Afghanistan.[218] If these documents could be authenticated by a witness testifying to that extent, they can provide a wealth of information on targeting decisions. But documents that are relevant for the attacks concerned would not be made public in all situations through, for example, Wikileaks; nor will it be easy to find witnesses who are able and willing to testify about the authenticity of the documents, also in light of the aforementioned absence of subpoena powers.

5.5 APPLYING ARTICLE 8(2)(B)(IV) TO NON-MEMBER STATES

When the United Nations Security Council refers a situation in a state that has not ratified the ICC Statute, the ICC basically acts as a mini ad hoc tribunal[219] based on Chapter VII of the UN Charter, in much the same way as the ICTY and ICTR were, and are still, acting.[220] The present author submits that the ICC – when prosecuting alleged crimes that occurred on the territory of non-state parties and are allegedly committed by nationals of a non-state party that has not ratified Additional Protocol I[221] – will have to consider whether the alleged crime under Article 8(2)(b)(iv) is

[215] On this issue, see Göran Sluiter, '"I Beg You, Please Come Testify": The Problematic Absence of Subpoena Powers at the ICC' (2009) 12 *New Criminal Law Review* 590; and Göran Sluiter, 'Appearance of Witnesses and Unavailability of Subpoena Powers for the Court' in Roberto Bellelli (ed), *International Criminal Justice: Law and Practice from the Rome Statute to Its Review* (Ashgate 2010) 459, in which he observes that '[o]ne of the most puzzling aspects of the ICC's legal edifice is the lack of subpoena powers in relation to witnesses'.

[216] Sluiter, 'Appearance of Witnesses', ibid 459.

[217] Patricia Waldt, 'General Radislav Krstic: A War Crimes Case Study' (2003) 16 *Georgetown Journal of Legal Ethics* 445 (Waldt sat on the bench for this case). Also the trial chamber relied on numerous UNPROFOR intercepts in ICTY, *Prosecutor v Popović and Others*, Judgment, IT-05-88-T, Trial Chamber, 10 June 2010, paras 64–66, 294, 318, 564.

[218] See, eg, the charge sheet in *United States v Bradley Manning* at http://www.washingtonpost.com/wp-srv/lifestyle/magazine/2011/manning/manning_charges.pdf.

[219] Similar to the 'real' ad hoc tribunals, the ICC's jurisdiction would be specifically instituted for one situation or one armed conflict. A similar situation will occur if a national of a non-state party were to find him/herself on trial before the ICC as a result of a declaration lodged by a non-state party with the Registrar (based on ICC Statute, art 12(3)) as the non-state party thereby accepts the ICC's jurisdiction over the alleged crime after the said crime allegedly occurred.

[220] It was the appeals chamber of the ICTY itself that – in a decision that was afterwards not disputed by the international community – concluded that 'the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41': *Tadić* Jurisdiction Decision (n 1) para 33.

[221] Arguably this should also be done when a member state has not incorporated the ICC Statute into national law and has not ratified Additional Protocol I.

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actually punishable by the ICC. The author holds, therefore, that the ICC should, in a similar fashion to that of the ICTY, apply the so-called '*Tadić* principles' to establish jurisdiction.[222] These 'principles' are the four conditions that, according to the appeals chamber of the ICTY, must be met in order for criminal conduct to fall within the scope of Article 3 of the ICTY Statute.[223]

Given, as observed above, that alleged violations of the proportionality principle to be brought before the court are likely to be linked to developed states that have the capability of using modern technology – several of which, such as the United States and Israel, have not ratified Additional Protocol I – the scenario of the crime of proportionality being applied in relation to non-states parties is not merely hypothetical.[224]

In such situations, there has been no prior consent by the relevant state to be bound by the ICC Statute and to the ICC exercising jurisdiction over its nationals, or over other individuals perpetrating crimes on its territory. The ICC Statute would thus be applied 'retroactively'[225] to nationals (or individuals on the territory) of non-states parties.[226] Absent national criminal law implementing the ICC Statute, the court's jurisdiction would have to be established on the prohibition of the relevant crimes forming part of customary international law.[227]

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[222] As was first done by the ICTY in *Tadić*, see below. In his report on the proposed ICTY Statute (n 43), the UN Secretary-General had already stated that 'the application of the principle *nullem crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all states to specific conventions does not arise': Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc S/25704, 34.

[223] These conditions are as follows:

(i) the violation must constitute an infringement of a rule of international humanitarian law;
(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met …;
(iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim …;
(iv) the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

With regard to (ii), the appeals chamber considered that 'the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law': *Tadić* Jurisdiction Decision (n 1) paras 94 and 143.

