THE CHALLENGING PROSECUTION OF UNLAWFUL ATTACKS AS WAR CRIMES AT INTERNATIONAL CRIMINAL TRIBUNALS

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Unlawful attacks, namely, attacks against civilian population and civilian objects and disproportionate attacks, have characterized recent and on-going armed conflicts around the world, including those taking place in the Middle East and Africa. International humanitarian law prohibits them. However, their prosecution is difficult as the case-law of the International Criminal Tribunal for the Former Yugoslavia evidences. In applying its Statute, the Elements of Crimes text and emerging practice, the International Criminal Court is expected to face similar challenges in ongoing and future cases. Underlying questions are why the prosecution of unlawful attacks before international criminal tribunals is challenging and how to handle it. Two reasons arguably explain this. First, there are problems relating to notions such as "civilian," "civilian object" and "proportionality". Second, there are practical problems including access to evidence, selection of modes of criminal liability, and prosecutorial discretion. How the International Criminal Tribunal for the Former Yugoslavia has handled this and how the International Criminal Court may proceed are examined.

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I. Introduction

Unlawful attacks, namely attacks against civilians, civilian populations, or civilian objects and disproportionate attacks, are prohibited in treaty and customary international humanitarian law (IHL).[1] However, as this article argues, the prosecution of unlawful attacks as war crimes has proven to be difficult at international criminal tribunals. As discussed throughout the present article, this is evidenced by the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY). Based on the ICTY experience, this article also argues that the International Criminal Court (ICC) is expected to face similar trouble in ongoing and future cases. Thus, the research questions that arise are why the prosecution of unlawful attacks before international criminal tribunals is particularly challenging and how to handle it. In addressing these research questions, this article seeks to demonstrate that there are two main reasons that underlie the obstacles to prosecution of unlawful attacks as war crimes. First, this article argues that there are problems relating to notions such as "civilian," "civilian object," and "proportionality," originally contained in general prohibitory IHL rules but now used as underlying notions in prosecution of the respective war crimes.[2] Second, there are problems of a more practical nature including access to evidence, determination of criminal liability modes suitable for prosecutorial strategy, and discretion of prosecutors of international criminal tribunals to open investigations, bring charges, or both.[3] It is herein analyzed how the ICTY has handled this and how the ICC under its Statute/Elements of Crimes text and its emerging case law can proceed.

This article first discusses the prohibition and subsequent criminalization of unlawful attacks. Then, problems relating to the notions of "civilian" and "civilian object/military objective" in unlawful attacks as war crimes are examined. Later, this article discusses problems

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1. *See generally* MARCO SASSÒLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? 199–230 (2d ed. 2006); Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175, 198–200 (2005); *see infra* Section II (for detailed discussion and respective citations).
2. *See infra* Sections III, IV, and V (concerning the problems on IHL notions).
3. *See infra* Section VI.

relating to the principle of proportionality in unlawful attacks as war crimes. Then, practical problems relating to the prosecution of unlawful attacks as war crimes are identified and discussed. Finally, some conclusions are provided.

II. Unlawful Attacks: From Prohibition to Criminalization

IHL has traditionally been implemented via prevention although *a posteriori* judicial action is increasing.[4] As to the conduct of hostilities, IHL is articulated at a high level of generality.[5] In turn, international criminal law is punitive.[6] As international criminal law addresses individual criminal responsibility, its provisions have to be very specific to satisfy the principle of legality.[7] International criminal tribunals (including the ICTY and the ICC) refine, develop and adapt IHL prohibitions, including those against unlawful attacks, to criminal proceedings.[8] Thus, it is herein necessary to present an overview of the prohibitions and crimes concerning unlawful attacks as follows.[9]

The prohibition against attacking civilian population and civilians is contained in the Protocols Additional to the Four Geneva Conventions of 1949 applicable to international and non-international armed conflicts respectively (AP I and AP II respectively) and is recognized as customary IHL.[10] Although there is no similar explicit prohibition against

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4. *See* SASSÒLI & BOUVIER, *supra* note 1, at 348–49.

5. *See, e.g.*, FRITS KALSHOVEN, REFLECTIONS ON THE LAW OF WAR: COLLECTED ESSAYS 628 (2007).

