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Principles of Distinction and Protection at the ICTY

Iain Bonomy



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PREFACE

The Right Honourable Lord Bonomy is a Senator of the College of Justice and Judge of the Supreme Courts of Scotland. He was formerly a Judge of the International Criminal Tribunal for the Former Yugoslavia (ICTY). In this publication he addresses the contribution of the ICTY to the clarification of the fundamental principles of distinction and protection in international humanitarian and criminal law. Lord Bonomy discusses the extent to which the ICTY has managed to shed new light on customary law provisions that have “lain dormant for some time”. His text is not a mere case law analysis to satisfy the doctrinal interest of lawyers. Rather, it is based on a practical recognition of the significance of actual application of international humanitarian law “to provide meaningful protection for civilians, or, at the very least, some satisfaction for them, when those who attacked them are brought to trial”.

The Torkel Opsahl Academic EPublisher is pleased to publish this concise and authoritative analysis of one of the main features of the ICTY’s legacy. The publication appears as *FICHL Occasional Paper Series No. 3 (2013)*, following papers by Judge Hans-Peter Kaul and Professor Richard J. Goldstone in the same Series. These publications can be freely read, printed and downloaded from www.fichl.org.

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Principles of Distinction and Protection at the ICTY*

Iain Bonomy**

1. Introduction

The assessment of military conduct during armed hostilities as either lawful or criminal involves striking a balance between the requirements of humanity and those of military necessity. Throughout its existence, the International Criminal Tribunal for the former Yugoslavia (hereafter the ‘ICTY’ or ‘the Tribunal’) has tackled this balancing exercise in the context of individual criminal responsibility by reference to the laws of war. Indeed, the Appeals Chamber of the ICTY in the *Kunarac* case noted that “the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of acts committed in its midst”.¹

Accordingly, for many years, the Trial and Appeals Chambers of the ICTY have been guided by the well-known principles of distinction and protection, which, according to one of the Trial Chambers, form “the

* I am indebted to my Legal Officer, Silva Hinek, for her indispensable assistance in researching and marshaling the material on which this paper is based and for her assistance in revising and updating it as at 31 December 2011. The paper was originally presented in September 2008, during the Seminar on International Criminal Justice and the Military, held at the Forum for International Criminal and Humanitarian Law in Oslo.

** **Iain Bonomy (The Right Honourable Lord Bonomy)**, Senator of the College of Justice, Judge of the Supreme Courts of Scotland and formerly of the International Criminal Tribunal for the Former Yugoslavia, who sat in the trial of Slobodan Milošević with effect from the resignation of Sir Richard May (Presiding Judge) on 1 June 2004 until its premature termination on the death of the accused on 11 March 2005.

¹ *Prosecutor v. Dragoljub Kunarac et al.*, Appeal Judgement, IT-96-23 and IT-96-23/1-A, 12 June 2002, para. 91.

foundation of international humanitarian law”.² In applying these guiding principles the Chambers have also had regard to and analysed the prohibition against indiscriminate and disproportionate attacks.

This has all been done in the context of the Statute establishing the ICTY. The relevant provisions in the Statute are Article 2 (grave breaches of the Geneva Conventions), Article 3 (violations of law or customs of war other than those covered by Articles 2, 4, and 5), and Article 5 (crimes against humanity).

This paper will consider pertinent ICTY’s jurisprudence and will provide an overview of the application of these principles in the various cases. In doing so, it will focus on those most relevant to the issue of what qualifies as lawful conduct in armed hostilities.³

2. Direct Attacks: Targeting the Civilian Population and Civilian Objects

2.1. Direct Attacks on Civilians

According to the principles of distinction and protection, directly targeting civilians and/or civilian objects during armed hostilities is absolutely prohibited. These principles are reflected in various international instruments. For example, Article 48 Additional Protocol I of 1977 to the Geneva Conventions of 1949 (‘AP I’) demands that parties to the conflict always distinguish between civilians and combatants, and between civilian objects and military objectives:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Article 51 of AP I provides for the protection of civilians during armed conflict:

² *Prosecutor v. Dragomir Milošević*, Trial Judgement, IT-98-29/1-T, 12 December 2007, para. 941.

³ The analysis in this paper is not intended as an exhaustive coverage of the legality of military operations.

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

Article 13 of Additional Protocol II of 1977 to the Geneva Conventions of 1949 ('AP II') applies the same general protection to civilians affected by an internal armed conflict. Moreover, common Article 3 to the Geneva Conventions of 1949 obliges parties to an internal armed conflict to ensure minimum protection to:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction.

Despite the clear and explicit nature of these provisions, none of the three relevant Articles of the ICTY Statute explicitly prohibits deliberate targeting of civilians or civilian objects. Nevertheless, the principles of distinction and protection have been examined and explained in a number of cases. In a recent judgement relating to the siege of Sarajevo and the deliberate targeting of civilians, the Trial Chamber explained, in the context of Article 3 of the ICTY Statute, that the principle of protection (Articles 51(1) of AP I and 13(1) of AP II) requires military and civilian commanders to ensure general protection of the civilian population against the dangers arising from the conduct of military operations.⁴ Further, the principle of distinction (Articles 48 and 51(2) of AP I, and 13(2) of AP II) "obliges warring parties to distinguish at all times between the civilian population and combatants and between civilian objects and mili-

⁴ *Prosecutor v. Dragomir Milošević*, Trial Judgement, *supra* note 2, para. 941.

tary objectives and ensure that operations will only be directed against military objectives”.⁵

I shall examine separately how the principles have been applied in charges falling under Articles 3 and 5 respectively.

2.1.1. Prohibition on Targeting Civilians under Article 3 of the ICTY Statute

Article 3 of the ICTY Statute contains a non-exhaustive list of violations of laws of war, based on the Hague law (means and methods of warfare),⁶ but does not explicitly prohibit direct targeting of civilians. Nevertheless, in the *Tadić Decision on Jurisdiction*, the Appeals Chamber emphasised that that Article is not limited to violations of Hague law, but covers all violations of international humanitarian law, subject to the limitations contained in the Statute.⁷ It established four conditions for the applicability of Article 3 to violations outside of those listed therein, namely: (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 is part of a treaty, 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; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.⁸ It also explained that Article 3 covers all violations of humanitarian law not falling under Articles 2, 4 or 5 of the Statute, and more specifically: (a) violations of the Hague law on international conflicts; (b) infringements of provisions of the Geneva Conventions other than those classified as “grave breaches” by those Conventions; (c) violations of Common Article 3 of the Geneva Conventions and other customary rules on internal conflicts; and (d) violations of agreements binding

⁵ *Ibid.*

⁶ The Hague Conventions of 1899 and 1907.

⁷ *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (“*Tadić Jurisdiction Decision*”), IT-94-1, 2 October 1995, para. 88.

⁸ *Ibid.*, para. 94; *Prosecutor v. Dragoljub Kunarac et al.*, *supra* note 1, para. 66.

upon the parties to the conflict, that is, agreements which have not turned into customary international law.⁹

In giving practical effect to these principles in *Galić*, a case dealing with the siege of Sarajevo and the issue of deliberately targeting civilians under Article 3 of the ICTY Statute, the Trial Chamber found, in relation to a challenge to its jurisdiction, that direct attacks on the civilian population or individual civilians meet the threshold requirements for war crimes and, therefore, are covered by Article 3 of the ICTY Statute.¹⁰ The Trial Chamber found that targeting civilians is absolutely prohibited *at all times* in customary international law, thus satisfying the *Tadić* condition (ii). As such, it is incapable of justification by reference to military necessity.¹¹ This was later confirmed by the ICTY's Appeals Chamber, first in *Kordić* and then in the *Galić* appeal.¹² The Tribunal's jurisprudence is here consistent with that of the International Court of Justice ('ICJ') which, in the *Advisory Opinion on the Legality of Nuclear Weapons*, held that civilians must never be made the object of an attack.¹³

In order to avoid similar jurisdictional challenges, the drafters of the Statute of International Criminal Court ('ICC') created a more comprehensive war crimes provision, with an expansive list of different offences. Thus, Article 8 (war crimes) of the ICC Statute categorises the crimes over which the ICC will have jurisdiction. The first two categories, namely, "grave breaches of Geneva Conventions" and "other serious violations of the laws and customs applicable in international armed conflict", cover crimes committed in international armed conflict, whereas the second two, namely, "serious violations of Article 3 common to the four Geneva Conventions" and "other serious violations of the laws and customs of

⁹ *Tadić* Jurisdiction Decision, *supra* note 7, para. 89.

¹⁰ *Prosecutor v. Stanislav Galić*, Trial Judgement, IT-98-29-T, 5 December 2003, paras. 16–32. This finding was later confirmed on appeal; *Prosecutor v. Stanislav Galić*, Appeal Judgement, IT-98-29-A, 30 November 2006, paras. 122–125.

¹¹ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, paras. 19, 44. See also *Prosecutor v. Tihomir Blaškić*, Appeal Judgement, IT-95-14-A, 29 July 2004, para. 109.

¹² *Prosecutor v. Dario Kordić and Mario Čerkez*, Appeal Judgement, IT-95-14/2-A, 17 December 2004, para. 54; *Prosecutor v. Stanislav Galić*, Appeal Judgement, *supra* note 10, para. 130.

¹³ *ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, para. 78.

war applicable in armed conflicts not of international character” deal with crimes committed in internal armed conflicts. Direct targeting of civilians is then explicitly prohibited in both internal and international armed conflicts (see Article 8(b)(i) and Article 8(d)(i)). On the other hand, the prohibition on direct targeting of civilian objects (other than those dedicated to religion, education, and arts, which are covered by a separate provision) is confined to international armed conflicts (Article 8(b)(ii)); there is no such explicit prohibition in internal armed conflicts.

As for the elements of direct targeting of civilians, the Trial Chamber in *Galić* held that they consist of (i) acts of violence directed against the civilian population or individual civilians not taking a direct part in hostilities (*actus reus*), and (ii) *wilfully* making the civilian population or individual civilians not taking a direct part in hostilities the object of those acts of violence (*mens rea*).¹⁴ In this context, “wilfully” targeting a civilian population or individual civilians, includes reckless conduct but obviously not mere negligence. It also set out a formula whereby the prosecution may discharge its burden of establishing the civilian status of those attacked in these terms:

[T]he Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person, that person shall be considered to be a civilian. However, in such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.¹⁵

In considering whether *Galić* could be held responsible for directly targeting civilians, the Trial Chamber found the following to be relevant enquiries:

[D]istance between the victim and the most probable source of fire; distance between the location where the victim was hit and the confrontation line; combat activity going on at the time and the location of the incident, as well as relevant nearby presence of military activities or facilities; appearance of the victim as to age, gender, clothing; the activity the

¹⁴ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 56.

¹⁵ *Ibid.*, para. 55.

victim could appear to be engaged in; visibility of the victim due to weather, unobstructed line of sight or daylight.¹⁶

The *Galić* Appeals Chamber later affirmed the relevance of such considerations.¹⁷

2.1.2. Prohibition on Targeting Civilians under Article 5 of the ICTY Statute

In relation to Article 5 the issue of targeting civilians arises not as a separate offence but in the context of the general elements that have to be established before any conduct can be regarded as infringing Article 5. The underlying offences must be committed as part of an attack “directed against any civilian population”.