[224] The Office of the Prosecutor of the ICC has initiated a preliminary investigation into situations in Afghanistan, which in part concerns actions by the US. A preliminary investigation has also been initiated into the 2009–10 Gaza War (Operation Cast Lead) involving Israel and Palestine: see ICC, Office of the Prosecutor, 'Communications, Referrals, and Preliminary Examinations', http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/decision%20not%20to%20proceed/palestine/Pages/palestine.aspx.

[225] ICC Statute (n 3) art 24 (non-retroactivity *ratione personae*) only deals with conduct prior to the entry into force of the statute.

[226] Leena Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 *European Journal of International Law* 543, 567.

[227] ibid.

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Although the ICC Statute includes a set of war crimes that, to a large extent, are customary, it also includes crimes that may be considered as treaty crimes (the crime of attacking peacekeepers, for example), or the customary status of which is debatable in the case of a non-international armed conflict. The foregoing is irrelevant, however, when it involves crimes allegedly committed in a state party. Instead, the customary status of the crimes becomes very relevant in the above situations with regard to crimes allegedly committed in a non-member state or by citizens of such a state. It would thus make sense for the trial chamber seized of a case dealing with such a situation to apply the *Tadić* principles in order to establish the ICC's jurisdiction over the alleged crimes.

Many authors,[228] and indeed, quite possibly also a (pre-)trial chamber of the ICC, might pass over this jurisdictional question relatively easily because they may consider the crimes section of the ICC Statute to reflect customary international law. However, while many of the crimes listed under Article 8 of the ICC Statute are violations of IHL for which individual criminal responsibility undoubtedly exists under customary international law,[229] there are certain crimes which are not reflective of customary law[230] – or at least were not in 1998.[231]

It is therefore submitted that in those cases where jurisdiction is based on a retroactive application of the ICC Statute, it would be most appropriate if the (pre-)trial chamber seized of the case were to pronounce on this issue and apply the *Tadić* principles, or its own ICC version of the principles, in order first to establish its jurisdiction before dealing with the substance of the case;[232] the same is true when the alleged crimes are not derived from the Additional Protocols or treaties that are not universally ratified. It is submitted, too, that the court should do so even in those cases where this issue is not raised by the defence. The appropriate moment would appear to be the confirmation

[228] Amongst those who consider the crimes in the ICC Statute to be reflective of customary law is the former chairman of the Rome Conference and first president of the ICC, Philippe Kirsch: see Philippe Kirsch, 'Customary International Humanitarian Law, its Enforcement, and the Role of the International Criminal Court' in Larry Maybee and Benarji Chakka (eds), *Custom as a Source of International Humanitarian Law: Proceedings of the Conference to Mark the Publication of the ICRC Study 'Customary International Humanitarian Law'* (International Committee of the Red Cross 2006) 79, 80. Others include Werle (n 39); Herman von Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International 1999) 79, 126.

[229] Such as the grave breaches of the Geneva Conventions of 1949 listed in art 8(2) of the ICC Statute: see, eg, Jean-Marie Henckaerts, 'The Grave Breaches Regime as Customary International Law' (2009) 7 *Journal of International Criminal Justice* 683.

[230] Leila Sadat states that the 'delegates were not prepared to accept wholesale that each and every definition adopted was perfectly reflective of custom': Leila Sadat, 'Custom, Codification and Some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute' (2000) 49 *De Paul Law Review* 916. William Schabas considers that 'while the correspondence with customary international law is close, it is far from perfect': William Schabas, *An Introduction to the International Criminal Court* (2nd edn, Cambridge University Press 2004) 28. Similarly, Leena Grover submits that 'Articles 6, 7, and 8 of the Rome Statute … are not completely exhaustive of custom and may depart from custom in places': Grover (n 226) 568. Also, the appeals chamber of the ICTY has this view of the customary nature of the ICC Statute: *Prosecutor v Furundzija*, Judgment, IT-95-17/1-T, Appeals Chamber, 10 December 1998, para 227.

[231] ICC Statute (n 3) art 10 has the effect of insulating the statute from subsequent customary law developments.

[232] See, in support, Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *European Journal of International Law* 144, 151. Cassese appears to be of a similar view when he notes that the ICC for certain crimes 'would first have to establish (i) whether under general international law such [conduct] … is considered a breach of international humanitarian law of armed conflict, and in addition (ii) whether under customary international law such a breach would amount to a war crime'.

decision by a pre-trial chamber on the prosecution's document containing the charges against one or more individuals. The ICC's practice to date, however, shows that this is not being done at that stage of the proceedings.[233] It remains to be seen whether at a later stage of the proceedings the trial chambers or appeals chamber of the court will pronounce on this matter.