6. *See* Alexander K.A. Greenawalt, *International Criminal Law for Retributivists,* 35 U. Pa. J. INT'L L. 969, 985, 1030 (2014); *see generally* Paola Gaeta, *The Interplay Between the Geneva Conventions and International Criminal Law*, *in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY 737, 751–52 (Andrew Clapham et al. eds., 2015).

7. Antonio Cassese, INTERNATIONAL CRIMINAL LAW 41–43 (2d ed. 2008).

8. *See* SASSÒLI & BOUVIER, *supra* note 1, at 322.

9. Attacks following Article 49 of the AP I are: "acts of violence against the adversary, whether in offence or in defence." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 49, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

10. *Id.* arts. 48, 51(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]; *The Principle of Distinction Between Civilians and Combatants: Rule 1*, ICRC, https://ihl-

attacking civilian objects under AP II (unlike AP I),[11] this prohibition is also applicable to non-international armed conflicts under customary IHL.[12] The principle underlying these treaty and customary prohibitions is the principle of distinction according to which attacks must not be directed against civilians or civilian objects and which is recognized as one of the cardinal IHL principles.[13] The prohibition against launching disproportionate attacks is included in AP I and is also considered applicable to non-international armed conflicts under customary IHL.[14] As for criminalization of those prohibitions, AP I considers attacks against civilian populations, individual civilians, and disproportionate attacks as grave breaches.[15] This is a category of war crimes only applicable in international armed conflicts.[16] Be that as it may, the war crimes of unlawful attacks in international and non-international armed conflicts are customary IHL.[17]

The ICTY interpreted that "general principles and rules on the protection of victims of [non-international armed conflicts] and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife" are criminalized under customary law.[18] The ICTY thus established that unlawful attacks as war crimes may be committed in non-international armed conflicts. The ICTY also

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databases.icrc.org/customary-ihl/eng/docs/v1_rul (last visited Jan. 1, 2017) [hereinafter ICRC].

11. AP I, *supra* note 9, art. 52(1).

12. ICRC, *supra* note 10, r. 2.

13. *See*, *e.g.*, ICRC, *supra* note 10, r. 1, 7 (for customary IHL rules reflecting this principle); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 ¶ 78 (July 8).

14. AP I, *supra* note 9, arts. 51(5)(b), 57; ICRC, *supra* note 10, r. 14.

15. AP I, *supra* note 9, art. 85(3)(a)–(b).

16. *See* SASSÒLI & BOUVIER, *supra* note 1, at 304; Gaeta, *supra* note 6, at 615, 642–643.

17. *See* Jean-Marie Henckaerts & Louise Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 576, 580, 591, 597, 599 (2005) (discussing international armed conflicts and non-international conflicts under customary IHL Rule 156); *see also id.* at 581 (Although attacks against civilian objects are prohibited under AP I, they were not explicitly included as grave breaches in the AP I. In any event, they are considered war crimes under customary IHL.).

18. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 134 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

understood that the non-exhaustive list of "violations of the laws or customs of war" contained in Article 3 of the ICTY Statute includes serious violations of conduct of hostilities as they meet some requirements set by the ICTY.[19]

The ICC Statute, as complemented by the ICC Elements of Crimes text,[20] criminalizes attacks against civilian population, individual civilians, and civilian objects as war crimes in international armed conflicts—Article 8(2)(b)(i), (ii)—and attacks against civilians in non-international armed conflicts—Article 8(2)(e)(i).[21] However, war crimes of attacks against civilian objects and disproportionate attacks in non-international armed conflicts are out of the ICC's jurisdiction.[22] It should be mentioned that national criminal courts have prosecuted unlawful attacks: i) as war crimes implementing specific IHL treaty provisions, customary rules, or both into their national criminal laws;[23] or ii) as

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19. *Id.* ¶ 87; *see also id.* ¶ 94 (To be subject to prosecution pursuant to Article 3:

> "(i) the violation must constitute an infringement of a rule of [IHL]; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met . . . ; (iii) the violation must be 'serious', . . . [i.e.,] it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim . . . ; (iv) the violation of the rule must entail . . . individual criminal responsibility . . . .").

20. Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

21. *Id.* art. 8(2)(b)(i) ("Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities."); *id.* art. 8(2)(b)(ii) ("Intentionally directing attacks against civilian objects, that is, objects which are not military objectives."); *id.* art. 8(2)(e)(i) ("Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.").

22. *See id.* arts. 8(2)(b), (e).

23. In the cases against Đukić Novak, Karajić Suljo, and Gojko Kličkovíc, at the Court of Bosnia and Herzegovina, the accused were charged with war crimes against civilians referred to in Article 173(1) of the Criminal Code of Bosnia and Herzegovina as *inter alia*: a) attack on civilian population and individual civilians; and b) "attack without selecting a target, by which civilian population is harmed."; *See* Lejla Vujinovic, *Correspondents' Reports: Bosnia and Herzegovina*, 11 Y.B. INT'L HUMANITARIAN L. 407, 419, 432–33 (2008).

domestic offences such as terrorism, murder, serious injuries or all three.[24]

III. Problems Relating to the Notion of "Civilian" in Unlawful Attacks as War Crimes

In international armed conflicts, while Article 50.1 of the AP I defines civilian as "any person who does not belong to one of the categories of persons referred to [members of armed forces as detailed in Geneva Convention III and AP I],"[25] civilian population, under Article 50.2 of the AP I, comprises "all persons who are civilians."[26] Under customary IHL, similar definitions also apply to non-international armed conflicts.[27] There is no category of quasi-combatant.[28] In giving content to the notion of "civilians," an important notion is "direct participation in hostilities," which is defined by the International Committee of the Red Cross (ICRC) in its interpretative guidance on direct participation in hostilities.[29] Thus, direct participation consists of acts that must be objectively likely to inflict harm to either adversely affect the military operations or military capacity of a party to an armed conflict or to inflict death, injury, or damage on persons or objects protected from direct attacks[30] provided that there is direct causation between that harm and the

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24. *E.g.*, Court of First Instance of Peru: National Criminal Chamber Oct. 13, 2006, Case No. 560-03, 72, 135–38, 240; Victor Polay Campos et al., Accumulated File 01-93, Judgement, at 134-36 (Mar. 21, 2006) (in both cases the accused were found guilty of terrorism, murder and serious injuries with references to IHL in the context of the Peruvian non-international armed conflict).

25. AP I, *supra* note 9, art. 50(1).

26. *Id.* art. 50(2).

27. *See* ICRC, *supra* note 10, at r.5 ("Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians." This rule is applicable to international armed conflicts/non-international armed conflicts); Prosecutor v. Kordić, Case No. IT-95-14/2-A, Judgement, ¶¶ 50, 97 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

28. SASSÒLI & Bouvier, *supra* note 1, at 204.

29. Nils Melzer, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, INT'L COMM. OF THE RED CROSS 46 (2009).

30. *Id*. at 47.

military operation.[31] Those acts must be "specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another."[32]

In prosecuting cases where armed groups mingle with civilians, the question is how a commander or a foot soldier knows when civilians are directly participating in hostilities. In general, it depends on the context to conclude if someone is directly participating in hostilities. The ICTY has considered that a person shall not be attacked when, under the circumstances at the time, it was not reasonable for the attacker to believe or conclude that the potential target was a combatant.[33] Such knowledge may be proved via the existence of information at the time of the attack.[34] When there is no evidence, it would be sufficient to show that the commander should have known the civilian character of the population based on a known state of affairs or on common sense.[35] Control of an area by the attackers and their previous contact with persons who were subsequently attacked may lead to the inference that the attackers must have been aware of the civilian status of the victims as indicated in the so-called Goldstone Report on the Gaza Conflict.[36] The loss of the civilian protection only lasts during the time when the civilian takes a direct part in hostilities,[37] namely, an act that both causes harm against a party to the armed conflict and is connected to hostilities.[38] Examples of a civilian taking a direct part in hostilities include: voluntary human shields and delivery by a civilian truck driver of

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31. *Id.* at 51; *see also* Prosecutor v. Strugar, Case No. IT-01-42-A, Judgement, ¶ 178 (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008).