In explaining how to assess whether the attack is directed against any civilian population, the Appeals Chamber in *Kunarac* stated that the civilian population must be the primary object of the attack. It affirmed the need to consider *inter alia*:

[T]he means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.¹⁸

2.1.3. Definition of ‘Civilians’ and a ‘Civilian Population’

Defining the relevant civilian population which must be the object of an attack before conduct can be classified as criminal, rather than as a lawful act of war, has presented difficulties in a number of cases over the years. The most problematic cases have been those where the status of the victim or object of the attack was unclear due to the presence of resistance fighters or combatants amongst the civilians, and the fact that this pres-

¹⁶ *Ibid.*, para. 188.

¹⁷ *Prosecutor v. Stanislav Galić*, Appeal Judgement, *supra* note 10, para. 133.

¹⁸ *Prosecutor v. Dragoljub Kunarac et al.*, *supra* note 1, para. 91.

ence was anticipated by the attacking party. Again, the definition has had to be addressed in the two different contexts of Article 3 and Article 5.

2.1.3.1. Civilians under Article 3

As seen above,¹⁹ the condition for the protection of civilians under Article 51(3) of AP I, namely, that they shall enjoy the protection of that provision “unless and for such time as they take a direct part in hostilities”, has been incorporated in the ICTY jurisprudence as the *actus reus* element of the crime of targeting civilians under Article 3 of the ICTY Statute.²⁰ Thus, as a matter of logical progression, the authoritative definition of ‘civilians’ and the ‘civilian population’, relied upon in cases dealing with this offence is derived from AP I and, in particular, Article 50 of AP I, which reads as follows:

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.²¹
2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

This definition by exclusion, or essentially “negative” definition, has been recognised and applied as customary law.²² It includes “anyone

¹⁹ See Section 2.1.1.

²⁰ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 56.

²¹ According to Article 4 of the Third Geneva Convention, combatants are: (i) members of the armed forces of a party to a conflict; (ii) members of militia or resistance movements belonging to a party to the conflict, provided that they are commanded by a person responsible for his subordinates, have a fixed distinctive sign recognisable at a distance, carry arms openly, and conduct their operations in accordance with the laws and customs of war; (iii) members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power; and (iv) inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces.

²² *Prosecutor v. Dario Kordić and Mario Čerkez*, *supra* note 12, para. 97.

who is not a member of the armed forces or of an organized military group”.²³ However, in relation to the presumption in favour of civilian status provided for in Article 50(1) of the AP I, the Trial Chamber in *Galić* relied on the ICRC Commentary on AP I, which provides that the presumption of civilian status concerns “persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances”.²⁴ The Trial Chamber found that “a person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant”.²⁵

As for what constitutes direct participation in hostilities, the Trial Chamber in *Galić* applied the definition given in the ICRC Commentary to the Additional Protocol, namely to contribute to “acts of war which by their nature or purpose are likely to cause actual harm to the personnel or *matériel* of the enemy armed forces”.²⁶ Continuing the trend of referring to the Commentary, the Trial Chamber in *Dragomir Milošević* reasoned that there is a need to distinguish between “direct participation in hostilities and participation in the war effort”,²⁷ also defining the former as en-

²³ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 47.

²⁴ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 50; ICRC Commentary to Additional Protocol I of 1977, para. 1922.

²⁵ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 50. See also *Prosecutor v. Tihomir Blaškić*, Appeal Judgement, *supra* note 11, para. 111, where the Appeals Chamber noted that the phrase “in case of doubt” in Article 50(1) of AP I is limited to the expected conduct of a member of the military; when that person’s criminal responsibility is at issue, however, the burden of proof as to whether a person is a civilian rests on the Prosecution.

²⁶ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 48.

²⁷ According to ICRC Commentary to the Additional Protocol I of 1977, para. 1945, “participation in the war effort” is often required from the population as a whole to various degrees. Thus, there has to be a distinction between it and the “direct participation in hostilities”; otherwise, the efforts made to reaffirm and develop international humanitarian law could become meaningless. An example of a contribution to the war effort not amounting to direct participation in hostilities can be found in *Galić* Trial Judgement where factory employees, producing uniforms for one of the parties in the conflict, were found not to be a legitimate military target; *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 495.

gaging in “acts of war which by their nature or purpose are likely to cause actual harm to the personnel or *matériel* of the enemy armed forces”.²⁸

This issue of participation in hostilities was also addressed in a slightly different context, where charges originated under Common Article 3 of the Geneva Conventions applicable to an internal armed conflict. In the *Čelebići* case the Appeals Chamber confirmed its earlier finding in the *Tadić Decision on Jurisdiction* that Common Article 3 was incorporated in Article 3 of the ICTY Statute.²⁹ In turn, Common Article 3 to the Geneva Conventions demands that “persons taking no *active part* in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*”, be treated humanely. When looking at that definition, the Appeals Chamber considered that Common Article 3 was intended to provide minimum guarantees of protection to the “widest category of persons”, and stated that its coverage “extended to any individual not taking part in hostilities”, omitting to qualify this participation with the adjective “active”.³⁰ This approach was then followed by the Trial Chamber in *Naletilić and Martinović*, as well as *Mrkšić et al*, also in the context of the Common Article 3 charges.³¹

Thus, as far as Article 3 of the ICTY Statute is concerned, the definition of a civilian may be said to depend on the origin of the underlying offence charged. In other words, if the charges originate from the Additional Protocols, the definition applied to civilians and/or civilian objects will be the one that can be found in the Additional Protocols. If, on the other hand, the charge relates to Common Article 3 of the Geneva Conventions, the definition to be applied is the one used in that provision and will include those who are *hors de combat*.³²

²⁸ *Prosecutor v. Dragomir Milošević*, Trial Judgement, *supra* note 2, para. 947.

²⁹ *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo (“Čelebići”)*, Trial Judgement, IT-96-21, 16 November 1998, para. 317.

³⁰ *Čelebići Appeal Judgement*, IT-96-21-A, 20 February 2001, para. 420.

³¹ *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Trial Judgement, IT-98-34-T, 31 March 2003, para. 229; *Prosecutor v. Mile Mrkšić et al.*, Trial Judgement, IT-95-13/1-T, 27 September 2007, para. 509. See also *Prosecutor v. Milan Martić*, Trial Judgement, IT-95-11-T, 12 June 2007, para. 47.

³² *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, paras. 41–51; *Čelebići Appeal Judgement*, *supra* note 30, para. 420.

2.1.3.2. Civilians under Article 5 of the ICTY Statute

In relation to crimes against humanity under Article 5 of the Statute and the requirement that there be an attack on a civilian population, the Appeals Chamber in *Kunarac* found that “population” under Article 5 did not mean the entire population of the geographical area in which the attack took place, but rather the targeting of a sufficient number of individuals comprising the civilian population.³³ The presence of a small number of resistance fighters or combatants in its midst does not deprive a population of its civilian character.³⁴ The same point has been made in regard to war crimes under Article 3, where the Appeals Chamber opined that such presence “does not necessarily change the fact that the ultimate character of the population remains, for legal purposes, a civilian one”.³⁵ These are examples of the recognition of the principles of distinction and protection.

However, controversy has surrounded the question whether crimes against humanity can be committed against combatants or active members of a resistance organisation, and against persons *hors de combat*.³⁶ In its review of the indictment in the *Mrkšić et al.* case,³⁷ Trial Chamber I considered that, although crimes against humanity must target a civilian population, individuals who at one time performed acts of resistance may, in certain circumstances be victims of crimes against humanity.³⁸ The Trial Chamber in the *Tadić* case then reasoned that, even where the ‘civilian population’ includes active members of a resistance movement, it could be considered to be of a civilian character, despite the presence of re-

³³ *Prosecutor v. Dragoljub Kunarac et al.*, *supra* note 1, para. 90.

³⁴ *Prosecutor v. Tihomir Blaškić*, Appeal Judgement, *supra* note 11, paras. 113–115; *Prosecutor v. Mile Mrkšić et al.*, Trial Judgement, *supra* note 31, paras. 458, 463; see ICRC Commentary to Additional Protocol 1 of 1977, para. 1922.

³⁵ *Prosecutor v. Stanislav Galić*, Appeal Judgement, *supra* note 10, para. 137; *Prosecutor v. Pavle Strugar*, Trial Judgement, IT-01-42-T, 31 January 2005, para. 284.

³⁶ *Prosecutor v. Tihomir Blaškić*, Appeal Judgement, *supra* note 11, para. 114; *The Prosecutor v. Mile Mrkšić et al.*, Trial Judgement, *supra* note 31, paras. 450–454, 462; *The Prosecutor v. Dario Kordić and Mario Čerkez*, *supra* note 12, para. 50.

³⁷ This review was possible under the old pre-trial scheme operating in the ICTY in its early years, and was available pursuant to Rule 61 of the Rules of Procedure and Evidence.

³⁸ *Prosecutor v. Mile Mrkšić et al.*, Trial Judgement, *supra* note 31, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-13-R61, 3 April 1996 (“*Vukovar Hospital Decision*”), para. 29.

sistance fighters in its midst, and indeed, these fighters themselves could also be considered victims of crimes against humanity.³⁹ This reasoning appeared to be followed by the Trial Chamber in *Galić*, which, having discussed the ‘civilian population’, thereafter found the definition of a ‘civilian’ to be an expansive one, including “individuals who at one time performed acts of resistance”, and persons rendered *hors de combat*.⁴⁰

However, later jurisprudence of the Tribunal has steered a different course. The Appeals Chamber first rejected the idea of former resistance fighters claiming civilian status under Article 5 of the Statute in the *Blaškić* case, where it chose to look to Article 50 of the AP I:

Read together, Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention establish that members of the armed forces, and members of militias or volunteer corps forming part of such forces, cannot claim civilian status. Neither can members of organized resistance groups, provided that they are commanded by a person responsible for his subordinates, that they have a fixed distinctive sign recognizable at a distance, that they carry arms openly, and that they conduct their operations in accordance with the laws and customs of war.⁴¹

Moreover, the Appeals Chamber took the view that the specific situation of the victim at the time of the attack may not be determinative of his civilian or non-civilian status. Accordingly, if a person is a member of an armed resistance organisation, “the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status”.⁴² In this regard, the ICTY was guided by the ICRC Commentary to Additional Protocol I, which states:

All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of quasi-combatants, which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military

³⁹ *Prosecutor v. Duško Tadić*, Trial Judgement, IT-94-1-T, 7 May 1997, para. 643.

⁴⁰ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 143.

⁴¹ *Prosecutor v. Tihomir Blaškić*, Appeal Judgement, *supra* note 11, para. 113.