This is another challenge the court would be faced with when seized of a case concerning Article 8(2)(b)(iv) charges. Together with the other challenges mentioned above, it shows how difficult it would be to prosecute someone for launching an attack that would result in excessive collateral damage. Without changes to the article in its current form it would be an almost unachievable task. The concluding remarks, to which the discussion now turns, propose some of the changes that could be made to create a workable criminalisation of violations of the principle of proportionality.

6. CONCLUDING REMARKS

The principle of proportionality is one of the core principles of international humanitarian law and forms an important part of the law of targeting. Although the ICTY has dealt with various conduct of hostilities cases that included alleged violations of the principle, it has been shown above that the tribunal has only once, in *Gotovina*, actually applied the balancing test on which this principle is based: weighing the anticipated military advantage against the possible incidental damage. This single application of the principle to the facts of the case has been criticised by academics and military lawyers, as well as by the appeals chamber. And while not explicitly overturning the trial chamber's finding, the appeals chamber nevertheless expressed its discontent with the trial chamber's reasoning. The foregoing illustrates the challenges in applying the principle of proportionality in retrospect, during (international) criminal trials.

This article has also shown that it would be extremely difficult to charge someone before the ICC who allegedly has carried out one or more attacks that were expected to cause excessive incidental damage. In order to effectively be able to rely on this important principle of humanitarian law as a retrospective enforcement mechanism, it would therefore be advised that the ICC Statute, as well as the Elements of Crimes, be modified so as to make prosecution of violations of the principle actually possible.

Specifically, the ICC Statute should be amended to include also the crime laid down in Article 8(2)(b)(iv) when committed in non-international armed conflicts. Attacks on rebel or government

[233] In the Decisions on the Confirmation of Charges in the cases related to an alleged attack on African Union peacekeepers in Darfur, the pre-trial chambers did not pronounce on this issue. It must be said that the defence in these cases did not raise the issue: see ICC, *Prosecutor v Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09, Pre-Trial Chamber, 8 December 2010 (ICC-02/05-02/09-243-Red); and ICC, *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Corrigendum of the 'Decision on the Confirmation of Charges', ICC-02/05-03/09, Pre-Trial Chamber, 8 March 2011 (ICC-02/05-03/09-121-CORR-RED). However, compare ICC, *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06, Pre-Trial Chamber, 29 January 2007 (ICC-01/04-01/06-803), paras 294–316 in which Pre-trial Chamber I did go into the issue of jurisdiction over the alleged conduct – even though here it involved a situation on the territory of a state party that had ratified Additional Protocol I.

posts in urban areas that cause extensive civilian casualties, as seen frequently during the conflicts in Libya and in Syria, would then fall within the court's material jurisdiction. Also, it would be preferable to amend Article 8(2)(b)(iv), as well as the additional sub-paragraph for Article 8(2)(e), to reflect the language of Additional Protocol I.[234] Furthermore, the Elements of Crimes for Article 8(2)(b)(iv) should be modified by deleting the value judgment and including an objective commander standard. Whilst such a modification would do away with the difficulties described above with respect to the value judgment made by the one launching the attack, the objective standard would still suffer from the difficulties related to determining the military advantage and the level of incidental damage that could be expected. Therefore, it would also be helpful if some clarification could be provided concerning the issues raised above,[235] such as the question as to what qualifies as damage, and whether or not the different types of damage should be added together.

Naturally, any such amendments or modifications would be subject to the respective negotiation processes. Given the drafting history of both Additional Protocol I and of the ICC Statute, such negotiations would be difficult, and are not likely to result in the proposed outcomes. However, without any changes to the current regime, Article 8(2)(b)(iv) of the ICC Statute appears to be a dead letter, which militates – at a very minimum – in favour of attempting to create a workable definition of the crime in question.

When any changes to the first part of Article 8(2)(b)(iv), which criminalises the behaviour prohibited in Articles 51(5)(b) and 57(2) of Additional Protocol I, proved to be unattainable, perhaps the Assembly of States Parties could agree to separate the first and the second part of the said article, and create a separate crime for attacks against the natural environment. At a time when climate change and the need to protect the environment become more and more urgent, it may be possible to strengthen the criminalisation of attacks that result in significant damage to the environment. Such strengthening could be achieved by creating a separate crime that would not be subject to the proportionality balance, similar to the prohibition contained in Article 35(3) of Additional Protocol I.

If none of these suggested modifications are achievable, the court will be left with a crime that is almost impossible to prove, and is thus likely never to lead to the prosecution of the types of violation that the principle of proportionality is envisaged to prevent. At the same time, and failing implementation of the proposed modifications, it appears that the use of nuclear weapons would be covered by Article 8(2)(b)(iv) and this provision, as such, could serve perhaps to prevent future use of these weapons.

[234] The text could then be as follows:

> Launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

[235] See Section 5.3 above.

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