32. Melzer, *supra* note 29, at 58.

33. Prosecutor v. Galić, Case No. IT-98-29-T, Judgement and Opinion, ¶ 50 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

34. *Id.*

35. *See* Carolin Wuerzner, *Mission Impossible? Bringing Charges for the Crime of Attacking Civilians or Civilian Objects Before International Criminal Tribunals*, 90 INT'L REV. RED CROSS 907, 915 (2008).

36. Human Rights Council, Rep. of the United Nations Fact-Finding Mission on the Gaza Conflict, ¶ 43, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009).

37. AP I, *supra* note 9, art. 51(3), AP II, *supra* note 10, art. 13(3); ICRC, *supra* note 10, r.6; Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Judgement, ¶ 157 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

38. Melzer, *supra* note 29, at 46.

ammunition to an active firing position at the front line.[39] In case of doubt, the civilian status is presumed.[40]

However, those who become members of organized armed groups lose their protection against a direct attack during the duration of their membership as they assume a "continuous combatant function."[41] This concept departs from the notion of "direct participation in hostilities" and constitutes an alternative standard for targeting.[42] It is indeed an exception to direct participation in hostilities since those members of armed groups considered as having "continuous combatant function" can be targeted not only when they directly participate in hostilities.[43] Accordingly, this article argues that the notion of "continuous combat[ant] function" seeks to address a remaining gap not covered by "direct participation in hostilities" and which consists of inequality in targetability between the state armed forces and the armed forces of a non-state party to the armed conflict. The notion of "continuous combat[ant] function" thus creates a greater expansion up to higher levels in the chain of command although it does not necessarily require command responsibility.[44] In any event, as authors Sassoli, Bouvier, and Quintin point out, the difficult practical question is how state armed forces determine fighting membership when the individual in question commits no hostile acts.[45] It is hence important for those who are regarded as having "continuous combat[ant] function" to declare that they put an end to this status or manifest so via conclusive behavior.[46]

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39. *Id.* at 56–57.

40. AP I, *supra* note 9, art. 50(1); *see also* HENCKAERTS & DOSWALD-BECK, *supra* note 17, at 24 (especially relevant information concerning non-international armed conflicts).

41. Melzer, *supra* note 29, at 73; *see also* Prosecutor v. Kordić, Case No. IT-95-14/2-A, Judgement, ¶ 51 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

42. *See* Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697, 704 (2010); Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 831, 890 (2010).

43. *See* Schmitt, *supra* note 42, at 704; MELZER, *supra* note 29, at 890–92.

44. *See* MELZER, *supra* note 29, at 72.

45. *See* MARCO SASSÒLI ET AL., HOW DOES LAW PROTECT IN WAR? 15 (3d ed. 2011).

46. Melzer, *supra* note 29, at 72.

According to the ICTY, the existence of some military activities such as poorly armed or trained part time soldiers defending their villages would not deprive the population of its civilian character. This is correct because such character is not changed by the presence within the civilian population of some individuals entitled to combatant status or those actively participating in the hostilities.[47] However, the ICTY went further by equating a weak defence with no defence at all.[48] This finding may be questioned. The ICTY mistakenly equated two different scenarios, namely, i) a civilian population that is not taking direct part in hostilities and is undefended; and ii) a civilian population which, albeit its poor organization, is equipped and instructed to conduct a military defence and, thus, may be targeted as a military objective taking precautions in the attack.[49]

The ICC in applying its Statute and Elements of Crimes determined that the crime of attacks against civilians consists of intentional attacks against civilians not having directly participated in hostilities, and may be established even if a military objective was also targeted, although attacks targeting military objectives that incidentally affected civilians fall short of this crime.[50]

A major challenge to charges for attacks against civilians is to prove that the accused knew that the individuals attacked were civilians and that his attack was not based on the reasonable belief that one of the following exceptions to the protection of civilians applies:[51] first, when

47. Prosecutor v. Simić, Case No. IT-95-9-T, Judgement, ¶ 42 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003); AP I, *supra* note 9, art. 50(3).