⁴² *Prosecutor v. Tihomir Blaškić*, Appeal Judgement, *supra* note 11, para. 114; ICRC Commentary to Additional Protocol I of 1977, para. 1676.

status, soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization such as that mentioned in paragraph 1, becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case, until he is permanently demobilized by the responsible command referred to in paragraph 1), whether or not he is in combat, or for the time being armed.⁴³

In addition, following *Blaškić*, the Appeals Chamber in *Galić* explained that, when referring to civilians as including those who were *hors de combat*, the *Galić* Trial Chamber did not intend to give a definition of an individual civilian. Instead, the Trial Chamber's definition of a 'civilian' was related to the *chapeau* requirement that there has to be an attack against the 'civilian population'. Thus, according to the Appeals Chamber, the Trial Chamber was simply referring to the well-established jurisprudence that the presence of soldiers and those who are *hors de combat* within the civilian population does not necessarily deprive that population of its civilian character. The *Galić* Appeals Chamber then reiterated that it is not necessarily correct to state that "a person *hors de combat* is a civilian in the context of international humanitarian law".⁴⁴ The Chamber elaborated further by stating that such a person will certainly be protected by Common Article 3 to the Geneva Conventions, but will not be a civilian for the purposes of Article 50 of the AP I.⁴⁵

A year later, the Trial Chamber in *Mrkšić*, relying on the *Blaškić and Galić* Appeal Judgements, rejected the conclusion that members of a resistance movement or former combatants, regardless of whether they were bearing arms or not, but who were no longer taking part in the hostilities when the crimes were committed, could qualify as victims of crimes against humanity.⁴⁶ In particular, the Trial Chamber refuted the proposition that the reference to civilians in Article 5 was intended to reflect Common Article 3 of the Geneva Conventions, thus including persons not taking an active or a direct part or who have ceased to take part

⁴³ ICRC Commentary to Additional Protocol I of 1977, para. 1676.

⁴⁴ *Prosecutor v. Stanislav Galić*, Appeal Judgement, *supra* note 10, para. 144.

⁴⁵ *Ibid.*

⁴⁶ *Prosecutor v. Mile Mrkšić et al.*, Trial Judgement, *supra* note 31, paras. 450–454, 462.

in hostilities, such as persons placed *hors de combat*.⁴⁷ Rather, it found that the determining definition of a “civilian” was the one provided by Article 50 of Additional Protocol I, in which the term is defined on a negative basis.⁴⁸ Moreover, the Judgement in *Mrkšić* demonstrated that, if the victims are predominantly members of a resistance movement, the attack will not qualify as an attack against the civilian population. The Trial Chamber stated that:

[T]hose at the hospital were, on the order of Mile Mrkšić, separated into two groups, designated in his terminology as war crimes suspects and civilians. Therefore, from the outset, the victims of the crimes charged in this Indictment were treated differently from the civilian population; they were selected and separated because of their known or believed involvement in the Croatian resistance against the Serb forces.⁴⁹

It also concluded that:

[T]he possibility now identified that a small number of civilians may have been among the prisoners, therefore, does not change the finding which the Chamber makes that the crimes charged [...] do not qualify as crimes against humanity in the particular circumstances of this case.⁵⁰

Thus, with respect to Article 5 of the ICTY Statute and its requirement that there be an attack on a civilian population, the presence of soldiers or persons *hors de combat* within that (predominantly) civilian population may not necessarily remove the civilian character from that population. However, whether or not the population is predominantly civilian⁵¹ must be examined closely, bearing in mind that the definition of a civilian set out in Article 50 of AP I does not include those who are *hors de com-*

⁴⁷ *Ibid.*, para. 454.

⁴⁸ *Ibid.*, paras. 455–457. See also *Prosecutor v. Milan Martić*, Trial Judgement, *supra* note 31, paras. 55–56.

⁴⁹ *Prosecutor v. Mile Mrkšić et al.*, Trial Judgement, *supra* note 31, para. 476.

⁵⁰ *Ibid.*, para. 481.

⁵¹ According to the *Blaškić* Appeals Chamber, in order to determine whether the presence of soldiers or those who are *hors de combat* within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined; *Prosecutor v. Tihomir Blaškić*, Appeal Judgement, *supra* note 11, paras. 113–115.

bat. Since at that point in time it appeared that crimes against humanity could only be committed against civilians,⁵² the effect of Article 50 was to exclude those who are *hors de combat* from the definition of victims of crimes against humanity.⁵³

However, one year later, the Appeals Chamber in the *Martić* case, while affirming its earlier holdings in the *Blaškić and Galić* Appeal Judgements, decided that “the fundamental of the notion of civilian in international humanitarian law and international criminal law militates against giving it differing meanings under Article 3 and Article 5 of the Statute.”⁵⁴ It then went on to consider whether the chapeau requirements of Article 5 of the Statute, namely that the attack be directed against a civilian population, also requires that each individual victim of a crime against humanity have a civilian status, thus excluding persons *hors de combat* who are present within the civilian population. The Appeals Chamber concluded that there is nothing in the text of Article 5 of the Statute or in the previous authorities of the Appeals Chamber that requires that individual victims of crimes against humanity be civilians as defined under Article 50(1) of AP I. With respect to the previous authorities of the Appeals Chamber, the Chamber noted that the definition of civilian was there discussed in the context of the *chapeau* requirement of an attack on a civilian population and not with the individual victims of crimes against humanity in mind. The Chamber was also satisfied, relying on a number of post World War II cases, that this approach reflects customary interna-

⁵² Interestingly, at that point in time, there was no explicit pronouncement by the Appeals Chamber on whether each alleged victim had to be civilian for the purposes of Article 5. However, there was some indication that that was indeed so; *Prosecutor v. Tihomir Blaškić*, Appeal Judgement, *supra* note 11, para. 107; *Prosecutor v. Mile Mrkšić et al.*, Trial Judgement, *supra* note 31, para. 458.

⁵³ This is precisely what happened in *Mrkšić et al.* trial, where the crimes against humanity charges failed in the first instance on the account of the victims being predominantly *hors de combat*. However, see *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Trial Judgement, IT-02-60-T, 17 January 2005, paras. 544 and 614, where the Trial Chamber, looking at persecution under Article 5, defined the civilian population as one including those *hors de combat*, and concluded that they also were terrorised, and thus persecuted, under Article 5.

⁵⁴ *Prosecutor v. Milan Martić*, Appeal Judgement, Case No. IT-95-11-A, paras. 291–302.

tional law and concluded that the principle of *nullum crimen sine lege* was not violated with this ruling.⁵⁵

Accordingly, the Tribunal's jurisprudence is now clear that persons *hors de combat* can be victims of an act amounting to a crime against humanity, provided that all other necessary conditions are met, and in particular that the act in question is part of a widespread or systematic attack against any civilian population.⁵⁶ It is also clear that the definition of a civilian is the same for the purposes of both Article 3 and Article 5. It follows from this that the jurisprudence excluding persons *hors de combat* from the definition of a civilian under Article 50, will have a bearing on Article 3 crimes which are based on AP I and for which the definition of a civilian is also dependent on Article 50 of AP I. One such crime, as seen above, is the deliberate targeting of civilians.

2.2. Direct Attacks against Civilian Objects

Article 52(1) of AP I outlaws attacks on civilian objects. Civilian objects are defined negatively as "all objects which are not military objectives". According to Article 52(2) of AP I, military objectives are limited to those objects which by their nature, location, purpose, or use, make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

Article 52(3) of Additional Protocol I provides that:

[I]n case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an

⁵⁵ *Ibid.*, paras. 303–314. [Check indentation here and in other notes, such as the following one.]

⁵⁶ The Appeals Chamber reaffirmed this conclusion one more time in the *Mrkšić* case where it held that the Trial Chamber erred in holding that individual victims of crimes against humanity had to be civilians. Nevertheless, the Appeals Chamber did not enter a conviction for crimes against humanity, holding somewhat surprisingly that there was no nexus between the attack on the victims in question (who were predominantly *hors de combat*) and the wider attack on the civilian population in Vukovar; see *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Appeal Judgement, Case No. IT-95-13/1-A, paras. 23–44.

effective contribution to military action, it shall be presumed not to be so used.

Moreover, cultural objects and places of worship are protected by Articles 53 of AP I, and 16 of AP II; while objects indispensable to the survival of a civilian population, including food-stuffs and drinking water installations are also prohibited from attack under Articles 54 of AP I and 14 of AP II.

2.2.1. Targeting of Civilian Objects under the ICTY Statute

The ICTY jurisprudence in relation to the offence of targeting civilian objects revolves mainly around Article 3 of the ICTY Statute, which contains three different provisions to that effect, namely:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

[...]

- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.

As far as Article 5 is concerned, targeting of civilian objects is usually considered under the offence of persecution, and most often in the context of destruction of religious property, such as mosques and churches, which is property with special protection under Article 53 of AP I and Article 16 of AP II.⁵⁷ In those cases, the chapeau requirements for crimes against humanity, as well as the elements of the offence of persecution, must be satisfied before a conviction can be entered.

Each of these offences has been considered by the ICTY, and its elements defined and debated, a discussion which is beyond the scope of

⁵⁷ See for example *Prosecutor v. Tihomir Blaškić*, Appeal Judgement, *supra* note 11, paras. 144–149; *Prosecutor v. Dario Kordić and Mario Čerkez*, *supra* note 12, para. 108.

this paper. What is important here is that the definition of a civilian object is identical for both Article 3 and Article 5 crimes.

2.2.2. Definition of Civilian Objects

The Appeals Chamber of the ICTY has ruled that the prohibition on directing attacks against civilian objects in Article 52(1), and the definition of a military objective in paragraph (2) thereafter, comprise customary international law, applicable in both international and internal armed conflicts.⁵⁸ Accordingly, the Trial Chamber in *Galić* affirmed that, in accordance with the principles of distinction and protection of the civilian population, attacks may only be directed against:

[T]hose objects which by their nature, location, purpose or use *make an effective contribution to military action* and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁵⁹

Further, the Trial Chamber in *Galić* accepted the presumption, pursuant to Article 52(3) of the AP I, in favour of civilian status for objects that are normally dedicated to civilian purposes, and concluded that:

[S]uch an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.⁶⁰

Of course, it is for the prosecution to establish that the destruction of a particular religious object was not justified by military necessity, as reaffirmed by the Appeals Chamber in *Brđanin*, in the context of Article 3(d). In other words, there is no automatic presumption that such an object, even though normally dedicated to civilian purposes, is not a military objective. The Chamber also held that, when determining whether destruction occurred pursuant to military necessity, the starting point is to

⁵⁸ *Prosecutor v. Dario Kordić and Mario Čerkez*, *supra* note 12, para. 59.

⁵⁹ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 51.

⁶⁰ *Ibid.*, para. 51. See also *Prosecutor v. Naser Orić*, Trial Judgement, IT-03-68-T, 30 June 2006, para. 587.

look at what constitutes a military objective. For this the Chamber followed Article 52(2) of AP I.⁶¹

Using the definitions of civilian and military objects as enumerated in Article 52(1) and (2) of the AP I, the Trial Chambers in two Sarajevo cases considered the targeting of trams in that city. In *Galić* it was held that a tram which was subject to sniping constituted a civilian object, since it “functioned during cease-fires, along a set route, and it could not have been confused for a military objective”.⁶² In *Dragomir Milošević* it was further noted that the trams were used exclusively by civilians and that the Army of Bosnia and Herzegovina (‘ABiH’) did not move personnel or equipment on the trams. In particular, the Trial Chamber relied on the testimony of a military expert that:

[A] tram is not well-suited for military use or transportation of military personnel because it is a relatively slow-moving vehicle, it is not able to deviate from the tracks, it is often brightly coloured, has lots of windows and is not armoured. There was no reason to identify a tram as a threat, or its passengers as combatants. He also said that it would be “very possible” for a sniper in Grbavica to know that he was shooting at a tram on Zmaja od Bosne, as distinct from a military vehicle.⁶³

Other direct attacks on civilian objects adjudged to constitute war crimes have included the targeting of civilian water supplies⁶⁴ and the shelling of a hospital.⁶⁵

⁶¹ *Prosecutor v. Radoslav Brđanin*, Appeal Judgement, IT-99-36-A, 3 April 2007, para. 337.

⁶² *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 255.

⁶³ *Prosecutor v. Dragomir Milošević*, Trial Judgement, *supra* note 2, para. 219. This was later confirmed on appeal, see *Prosecutor v. Dragomir Milošević*, Appeal Judgement, IT-98-29/1-A, para. 128.

⁶⁴ *Prosecutor v. Dragomir Milošević*, Trial Judgement, *supra* note 2, paras. 208, 563–564.

⁶⁵ *Prosecutor v. Radoslav Brđanin*, Trial Judgement, IT-99-36-T, 1 September 2004, para. 627; *Prosecutor v. Radislav Krstić*, Trial Judgement, IT-98-33-T, 2 August 2001, para. 122.

2.2.3. Dual-use Facilities (Civilian Objects Used for a Military Purpose)

Questions relating to the legality of military operations conducted against facilities that in peace time would be considered as civilian objects, but which are being used for a military purpose during hostilities, have produced controversial decisions.

For example, the Appeals Chamber in *Kordić and Čerkez* concluded that a firehouse being used as the headquarters of the Muslim territorial defence in Vitez was subject to lawful attack as a military target. It emphasised that:

[...] although military operations directed at dwellings and other installations that are used only by civilians are prohibited, civilian property making an effective contribution to military action whose total or partial destruction offers a definite military advantage may constitute a legitimate military objective.⁶⁶

Thus, the Chamber found that the attack on Vitez as a whole was not an attack directed at civilians.⁶⁷

This may be contrasted with the approach of the *Dragomir Milošević* Trial Chamber to an attack on a local square, where one of the buildings in the square housed the headquarters of the civil defence. One of the victims injured in the attack on the square testified that she worked for the Muslim territorial defence, and stated that the territorial defence was attached to the municipal centre, which was located in the vicinity. Although not stated in so many words, it does appear that the Chamber was of the opinion that the square was not a military target. It noted evidence that the civil defence force had been regarded as a civilian institution, responsible for the distribution of humanitarian aid, and stated that no soldiers had been present in the vicinity. The Chamber did not explicitly address the issue of the presence of the territorial defence in the area.⁶⁸

The Trial Chamber in *Galić* considered the lawfulness of a mortar shell attack on Markale open-air market in Sarajevo on 5 February 1994. The defence argued that the actual target of the attack had been the em-

⁶⁶ *Prosecutor v. Dario Kordić and Mario Čerkez*, *supra* note 12, paras. 441, 450–451.

⁶⁷ *Ibid.*

⁶⁸ *Prosecutor v. Dragomir Milošević*, Trial Judgement, *supra* note 2, paras. 541–542.

ployees of a factory which manufactured army uniforms. The Trial Chamber concluded that such employees did not constitute a legitimate military objective, and thus targeting the market constituted a war crime:

The Majority is convinced that the mortar shell which struck Markale was fired deliberately at the market. That market drew large numbers of people. There was no reason to consider the market area as a military objective. Evidence was presented in relation to the status of the “December 22” building located by the market, which manufactured uniforms for the police and the army. It is unclear whether manufacturing was still on-going at the time of the incident but in any case it is not reasonable to consider that the employees of such a manufacturing plant would be considered legitimate targets.⁶⁹

The Trial Chamber also concluded that the Koševo hospital in Sarajevo had been directly targeted.⁷⁰ Galić appealed this finding on the basis that the attack was a lawful act of warfare, since the opposing military forces had been using the hospital as a military base.⁷¹ The Appeals Chamber concluded that a hospital may be the lawful object of an attack if it is used for military purposes which are outside its humanitarian function.⁷² However, relying on relevant provisions of AP I (Article 13(1)) and AP II (Article 11(2)), the Appeals Chamber qualified the loss of protection by requiring that an advance warning be given of an attack. In its view, the lack of a due warning, including a reasonable time period for compliance, would render any subsequent attack unlawful, despite the fact that the protected object constituted a military objective.⁷³ Moreover, the Appeals Chamber found that:

[M]ilitary activity does not permanently turn a protected facility into a legitimate military target. It remains a legitimate military target *only as long as it is reasonably necessary* for the opposing side to respond to the military activity. Additionally, an attack must be aimed at the military objects in or

⁶⁹ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 495.

⁷⁰ *Ibid.*, para. 509.

⁷¹ *Prosecutor v. Stanislav Galić*, Appeal Judgement, *supra* note 10, para. 337.

⁷² *Ibid.*, para. 341.

⁷³ *Ibid.*, para. 344.

around the facility, so only weaponry reasonably necessary for that purpose can be used.⁷⁴

The Chamber concluded that, due to their timing or the weaponry used, some of the attacks conducted against the hospital were not legitimate attacks and, instead, constituted examples of the campaign against civilians.⁷⁵

The ICTY faced many more interesting examples of dual-use objects in the case of *Dragomir Milošević*. The defence there asserted that an electricity transformer station was a military headquarters and thus a military target. The Chamber, however, pointed to the evidence that the electricians employed by the station were not obliged to provide for the needs of the military, and did not wear uniforms, as well as the fact that ABiH documents explicitly noted that there were no combat activities in the area, thereby implying that the object was a civilian one.⁷⁶

The Trial Chamber also considered the shelling of the tunnel in Sarajevo. While the tunnel had been used by civilians and for the delivery of vital humanitarian aid, it also comprised a passage for the movement of soldiers and various forms of ammunition. The court noted that the shelling continued, “regardless of who or what was going through”, thereby implying that the tunnel was a civilian object or, at the very least, that it was attacked in an indiscriminate manner.⁷⁷

Another potential dual-purpose object is the communications network of the opposing side. An example can also be found in the *Dragomir Milošević* Judgement, where the Chamber considered the shelling of a television building in Sarajevo on 28 June 1995. Ultimately, the Chamber found that the building was a civilian object.⁷⁸ It arrived at that conclusion despite the fact that the opposing force had placed heavy weapons and mortars in the vicinity, and emphasised evidence that there were no military activities or personnel inside the building.⁷⁹ The Chamber also re-

⁷⁴ *Ibid.*, para. 346 (emphasis added).

⁷⁵ *Ibid.*, para. 347.

⁷⁶ *Prosecutor v. Dragomir Milošević*, Trial Judgement, *supra* note 2, para. 514.

⁷⁷ *Ibid.*, para. 750.

⁷⁸ *Ibid.*, paras. 497, 964. This finding was later confirmed on appeal and the Appeals Chamber held that the TV building was a “clearly civilian object”. See *Prosecutor v. Dragomir Milošević*, Appeal Judgement, *supra* note 63, para. 250.

⁷⁹ *Prosecutor v. Dragomir Milošević*, Trial Judgement, *supra* note 2, paras. 582–583.

ferred to a combat report signed by the accused, in which reference was made to the shelling of the TV station, which was considered to be “the centre of media lies against the just struggle of the Serb people”.⁸⁰ Thus, implicitly, the Chamber rejected the argument that a TV station, being essentially a propaganda tool of one side, can be seen to be a military target.

This may be contrasted with the result of the investigation of the NATO attack on the Serbia Radio and Television station in Belgrade on 23 April 1999. The Final Report to the ICTY Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (‘FRY’) concluded that:

To the extent particular media components are part of the C3 (command, control and communications) network they are military objectives. If media components are not part of the C3 network then they may become military objectives depending upon their use. As a bottom line, civilians, civilian objects and civilian morale as such are not legitimate military objectives. The media does have an effect on civilian morale. If that effect is merely to foster support for the war effort, the media is not a legitimate military objective. If the media is used to incite crimes, as in Rwanda, it can become a legitimate military objective. If the media is the nerve system that keeps a war-monger in power and thus perpetuates the war effort, it may fall within the definition of a legitimate military objective. As a general statement, in the particular incidents reviewed by the committee, it is the view of the committee that NATO was attempting to attack objects it perceived to be legitimate military objectives.⁸¹

⁸⁰ *Ibid.*, para. 615.

⁸¹ Final report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, para. 55.

3. The Regulation of Indirect Attacks: Indiscriminate and Disproportionate Use of Force

3.1. General

While civilians and civilian objects benefit from the principles of distinction and protection which prohibit making them the direct object of an attack, their position is governed by another set of rules when military objects are attacked. Targeting military objects is permissible, even if it causes injury to civilians and/or damage to civilian objects as an incidental effect. Such damage is classified as ‘collateral’, and the attack as an undesirable but lawful act of warfare.⁸² However, this exception is regulated by the prohibition on indiscriminate and disproportionate use of force, provided by Articles 51 and 57 of the AP I.

3.2. Indiscriminate Use of Force

Article 51(4) of the AP I prohibits indiscriminate attacks, which it defines as:

- (a) those which are not directed at a specific military objective;
 - (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
 - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
- and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

In addition, Article 51(5) of AP I considers, inclusively, the following attacks to be indiscriminate:

- (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located

⁸² *The Prosecutor v. Milan Martić*, Trial Judgement, *supra* note 31, para. 93; *The Prosecutor v. Stanislav Galić*, Appeal Judgement, *supra* note 10, para. 190; *Prosecutor v. Hadžihasanović and Kubura*, Trial Judgement, IT-01-47-T, 15 March 2006, para. 45.

- in a city, town, village or other area containing a similar concentration of civilians or civilian objects;
- (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.

Other provisions dealing with indiscriminate attacks are Article 85(3)(b) of AP I and Article 26(3) of AP II. This prohibition follows naturally from the principle of distinction between civilians and combatants.

Once again, the ICTY Statute does not contain a provision explicitly forbidding indiscriminate attacks. However, as stated earlier, Article 3(c) prohibits attacks by bombardment of undefended towns, villages, dwellings, or buildings. In addition, wanton destruction of cities, towns or villages, or devastation not justified by military necessity is prohibited by Article 3(b), and constitutes war crimes entailing individual criminal responsibility. As for Article 5, evidence of indiscriminate attacks being launched falls to be considered in the context of, once again, the chapeau requirement that there be an attack directed against the civilian population, and the crime of persecution.⁸³

The Trial Chamber in the *Kupreškić* case, in a section of its judgement entitled “Preliminary Issues”, and thus before going into the specifics of Articles 3 and 5 of the Statute, affirmed that:

[...] attacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians.⁸⁴

Having also referred to the proportionality principle, which will be discussed in more detail below, the Chamber continued:

These principles have to some extent been spelled out in Articles 57 and 58 of the First Additional Protocol of 1977. Such provisions, it would seem, are now part of customary international law, not only because they specify and flesh out

⁸³ See for example *Prosecutor v. Mile Mrkšić et al.*, Trial Judgement, *supra* note 31, para. 472.

⁸⁴ *Prosecutor v. Zoran Kupreškić et al.*, Trial Judgement, IT-95-16-T, 14 January 2000, para. 524.

general pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol. Admittedly, even these two provisions leave a wide margin of discretion to belligerents by using language that might be regarded as leaving the last word to the attacking party.⁸⁵

The fact that the prohibition on indiscriminate attacks reflects customary international law was confirmed by the Trial Chamber in *Galić* in the context of discussion of Article 3. Both the *Kupreškić* and *Galić* Trial Chambers also held that, under customary law, the prohibition of indiscriminate attacks applies to both international and internal armed conflicts.⁸⁶

The practical application of the prohibition of indiscriminate attacks in cases before the Tribunal is briefly summarised below.