48. *See* Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶ 407 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

49. *See* HÉCTOR OLÁSOLO, UNLAWFUL ATTACKS IN COMBAT SITUATIONS: FROM THE ICTY'S CASE LAW TO THE ROME STATUTE 116–17 (2008); *see also* AP I, *supra* note 9, art. 57 (stating the precautions to be made in the case of attack); ICRC, *supra* note 10, r.15–21 (stating the precautions to be made in the case of attack regarding international armed conflicts/non-international armed conflicts). If civilians exert individual self-defence or defence of others, there is no belligerent nexus and, hence, this does not constitute direct participation in hostilities. MELZER, *supra* note 29, at 61. However, self-defence as an exception to the classification of certain conducts as direct participation in hostilities has to be construed very narrowly. *See* SASSÒLI ET AL., *supra* note 45, at 11.

50. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgement Pursuant to Article 74 of the Statute, ¶¶ 796-808 (Mar. 7, 2014).

51. *See* Wuerzner, *supra* note 35, at 912.

civilians abuse their rights; second, even if the object of the attack is a military objective, belligerents cannot avoid causing collateral damage.[52]

As for mens rea, the prosecutor has to prove, according to the ICTY, that the offender "was aware or should have been aware of the civilian status of the persons attacked."[53] In case of doubt about the status of the attacked person, the person should be considered a civilian.[54] The standard of proof is that a reasonable person in the circumstances could not have believed that the attacked individual was a combatant.[55] Concerning mens rea of the war crime of attacking civilians, there is an important difference between the ICTY case law and the ICC Statute/Elements of Crimes. Following the ICRC AP I Commentary,[56] the ICTY has broadly interpreted the expression "when committed willfully" contained in Article 85.3(a) of the AP I[57] by including not only criminal intent, or *dolus*, but also recklessness.[58] However, as interpreted by the ICC, the ICC Statute/Elements of Crimes raise the evidentiary threshold requiring intent.[59] This option may be considered stringent as there was no need to be more restrictive than the definition under Article 85.3(a) of the AP I. It could however be argued that the ICC Statute more

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52. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, ¶ 522 (Jan. 14, 2000).

53. Prosecutor v. Galić, Case No. IT-98-29-T, Judgement and Opinion, ¶ 55 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

54. *Id.*; AP I, *supra* note 9, art. 52(3); ICRC, *supra* note 10, r.6 (stating the rules for international armed conflicts/non-international armed conflicts); HENCKAERTS & DOSWALD-BECK, *supra* note 17, at 23–24.

55. *Galić*, Case No. IT-98-29-T, ¶ 55.

56. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 994 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

57. AP I, *supra* note 9, art. 85(3) (stating that an act is "committed willfully [when] . . . (a) making the civilian population or individual civilians the object of attack").

58. Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶ 180 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

59. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on Confirmation of Charges, ¶ 271 (Sept. 30, 2008); ICC Statute, *supra* note 20, arts. 8(2)(b)(i), (e)(i) ("Intentionally directing attacks"); U.N. Preparatory Commission for the International Criminal Court, Elements of Crimes, arts. 8(2)(b)(i), (e)(i), PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter ICC Elements of Crimes] ("The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.").

precisely defines the boundaries between attacks against civilians and those which are disproportionate.[60] Be that as it may, this more demanding subjective element is offset by the fact that under the ICC Statute/Elements of Crimes these are crimes of action completed by launching the attack.[61] This coincides with the ICRC study on customary IHL.[62] Following Article 85.3(a) of the AP I, the ICTY has required "death or serious injury to body or health" to be caused as a result.[63]

Nevertheless, as already determined by the ICC,[64] it is unnecessary to prove a result as this is not a material element under the ICC Statute/Elements of Crimes.[65] In any event, in most cases a charge would not be brought unless there was some actual loss.[66] Thus, in application of Article 8(2)(e)(i) of the ICC Statute, the ICC Trial Chamber in *Prosecutor v. Katanga* found *inter alia* that the crime of attack against civilians requires no result such as persons killed; however, due to the facts of the case, the Chamber took the existent results to demonstrate the perpetration of the crime.[67]

The required *mens rea* may be inferred from the fact that necessary precautions, such as the use of available intelligence to identify the target, were not taken before and during the attack.[68] The competent court has to assess information available or information that could have been reasonably available when the attack occurred, i.e., such evaluation cannot be made with hindsight.[69] The best manner to establish the

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60. *See* OLÁSOLO, *supra* note 49, at 222.

61. *Id.* at 76.