3.2.1. Targeting Failures

The applicable principle is that firing into a crowded residential/civilian area in the hope of hitting enemy personnel located within the area or in the near vicinity is forbidden. For example, the Trial Chamber in *Galić*, in the context of charges relating to an attack on civilians as a violation of the laws and customs of war under Article 3, referred to several authorities prohibiting area bombardment, and concluded that a deliberate intent to attack civilians could be inferred from an indiscriminate attack in the form of an area bombardment. The Trial Chamber took as examples of *opinio juris* two statements of the British Prime Minister with regard to the Spanish Civil War, in which he considered the random aerial bombardment of Barcelona, without the targeting of specific military objectives, to be by its nature a direct and deliberate attack against civilians.⁸⁷ In addition, the Trial Chamber considered the non-binding Air Warfare Rules of 1924 to be an authoritative interpretation of the law relating to prohibition on indiscriminate attacks. It referred to Article 24(3), which provides that “where military objectives were situated so that they could not be bombarded without the indiscriminate bombardment of the civilian

⁸⁵ *Ibid.*

⁸⁶ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 57, fn. 103; *Prosecutor v. Zoran Kupreškić et al.*, *supra* note 84, para. 521.

⁸⁷ *Prosecutor v. Stanislav Galić*, *supra* note 10, para. 57, fn. 103.

population, the aircraft must abstain from the bombardments”, as well as Article 24(4), which states that the bombardment of a city is legitimate “provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardments, having regard to the danger thus posed to the civilian population”.⁸⁸ The Trial Chamber considered the assertion of the defence that, in relation to a shelling incident in Dobrinja, a suburb of Sarajevo, the office of the territorial defence, rather than the civilian population, had been the target of the attack, and concluded that the attack was “at the very least, indiscriminate as to its target (which nevertheless was primarily if not entirely a residential neighbourhood) and was carried out recklessly, resulting in civilian casualties”.⁸⁹

In *Mrkšić et al.*, the Trial Chamber observed that “[t]he duration of the fighting, the gross disparity between the numbers of the Serb and Croatian forces engaged in the battle and in the armament and equipment available to the opposing forces and, above all, the nature and extent of the devastation brought on Vukovar” made it possible to conclude that “the Serb attack was also consciously and deliberately directed against the city of Vukovar itself and its hapless civilian population”.⁹⁰ Further, it found that:

[...] the extensive damage to civilian property and civilian infrastructure, the number of civilians displaced or forced to flee clearly indicate that the attack was carried out in an indiscriminate way, contrary to international law. It was an unlawful attack. Indeed it was also directed in part deliberately against the civilian population.⁹¹

Thus, it could constitute both a war crime *and* a crime against humanity. However, these statements were *obiter dicta* since the Indictment did not charge the accused for acts of destruction and the killing of civilians in the broader area of the town of Vukovar but was limited to the murder and ill-treatment of members of the armed forces rendered *hors de combat* in Vukovar hospital.⁹²

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, paras. 405–410.

⁹⁰ *Prosecutor v. Mile Mrkšić et al.*, Trial Judgement, *supra* note 31, para. 470.

⁹¹ *Ibid.*, para. 472.

⁹² *Ibid.*, para. 473.

The Trial Chamber in *Strugar*, a case concerned with the shelling of Dubrovnik (in Croatia) by the Yugoslav Peoples' Army ('JNA'), considered whether mortar and artillery fire on the Old Town in Dubrovnik in November 1991 constituted a war crime under Article 3. It made a distinction between military objectives located in the area of Dubrovnik as a whole and the area of the Old Town of Dubrovnik to which it accorded civilian status.⁹³ In this regard, it noted evidence that, although the Croatian forces held fixed mortar positions in Dubrovnik, there were no such mortars or artillery positions within the Old Town itself.⁹⁴ The Trial Chamber then considered an order to fire on Dubrovnik, which failed to sufficiently target military objectives, stating:

[...] while the phrase 'targets in the town' does not appear to mean the Old Town, as distinct from the rest of [the] Dubrovnik residential area, neither is the Old Town excluded from the scope of the targets.⁹⁵

Moreover, the Chamber concluded that: "there was inadequate direction of the fire of the JNA mortars and other weapons against Croatian military targets. Instead, they fired extensively and without disciplined direction and targeting correction, at Dubrovnik, including the Old Town",⁹⁶ from which the Trial Chamber inferred a direct attack on civilians and civilian property.⁹⁷

In the *Orić* case, the Trial Chamber emphasised that, in principle, destruction could not be justified by military necessity if it was inflicted after the cessation of fighting between the parties.⁹⁸ As such, it would constitute a war crime. The Trial Chamber qualified this principle, however, with the exception that such destruction may, in the alternative, be justified as a preventive action:

A different situation arises if a military attack is launched against a settlement from which previously, due to its location and its armed inhabitants, a serious danger emanated for

⁹³ For analysis of its civilian status, see *Prosecutor v. Pavle Strugar*, *supra* note 35, paras. 183–184; 190.

⁹⁴ *Ibid.*, paras. 71–72.

⁹⁵ *Ibid.*, para. 129.

⁹⁶ *Ibid.*, para. 139.

⁹⁷ The Trial Chamber emphasised that it did not need to, thereafter, determine the lawfulness of attacks incidentally causing excessive damage. *Ibid.*, para. 281.

⁹⁸ *Prosecutor v. Naser Orić*, *supra* note 60, para. 588.

the inhabitants of a neighbouring village who are now seeking to remove this danger through military action. It may be the case that, after such a settlement had been taken, destruction of houses occurs in order to prevent the inhabitants, including combatants, to return and resume the attacks. A submission that such destruction is covered by “military necessity” will be entertained on a case-by-case basis. Except for the rare occasions in which such preventive destruction could arguably fall within the scope of “military necessity”, the principle must be upheld that the destruction of civil settlements, as a rule, is punishable as a war crime.⁹⁹

The Chamber then concluded that, although there may have been military justification for attacking that area due to the presence of armed village guards, “such justification cannot extend to wanton destruction of civilian property, such as houses, as well as barns and outbuildings”. In addition, since most of the destruction took place once the Bosnian Serbs had withdrawn, the Chamber found no military necessity for the attack, and also concluded that the attack was an indiscriminate one and therefore unlawful.¹⁰⁰

3.2.2. Methods of Combat

In *Blaškić* the Trial Chamber addressed the Defence assertion that Croatian Defence Council (“HVO”) forces had acted illegally by employing the legitimate military tactic known as “fighting in built-up areas”, in which automatic weapons and grenades were used on a house-by-house basis, to clear a built-up area. It submitted that civilian casualties of this method of combat should be considered as “collateral”.¹⁰¹ However, having considered evidence that whole villages would often be burnt under this combat method, the Trial Chamber concluded that the attacks on civilians were not justified by a military objective.¹⁰² On the contrary, the attacks resulted in a number of crimes against humanity and war crimes being committed by the forces participating in them.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, paras. 606–607.

¹⁰¹ *Prosecutor v. Tihomir Blaškić*, Trial Judgement, IT-95-14-T, 3 March 2000, para. 406.

¹⁰² *Ibid.*, para. 410.

3.2.3. Weapons

In its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the ICJ stated that states must “never use weapons that are incapable of distinguishing between civilian and military targets”.¹⁰³ The ICTY has consistently followed the same approach. In addition, Article 3(a) of the ICTY Statute provides that violations of the laws of war include the “employment of poisonous weapons or other weapons calculated to cause unnecessary suffering”.

In the case of *Dragomir Milošević*, the Trial Chamber considered the use of modified air bombs. Each bomb had an explosive charge of TNT or a fuel-air mixture which weighed between 100 and 250 kilograms. They were either dropped from an airplane or attached to a rocket and fired from a launch pad on the ground.¹⁰⁴ In particular, it was noted that such “fuel-air explosions cause a lethal wave of overpressure and destroy everything and everyone in the blast. [...] the effects of a blast wave of a fuel-air explosion could vary, depending on the type of location it hit as well as weather conditions”.¹⁰⁵ As a consequence, many civilians suffered so-called ‘blast syndrome’, which comprised injuries to their internal organs.¹⁰⁶ In regard to its ability to distinguish between combatants and civilians, the Trial Chamber noted evidence that:

[O]nce a modified air bomb was launched, its flight path could not be managed; it could only be directed at a general area. As a result, modified air bombs were described as “a highly inaccurate weapon, but nonetheless a weapon with extremely high explosive force”.¹⁰⁷

While one military expert considered that “a modified air bomb could deviate from its intended target by as much as one kilometre”,¹⁰⁸ others asserted that:

[I]n addition to the inherent inaccuracy of air bombs and unguided missiles, the unprofessional way the rockets were

¹⁰³ *ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *supra* note 13, para. 78.

¹⁰⁴ *Prosecutor v. Dragomir Milošević*, Trial Judgement, *supra* note 2, paras. 92–93.

¹⁰⁵ *Ibid.*, para. 94.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, para. 97.

¹⁰⁸ *Ibid.*

mounted under the air bomb increased the risk of deviation of the bomb while in flight. [M]odified air bombs were “uncontrollable” [...] “completely inaccurate” and “highly destructive”. [They] were inappropriate weapons and served no military purpose.¹⁰⁹

The defence asserted that there had been an on-going ABiH military offensive in the area, and thus the intensity of the conflict justified the use of the weapon. However, the Chamber concluded that these circumstances could not justify the use of such a weapon.¹¹⁰ In the findings section, the Chamber stated:

Furthermore, in light of the evidence referred to earlier in the Judgement on the basis of which the Trial Chamber found that the SRK was responsible for shelling civilians and civilian areas by modified air bombs, and particularly *in light of the evidence of the indiscriminate nature of the modified air bomb*, the knowledge of the SRK of that indiscriminate character, the gravity of the injuries and the number of deaths caused by the use of these highly inaccurate bombs, the Trial Chamber finds that terror within the meaning of Count 1 was committed by the SRK forces. In this respect, the Trial Chamber also recalls its earlier finding that only the SRK possessed and used modified air bombs to target the civilian areas in Sarajevo. It is perfectly reasonable for the Trial Chamber to infer an intent to terrorise from the very use by the SRK of *this highly inaccurate and indiscriminate weapon*, the modified air bomb.¹¹¹

Further, in *Martić*, the Trial Chamber noted evidence that, on 2 and 3 May 1995, an Orkan rocket was fired at military targets in Zagreb, including the Ministry of Defence, the Presidential Palace and Zagreb/Plešo airport. It concluded that “the presence or otherwise of military targets in Zagreb is irrelevant in light of the nature of the M-87 Orkan”.¹¹² In particular, the Trial Chamber emphasised that the rocket fired on Zagreb was “non-guided”, and contained a cluster warhead.¹¹³ It had also been “fired

¹⁰⁹ *Ibid.*, paras. 97–98.

¹¹⁰ *Ibid.*, para. 540.

¹¹¹ *Ibid.*, para. 912.

¹¹² *Prosecutor v. Milan Martić*, Trial Judgement, *supra* note 31, para. 461.

¹¹³ *Ibid.*, para. 462.

from the extreme of its range”.¹¹⁴ As such, the Orkan rocket was considered to be “incapable of hitting specific targets”.¹¹⁵ Therefore, the Chamber concluded that “the M-87 Orkan is an indiscriminate weapon, the use of which in densely populated civilian areas, such as Zagreb, will result in the infliction of severe casualties”.¹¹⁶ As such, its use constituted a widespread attack directed against the civilian population, and thus satisfied the general requirements of Articles 3 and 5 of the Statute. Ultimately, for this attack on Zagreb, Martić was convicted of attacks on civilians and cruel treatment under Article 3 and also of inhumane acts under Article 5.¹¹⁷ It is notable that already in 1996, during the process of confirming the Indictment, the Trial Chamber had issued a decision wherein it acknowledged that there was no formal provision forbidding the use of cluster bombs as such, but nevertheless regarded the use of the Orkan rocket as evidence which was capable of proving that the Accused intended to attack the civilian population. That was because the rocket was inherently inaccurate, it landed in an area with no military objectives nearby, it was used as an antipersonnel weapon launched against the city of Zagreb, and the accused indicated that he intended to attack the city as such.¹¹⁸

It is interesting to compare the findings of the Chamber in *Martić* with those made by the Committee Established to Review the NATO Bombing Campaign Against the FRY.¹¹⁹ In its report to the Prosecutor,

¹¹⁴ *Ibid.*, para. 463.

¹¹⁵ *Ibid.*, para. 463.

¹¹⁶ *Ibid.* This finding was confirmed on appeal. See *Prosecutor v. Milan Martić*, Appeal Judgement, IT-95-11-A, paras. 247–252.

¹¹⁷ *Prosecutor v. Milan Martić*, Trial Judgement, *supra* note 31, para. 469. This was also confirmed on appeal. See *Prosecutor v. Milan Martić*, Appeal Judgement, *supra* note 116, para. 255.

¹¹⁸ *Prosecutor v. Milan Martić*, Trial Chamber, IT-95-11, Decision Pursuant to Rule 61, 8 March 1996, para. 23–31.

¹¹⁹ On 14 May 1999 the then Chief Prosecutor of the ICTY established a committee to assess the allegations of serious violations of international humanitarian law during the NATO campaign in Kosovo, and advise the Prosecutor and Deputy Prosecutor whether or not there was a sufficient basis to proceed with an investigation into some or all the allegations or into other incidents related to the NATO bombing. During its review, the committee considered various materials, including, *inter alia*, public documents prepared by NATO, documents filed by the FRY before the ICJ, various

the Committee recommended that no investigation be brought by the Prosecutor into incidents attributed to NATO, partly on the ground that “the law is not sufficiently clear”.¹²⁰ The Committee concluded that:

There is no specific treaty provision which prohibits or restricts the use of cluster bombs although, of course, cluster bombs must be used in compliance with the general principles applicable to the use of all weapons.¹²¹

It distinguished the situation of cluster bombs from antipersonnel landmines which were prohibited under the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 1997. Moreover, the Committee distinguished the use of cluster bombs by NATO from the factual circumstances present in the *Martić* case, even though the U.K. admitted contributing to the NATO campaign by providing unguided cluster bombs. The main point of distinction was that Martić had intended to *directly attack* the civilian population in the city of Zagreb as a means of inflicting terror. The Committee found that “[t]here is no indication cluster bombs were used in such a fashion by NATO”.¹²²

Interestingly, the first reason for the Committee’s recommendation against an investigation is now somewhat redundant. On 30 May 2008 parties to the Diplomatic Conference for the Adoption of a Convention on Cluster Munitions in Dublin ratified a new Convention on Cluster Munitions, prohibiting their use, development, transfer, and stockpiling, and forbidding parties from assisting non-parties in such.¹²³ Moreover, the prohibition was made equally applicable to “explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft”.¹²⁴ However, while the Convention has been ratified by more than 100 states, it has yet to be ratified by the U.S, Israel, China, Russia, India, and Pakistan.

newspaper reports, and an Amnesty International Report on the campaign. See <http://www.un.org/icty/pressreal/nato061300.htm>, last accessed 8 February 2012.

¹²⁰ Final report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, para. 90.

¹²¹ *Ibid.*, para. 27.

¹²² *Ibid.*, para. 27.

¹²³ Convention on Cluster Munitions, CCM/77, 30 May 2008, Article 1.

¹²⁴ *Ibid.*, Article 2.

3.3. Disproportionate Use of Force

The prohibition on the disproportionate use of force, like the prohibition on indiscriminate attacks, is yet another natural consequence of the principle of distinction, designed to regulate attacks on military objectives and minimise the resulting damage to civilians and their objects. The requirement of proportionality demands that an operation against a legitimate military target, which is likely to result in the incidental loss of life or injury to civilians, be justified by the corresponding military advantage anticipated. According to the Trial Chamber in *Galić*, this principle is inherent in the competing requirements of humanity and military necessity, and can be derived from Articles 15 and 22 of the Lieber Code, and Article 24 of the Hague Air Warfare Rules of 1924, with Article 51(5)(b) and Article 57(2)(a)(iii) and (b) of AP I providing the modern conventional version of the rule.¹²⁵

Article 51(5)(b) of AP I prohibits:

[A]n 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*.

Article 57(2) and (3) of AP I provides that:

1. 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;
 - (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

¹²⁵ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 58, fn. 104.

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;

2. 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.

As can be seen from the provisions outlined above, having to ensure that an attack is proportionate is only one of the precautions required by Article 57(2) of AP I of a party planning an attack. Indeed, both Articles 57 and 58 belong to a Chapter of the AP I entitled “Precautionary Measures”, which carves out the principle of precaution. The tribunal has been consistently guided by this principle.¹²⁶

Thus, the Trial Chamber in *Galić* concluded that, in assessing the proportionality of a military operation,

[...] 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.¹²⁷

In this regard, it was emphasised that the test was not one based on hindsight, and the advantage actually attained; rather, the crucial factor is the military advantage that was anticipated at the time of the attack.¹²⁸ Accordingly, the *mens rea* of a disproportionate attack is whether the operation was launched wilfully, and the perpetrator held knowledge of circumstances which would be such as to give rise to an expectation of excessive

¹²⁶ See for example *Prosecutor v. Dragomir Milošević*, Trial Judgement, *supra* note 2, para. 941.

¹²⁷ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 58.

¹²⁸ *Ibid.*, para. 58, fn. 109.

civilian casualties as a consequence.¹²⁹ However, the application of this test is easier said than done.

In the *Kupreškić* case, in the course of a general discussion on the distinction principle, the Trial Chamber referred to the Marten's Clause, derived from the preamble to the Hague Convention concerning the Laws or Customs of War on Land of 1899, and incorporated in AP I by Article 1(2), which requires parties to an armed conflict to abide by the "principles of humanity" and the "dictates of public conscience" in all instances not explicitly set-out in the law.¹³⁰ Accordingly, in interpreting the law on indiscriminate and disproportionate attacks, the Trial Chamber in *Kupreškić* stated that:

True, this Clause may not be taken to mean that the "principles of humanity" and the "dictates of public conscience" have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice. However, this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates. In the case under discussion, this would entail that the prescriptions of Articles 57 and 58 (and of the corresponding customary rules) must be interpreted *so as to construe as narrowly as possible the discretionary power to attack belligerents* and, by the same token, *so as to expand the protection accorded to civilians*.¹³¹

The court applied that rule in considering "the cumulative effect of attacks on military objectives causing incidental damage to civilians".¹³² Accordingly, the Trial Chamber found that:

[I]t may happen that single attacks on military objectives causing incidental damage to civilians, although they may

¹²⁹ *Ibid.*, para. 59.

¹³⁰ The same requirement is stated in the preamble to Additional Protocol II. This requirement was found to comprise customary international law by the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*; see *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 13, para. 84.

¹³¹ *Prosecutor v. Zoran Kupreškić et al.*, *supra* note 84, para. 525.

¹³² *Ibid.*, para. 526.

raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within *the grey area* between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, *this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity*".¹³³

Thus, while one attack on a military objective may be considered proportionate to the incidental injury or damage to civilians, the same kind of attack or conduct or the use of the same type of weapon on repeated occasions may be found unlawful and entail individual criminal responsibility for the perpetrator. For example, those planning a military operation, through knowledge of the consequences of a previous attack, would be on heightened notice of the detrimental effect on civilians of conducting such an act, and thus would be expected to take more precautions, or indeed refrain from launching the attack.

With this in mind, it is pertinent to consider the conclusion of the Appeals Chamber in *Blaškić*, in overturning the Accused's conviction for crimes against humanity committed through the use of 'baby-bombs'. The Trial Chamber there considered evidence that men, women, and children were attacked without distinction, before concluding that an attack on civilians in Stari Vitez had been deliberate.¹³⁴ In particular, the Trial Chamber stated that it had "inferred from the arms used that the perpetrators of the attack had wanted to affect Muslim civilians. The 'baby-bombs' are 'home-made mortars' which are difficult to guide accurately. Since their trajectory is 'irregular' and non-linear, they are likely to hit non-military targets. In this case, these blind weapons were sent onto Stari Vitez where they killed and injured many Muslim civilians".¹³⁵ The Trial Chamber had also taken into account evidence of the use of heavy, sophisticated weapons, including anti-aircraft guns, and anti-tank weapons, in concluding

¹³³ *Ibid.*

¹³⁴ *Prosecutor v. Tihomir Blaškić*, Trial Judgement, *supra* note 101, para. 507.

¹³⁵ *Ibid.*, para. 512.

that the attacks on civilians in Vitez had been deliberate and qualified as a crime against humanity.¹³⁶ In particular, it had stated that the attacks “targeted the Muslim civilian population and were not designed as a response to a military aggression. At the very least, even if there had been such aggression, the assets and the method used could not be deemed proportionate to it”.¹³⁷ The Trial Chamber had further pointed out that the majority of the victims were civilians, and that the attacks resulted in a “substantial material civilian damage”.¹³⁸ The Trial Chamber had concluded that *Blaškić* knew that the use of heavy weapons to seize villages mainly inhabited by civilians would have “consequences out of all proportion to military necessity” and that many civilians would be killed. Thus, he had deliberately taken the risk of making civilians and civilian objects the primary targets.¹³⁹

However, the Appeals Chamber overturned this conclusion, holding that:

[A]s bombardment with “baby bombs” was not known as a means of attack before the attack of 18 July 1993, the Appellant *could not be aware of any risk* of the HVO units under his *de jure* command using such weapons against Muslim civilians or to destroy their property. No reasonable trier of fact could have found, on the basis of the trial evidence, that the Appellant was aware of the risk that the crime of using “baby bombs” against Muslim civilians or to destroy their property might be committed during the attack. It is, furthermore, clear from the preceding sub-section that *the Trial Chamber considered the use of such bombs to be illegal with reference to the circumstantial evidence of the consequences of using them*. That conclusion has, however, been put in doubt on the basis of both trial and additional evidence. It need not be decided whether, in general terms, the use of “baby bombs” is illegal. The evidence before the Appeals Chamber, however, does not satisfy beyond reasonable doubt the standard of *mens rea* pronounced by the Appeals Chamber in this Judgement, that the Appellant was aware of a substantial likelihood that “baby bombs” would be used

¹³⁶ *Ibid.*, para. 504.

¹³⁷ *Ibid.*, para. 507.

¹³⁸ *Ibid.*, para. 507, 512.

¹³⁹ *Ibid.*, paras. 651–653.

against Muslim civilians or their property during the attack [...].¹⁴⁰

In other words, the Appeals Chamber reaffirmed that the test applicable to disproportionate attacks is based on the military advantage and assessment anticipated at the time of the attack, and is not one based on hindsight with a view to the injury to civilians or the damage to civilian objects that in fact resulted. Moreover, the Appeals Chamber also noted evidence that, in the circumstances of the case, the military forces of the accused had been engaged in combat with the hostile party, and had known in advance of launching the ‘baby-bombs’ that the civilians in Stari Vitez were in the basements of houses, and thus anticipated that the attack would result in few civilian casualties.¹⁴¹ Therefore, the attack could not reasonably be considered as intentionally directed at civilians.

3.4. The Inter-Relationship between Indiscriminate and Disproportionate Attacks

As stated earlier, one of the examples of an *indiscriminate* attack provided by Article 51(5) of AP I is that of “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*”. The Trial Chamber in *Galić* found that this test also defines a disproportionate attack.¹⁴²

Thus, in the jurisprudence of the ICTY, which relies heavily on Additional Protocol I, attacks that are disproportionate are often held to have been indiscriminate. For example, the Trial Chamber in *Strugar* considered the proportionality of an attack on Dubrovnik’s Old Town in November 1991 in finding that the attack was also an indiscriminate one. It found that, even if it were to assume the presence of a military objective in the near vicinity, this “would not provide any possible explanation for, or justification of, the nature, extent and duration of the shelling of the Old Town that day, and the variety of positions shelled”. Therefore, this precluded “a finding that the JNA artillery was merely firing at Croatian military targets in the Old Town. There would be simply no relationship

¹⁴⁰ *Prosecutor v. Tihomir Blaškić*, Appeal Judgement, *supra* note 11, para. 465.

¹⁴¹ *Ibid.*, para. 464.

¹⁴² *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 58, fn. 104.

in scale between the evidence offered as the reason for the attack, and the JNA artillery response".¹⁴³ In other words, the Chamber concluded that, even if there were some military targets in the Old Town, the shelling eventually perpetrated was so disproportionate that it would have amounted to an indiscriminate attack. In the end the Chamber found that there were no military targets in the Old Town and held that the shelling constituted a direct attack on civilians.¹⁴⁴

3.5. The Relationship between Indiscriminate and Disproportionate Attacks and Direct Targeting of Civilians and Civilian Objects

To complicate matters even further, evidence of an indiscriminate attack has been used to infer the existence of an intent to conduct a direct attack on civilians or civilian objects.¹⁴⁵ The Trial Chamber in *Galić* found that both indiscriminate attacks and disproportionate attacks may give rise to the inference that civilians were the object of those attacks.¹⁴⁶ This finding was upheld on appeal, where the Appeals Chamber emphasised that the Trial Chamber's finding was not mandatory in the sense that every such indiscriminate or disproportionate attack would necessarily amount to a direct attack on civilians but was permissive and recognised that some disproportionate or indiscriminate attacks *may* qualify as direct attacks.¹⁴⁷

As stated above, in *Blaškić*, the Trial Chamber considered evidence that men, women and children were attacked without distinction, before concluding that an attack on civilians in Stari Vitez had been deliberate.¹⁴⁸ In particular, the Trial Chamber stated that it had inferred from the arms used, namely the baby bombs, that the perpetrators of the attack had wanted to affect Muslim civilians.¹⁴⁹

Moreover, as discussed in paragraph 70 above, the Trial Chamber in *Martić* inferred a direct attack on civilians from the use of an indiscriminate weapon, the M-87 Orkan rocket, which contained a cluster war-

¹⁴³ *Prosecutor v. Pavle Strugar*, *supra* note 35, para. 195.

¹⁴⁴ *Ibid.*, para. 214.

¹⁴⁵ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 57.

¹⁴⁶ *Ibid.*, paras. 57, 60.

¹⁴⁷ *Prosecutor v. Stanislav Galić*, Appeal Judgement, *supra* note 10, paras. 131–133.

¹⁴⁸ *Prosecutor v. Tihomir Blaškić*, Trial Judgement, *supra* note 101, para. 507.

¹⁴⁹ *Ibid.*, para. 512.

head.¹⁵⁰ And in *Dragomir Milošević*, the Trial Chamber considered an attack with a modified air bomb, on what the defence claimed was a “military area” to have been an attack on a civilian area despite the presence of some military personnel. The Trial Chamber relied on evidence that there had been:

[A]n abundance of civilian objects in the vicinity, such as the Bosnia Radio and Television Building (“TV Building”), the Žica factory, the transformer station [and the] Novi Grad Municipal Assembly, all of which were very close to the point of impact.¹⁵¹

From the indiscriminate nature of the attack, arising from the use of a modified air bomb, the Trial Chamber inferred that the civilian population had been directly targeted as an act of terror, constituting a war crime.

Similar findings have been made with respect to disproportionate attacks. The Appeals Chamber reasserted in *Kordić and Čerkez* that:

[I]n principle, the crime of unlawful attack on civilian objects does not require proof of a specific amount of civilian destruction as long as there is evidence which proves beyond reasonable doubt that civilian objects were deliberately attacked. However, in a circumstantial case such as the present one, the scale of civilian destruction may be relevant to determine whether an attack is aimed at civilian objects.¹⁵²

4. The Crime of “Terrorising the Civilian Population”

4.1. General

The recognition of the offence of “terrorising the civilian population” stems from, but is not limited to, its codification in Article 22 of the Hague Air Warfare Rules of 1924:

Any air bombardment for the purpose of terrorizing the civil population or destroying or damaging private property with-

¹⁵⁰ *Prosecutor v. Milan Martić*, Trial Judgement, *supra* note 31, para. 472. This was confirmed on appeal. See *Prosecutor v. Milan Martić*, Appeal Judgement, *supra* note 116, para. 260.

¹⁵¹ *Prosecutor v. Dragomir Milošević*, Trial Judgement, *supra* note 2, para. 497.

¹⁵² *Prosecutor v. Dario Kordić and Mario Čerkez*, *supra* note 12, para. 453.

out military character or injuring non-combatants, is forbidden.

In addition, Articles 51(2) of AP I and 13(2) of AP II prohibit attacks designed to spread terror:

The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

4.2. Terror under Article 3

As is the case with attacks on civilians, the prohibition on acts of terror is not explicitly set out in the ICTY Statute. However, the development of the jurisprudence of the Tribunal in defining what is and is not lawful in the conduct of hostilities has led to the recognition of the existence of this war crime under Article 3. The two leading cases where this crime was considered in detail are *Galić* and *Dragomir Milošević*. Even though earlier cases considered evidence of the terrorising of civilians, this was done in the context of other charges. Thus, the *Galić* case was the first occasion on which an ICTY Chamber looked at such acts as a separately charged crime under its Statute.¹⁵³

The *Galić* Trial Chamber started its analysis by looking firstly at whether the Tribunal had jurisdiction over the charge in the Indictment, namely “killing and wounding civilians in time of armed conflict with the intention to inflict terror on the civilian population”.¹⁵⁴ In that context, the Chamber went through the four *Tadić* conditions discussed above¹⁵⁵ and concluded that this offence fell under the jurisdiction of the Tribunal pursuant to Article 3 of the ICTY Statute.¹⁵⁶ In considering the requirement that before a rule can be incorporated under Article 3 it must either be customary in nature or belong to conventional law, the Chamber based its conclusions on conventional law, namely Article 51(2) which prohibits acts or threats of violence carried out with the primary purpose of spread-

¹⁵³ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 66.

¹⁵⁴ *Ibid.*, para. 87.

¹⁵⁵ See Section 2.1.1. above.

¹⁵⁶ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, paras. 91–138.

ing terror among the civilian population,¹⁵⁷ noting that it was not necessary for it to take a position on whether the “crime of terror” is part of customary international law.¹⁵⁸

However, the Appeals Chamber in *Galić* concluded that the prohibition of terrorising the civilian population, as contained in Article 51(2) of AP I and Article 13(2) of AP II, was indeed a codification of customary international law.¹⁵⁹ It further considered that a breach of this prohibition entailed individual criminal responsibility in customary law at the time in question (namely 1992).¹⁶⁰ In *Dragomir Milošević* the Trial Chamber noted “a growing tendency in international law to distinguish between terror in times of peace and terror in a situation of armed conflict as understood in international humanitarian law”.¹⁶¹ It nonetheless concluded that “attacks directed against the civilian population are equally prohibited in the international instruments dealing with the crime of terror in peace time”.¹⁶²

In articulating the elements of the crime of terror alleged in the Indictment, the *Galić* Trial Chamber relied on the wording of Article 51(2) of the AP I. The elements were found to be as follows: (i) acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population; (ii) the offender wilfully made the civilian population or individual civilians not taking [a] direct part in hostilities the object of those acts of violence (the general intent); (iii) the above offence was committed with the primary purpose of spreading terror among the civilian population (the specific intent).¹⁶³

Relying on the plain wording of Article 51(2), the Chamber rejected the parties’ submissions that actual infliction of terror is an element of the crime of terror. As a result, it also found that there is no requirement of

¹⁵⁷ *Ibid.*, para. 97.

¹⁵⁸ *Ibid.*, para. 69, 113.

¹⁵⁹ *Prosecutor v. Stanislav Galić*, Appeal Judgement, *supra* note 10, paras. 86–87, 98.

¹⁶⁰ *Ibid.*, para. 86; Judge Schomburg dissented on this point: *Ibid.*, XXII. Separate and Partially Dissenting Opinion of Judge Schomburg, pp. 212–221.

¹⁶¹ *Prosecutor v. Dragomir Milošević*, Trial Judgement, *supra* note 2, para. 887.

¹⁶² *Ibid.*

¹⁶³ *Prosecutor v. Stanislav Galić*, Trial Judgement, *op. cit.*, para. 133; *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, *supra* note 53, para. 589.

proof of a causal connection between the unlawful acts of violence and the actual production of terror.¹⁶⁴ The Chamber also held that “acts of violence” are confined to unlawful attacks against civilians and do not include legitimate attacks upon combatants.¹⁶⁵ Furthermore, it considered that the “primary purpose” referred to in the elements qualifies the *mens rea* of the crime of terror and is to be understood as excluding recklessness as sufficient. In other words, the prosecution would be required to prove not only that an accused accepted the likelihood that terror would result from illegal acts, but that this was the result the accused specifically intended. Thus, the crime of terror was found to be a specific intent crime like genocide and persecution.¹⁶⁶ Finally, the Chamber considered that terror constitutes ‘extreme fear’ on the part of civilians, and that the definition of the ‘civilian population’ was the same as the one it discussed in the context of Article 3.¹⁶⁷

While the Trial Chamber in *Galić* was not required to decide on circumstances where there was simply a threat to cause acts of violence with the primary purpose of spreading terror, as distinct from a threat which was actually carried out, it nonetheless observed that a threat of violence alone could involve grave consequences, such as grave fear, thus meeting the *Tadić* requirement for war crimes under Article 3. In particular, the Trial Chamber noted that:

[A] credible and well publicised threat to bombard a civilian settlement indiscriminately or to attack with massively destructive weapons will most probably spread extreme fear among civilians and result in other serious consequences, such as displacement of sections of the civilian population.¹⁶⁸

¹⁶⁴ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 134.

¹⁶⁵ *Ibid.*, para. 135.

¹⁶⁶ *Ibid.*, para. 136.

¹⁶⁷ *Ibid.*, para. 137.

¹⁶⁸ *Ibid.*, para. 110, fn. 179. The Appeals Chamber in *Galić* later confirmed that threats to cause acts of violence would suffice. See *Prosecutor v. Stanislav Galić*, Appeal Judgement, *supra* note 10, paras. 87, 102. More recently, the *Dragomir Milošević* Appeals Chamber confirmed that, in light of the fact that threats would suffice, actual infliction of death or serious injury to victims was not an element of offence *per se* but simply one of the possible modes of its commission. See *Prosecutor v. Dragomir Milošević*, Appeal Judgement, *supra* note 63, paras. 31–33.

The Trial Chambers in the *Dragomir Milošević* and *Galić* cases emphasised the need to distinguish the prohibition of spreading terror from the effects that acts of legitimate warfare may have on a civilian population.¹⁶⁹ In *Dragomir Milošević*, the Trial Chamber noted that:

This is particularly the case in an armed conflict conducted in an urban environment, where even legitimate attacks against combatants may result in intense fear and intimidation among the civilian population, but to constitute terror, an intent to instill fear beyond this level is required.¹⁷⁰

Thus, the jurisprudence requires not only illegitimate acts of warfare, such as an unlawful attack on the civilians, but also a specific intent to cause a feeling of “extreme fear” on the part of civilians.¹⁷¹

On appeal, *Galić* challenged many aspects of the Trial Chamber’s analysis relating to jurisdiction. The Appeals Chamber, however, rejected all of them and held, as stated above, that the crime of terror is part of customary international law due to the fact that Article 51(1), (2), and (3) constituted a confirmation of existing customary international law at the time of its adoption.¹⁷² With respect to the elements of the crime of terror, the *Galić* Appeals Chamber confirmed that the actual infliction of terror is not an element of it.¹⁷³ With respect to the issue of “primary purpose”, the Appeals Chamber concluded that:

[T]he purpose of the unlawful acts or threats to commit such unlawful acts need not be the only purpose of the acts or threats of violence. The fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian population was principal among the aims. Such intent can be inferred from the circumstances of the acts or

¹⁶⁹ *Prosecutor v. Dragomir Milošević*, Trial Judgement, *supra* note 2, para. 888; *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 101.

¹⁷⁰ *Prosecutor v. Dragomir Milošević*, Trial Judgement, *supra* note 2, para. 888.

¹⁷¹ *Prosecutor v. Stanislav Galić*, Trial Judgement, *supra* note 10, para. 135.

¹⁷² *Prosecutor v. Stanislav Galić*, Appeal Judgement, *supra* note 10, para. 87.

¹⁷³ *Ibid.*, paras. 72, 77, 103–104. The Appeals Chamber in *Dragomir Milošević* found, however, that the evidence of actual terrorisation may contribute to establishing other elements of the crime of terror. See *Prosecutor v. Dragomir Milošević*, Appeal Judgement, *supra* note 63, paras. 35, 37.

threats, that is from their nature, manner, timing and duration.¹⁷⁴

Finally, the Appeals Chamber repeated several times that the crime of “acts or threats of violence the primary purpose of which is to spread terror among the civilian population *falls within the general prohibition of attacks on civilians*”.¹⁷⁵ Notably, neither the Trial, nor the Appeals Chamber specifically addressed the possible exception provided in the Commentary to Additional Protocol I, which states that Article 51(2) is intended to cover “acts of violence the primary purpose of which is to spread terror among the civilian population *without offering substantial military advantage*”.¹⁷⁶ This suggests that ‘terrorisation’ of the civilian population may be justified if carried out with the primary aim of gaining a substantial military advantage or otherwise for reasons of military necessity. However, that would be contrary to the Tribunal’s clear jurisprudence that a deliberate attack against civilians can never be justified by military necessity.¹⁷⁷ Indeed, in its discussion of the *mens rea* elements of the crime of terror the Appeals Chamber in *Galić* stated that “[t]he prohibition of acts or threats of violence would in that sense stem from the unconditional obligation not to target civilians for any reason, *even military necessity*”.¹⁷⁸ As observed by the Trial Chamber in the *Dragomir Milošević* case, the crime of terror has been treated as substantively the same as that of direct attacks against civilians, with the additional element of a specific intent to spread terror.

4.3. Terror under Article 5

The acts amounting to terror described above have also been considered in the context of crimes against humanity under Article 5. In *Blagojević* the accused were charged with persecution, a crime against humanity, in the form of terrorisation of Bosnian Muslim civilians in Srebrenica and Potočari. The Chamber found that, while the act of “terrorising the civilian population” is not found in the Statute, it was similar to “acts or

¹⁷⁴ *Prosecutor v. Stanislav Galić*, Appeal Judgement, *supra* note 10, para. 104.

¹⁷⁵ *Ibid.*, paras. 102–103.

¹⁷⁶ ICRC Commentary to Additional Protocol I of 1977, para. 1940.

¹⁷⁷ *Prosecutor v. Tihomir Blaškić*, Appeal Judgement, *supra* note 11, para. 109.

¹⁷⁸ *Prosecutor v. Stanislav Galić*, Appeal Judgement, *supra* note 10, para. 103.

threats of violence the primary purpose of which is to spread terror among the civilian population” prohibited under Article 51(2) of AP I and Article 13(2) of AP II to the Geneva Conventions. Under reference to the *Galić* Trial Judgement, the Chamber defined the elements of “terrorising the civilian population” as follows: (i) acts or threats of violence; (ii) the offender wilfully made the civilian population or individual civilians not taking part in hostilities the object of those acts or threats of violence; and (iii) the acts or threats of violence were carried out with the primary purpose of spreading terror among the civilian population.¹⁷⁹ It concluded that terrorisation of the civilian population violated the fundamental right to security of the person contained within international customary and conventional law.¹⁸⁰ It also affirmed the need to find a specific intent to terrorise and emphasised that the infliction of terror did not need to be the only objective of the acts or threats of violence but, rather, the principal one.¹⁸¹ Accordingly, the Trial Chamber found that the shelling of the UN compound in Srebrenica while thousands of Bosnian Muslim refugees were seeking protection there, the firing on refugees fleeing from Srebrenica to Potočari, and the threats and physical attacks on Bosnian Muslims sheltering in Potočari thereafter, constituted terrorisation of the civilian population, having been conducted with the primary purpose of creating an atmosphere of extreme fear.¹⁸²

4.4. Inferring an Intent to Terrorise from the Use of Indiscriminate and Disproportionate Force

As stated earlier, aside from the added element of specific intent, the crime of terror under Article 3 has been treated by the ICTY in the same manner as the unlawful attacks on civilians. Thus, in *Galić* the Appeals Chamber emphasised that:

[...] the acts or threats of violence constitutive of the crime of terror shall not be limited to direct attacks against civilians

¹⁷⁹ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, *supra* note 53, para. 589.

¹⁸⁰ *Ibid.*, para. 592. The Trial Chamber quoted Article 9 of the ICCPR and Article 5 of the ECHR as pertaining to this right.

¹⁸¹ *Ibid.*, para. 591.

¹⁸² *Ibid.*, paras. 611–614.

or threats thereof but may include indiscriminate or disproportionate attacks.¹⁸³

The same approach was applied by the Trial Chamber in *Dragomir Milošević*, where the Trial Chamber inferred an intent to terrorise “from the very use by the SRK of this highly inaccurate and indiscriminate weapon, the modified air bomb”.¹⁸⁴ It further highlighted this by stating:

The use of the modified air bombs is another clear indication of the Accused’s intent to spread terror. The highly destructive force and the psychological effects these bombs had on the civilian population were obvious to anyone. The decision by the Accused to use modified air bombs against civilian targets can, therefore, only be interpreted as demonstrating the intent to spread terror.¹⁸⁵

The court further inferred an intent to terrorise the civilian population from “evidence as to the accuracy of mortars and the skill of the SRK mortar crews, the firing of numerous shells into the city, the *gravity* of the injuries and the *number of innocent deaths* caused by mortar fire”.¹⁸⁶

5. Conclusion

As can be seen from the discussion above, the ICTY has relied heavily on the well-known principles of distinction and protection in interpreting its Statute, and developing its jurisprudence relating to lawful and unlawful conduct in armed hostilities. Some of the definitions and concepts in conventional and customary international humanitarian law, such as those relating to civilians and a civilian population, have been taken in their entirety from the relevant instruments, mainly the Additional Protocols.

The prime difficulty that the ICTY has faced has been the application of these principles to crimes against humanity (as opposed to war crimes), and the determination of the extent to which the protection against such crimes extends to combatants and persons *hors de combat*.

¹⁸³ *Prosecutor v. Stanislav Galić*, Appeal Judgement, *supra* note 10, para. 102.

¹⁸⁴ *Prosecutor v. Dragomir Milošević*, Trial Judgement, *supra* note 2, paras. 872, 912.

¹⁸⁵ *Ibid.*, para. 970.

¹⁸⁶ *Ibid.*, para. 913. This was confirmed on appeal. See *Prosecutor v. Dragomir Milošević*, Appeal Judgement, *supra* note 63, para. 37.

In addition, relying upon the relevant conventional and customary law, the ICTY has recognised the terrorising of a civilian population as a war crime. This progress is important as it shows that relatively old international customary law provisions apply to new methods of warfare, as well as new weapons used in modern armed conflicts, both of which can have grave consequences for civilian populations. One of the many achievements of the ICTY has been to develop the jurisprudence of international criminal law, in particular the customary law provisions that have lain dormant for some time. The real significance of this is the practical application of international humanitarian law to provide meaningful protection for civilians, or, at the very least, some satisfaction for them, when those who attacked them are brought to trial.

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Principles of Distinction and Protection at the ICTY

Iain Bonomy

The assessment of military conduct during armed hostilities as either lawful or criminal involves striking a balance between the requirements of humanity and those of military necessity. Throughout its existence, the International Criminal Tribunal for the former Yugoslavia ('ICTY') has tackled this balancing exercise in the context of individual criminal responsibility by reference to the laws of war. Indeed, the Appeals Chamber of the ICTY in the Kunarac case noted that "the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of acts committed in its midst".

Accordingly, for many years, the Trial and Appeals Chambers of the ICTY have been guided by the well-known principles of distinction and protection, which, according to one of the Trial Chambers, form "the foundation of international humanitarian law". In applying these guiding principles the Chambers have also had regard to and analysed the prohibition against indiscriminate and disproportionate attacks.

This has all been done in the context of the Statute establishing the ICTY. The relevant provisions in the Statute are Article 2 (grave breaches of the Geneva Conventions), Article 3 (violations of law or customs of war other than those covered by Articles 2, 4, and 5), and Article 5 (crimes against humanity).

This paper considers pertinent ICTY's jurisprudence and provides an overview of the application of these principles in the various cases. In doing so, it focuses on those most relevant to the issue of what qualifies as lawful conduct in armed hostilities.

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