62. Henckaerts & Doswald-Beck, *supra* note 17, at 577 (discussing international armed conflicts).

63. AP I, *supra* note 9, art. 85(3)(a).

64. *Katanga*, Case No. ICC-01/04-01/07, ¶ 270.

65. *See* ICC Statute, *supra* note 20, art. 8(2)(b)(i).

66. *See* W.J. Fenrick, *Crimes in Combat: The Relationship Between Crimes Against Humanity and War Crimes*, *in* GUEST LECTURE SERIES OF THE ICC OFFICE OF THE PROSECUTOR 9 (2004).

67. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgement Pursuant to Article 74 of the Statute, ¶ 871 (Mar. 7, 2014).

68. Knut Dörmann, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 132 (2003) [hereinafter ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE].

69. *See* Knut DÖRMANN, *Article 8 Para. 2(b)(i), in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 323, 326 (Otto Triffterer ed., 2d ed. 2008).

reasons behind an attack arguably consists of orders and intelligence reports produced by the attacker before and during the incident.[70] This documentary evidence is arguably the best form to decipher what the military commander was thinking when the attack occurred.[71] Considering a lack of relevant documents combined with the hurdles to determine the commander's state of mind from the death, injuries, and damage inflicted by the attack, other sources of information and inferences prove to be pivotal.[72]

Clothing, activity, age, sex, or all of the above of the person attacked have been factors to decide whether he was a civilian.[73] Distance of the victims from the alleged offenders, visibility and weather at the time of the attack, and proximity of victims to possible military targets have also been regarded as factors to reasonably conclude the non-combatant status of targeted individuals.[74] The last factor holds particular relevance because if a military objective exists and the attack was launched under that belief, the attack may be justified.[75] Nonetheless, the presence of military objectives does not necessarily mean that the attacks did not target civilians.[76] In cases where the vast majority of victims were civilians, the ICTY has inferred that the attack was actually launched against them, especially when no military objective was present.[77] However, this finding is not shared by some scholars who consider that the ICTY should have differentiated crimes based on attacks against civilians from those based on disproportionate attacks.[78]

The ICC has correctly differentiated an attack simultaneously targeting a military objective and a civilian population in the vicinity not taking a direct part in hostilities (an attack against civilians) from an

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70. *See* OLÁSOLO, *supra* note 49, at 223.

71. *See id.*

72. *See id.* at 223–24.

73. Prosecutor v. Galić, Case No. IT-98-29-T, Judgement and Opinion, ¶ 50 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

74. *Id.* ¶¶ 355, 428.

75. Prosecutor v. Strugar, Case No. IT-01-42-T, Judgement, ¶ 284 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005).

76. Prosecutor v. Galić, Case No. IT-98-29-A, Judgement, ¶ 136 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006).

77. Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶¶ 509–11 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

78. *See* DÖRMANN, *supra* note 69, at 327.

attack targeting only a military objective but causing excessive collateral damage (a disproportionate attack).[79] Evidence included previous attacks to the village, the absence of a military camp in the vicinity, and attackers' ethnic songs and lyrics.[80] However, in cases where the anticipated civilian casualties or damages were very notorious, it may arguably be inferred for evidentiary purposes that the object of the attack was indeed civilian population, civilians, or both.[81] Accordingly, concerns about merging war crimes should be mitigated. In any event, the fact that a civilian was killed or injured does not automatically mean a war crime of unlawful attack occurred. For example, projectiles may have missed the target or there was a mistake of fact, which negates mens rea.[82]

The analysis of the means of combat used to carry out the attack may lead to inferences such as the following. When it is claimed that the attack targeted precise and geographically limited military objectives, there is an essential contradiction if blind weapons such as the "baby bombs" and cluster bombs are employed.[83] This is because these weapons are, in certain or all contexts, indiscriminate and their use can prove that the attack was launched against civilians as identified by the ICTY and the U.N. Special Rapporteurs on Mission to Lebanon and Israel.[84] The nature and purpose of the attack to target civilians may also

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79. *See* Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on Confirmation of Charges, ¶¶ 273–74 (Sept. 30, 2008).

80. *See id.* ¶¶ 275–84.

81. Prosecutor v. Galić, Case No. IT-98-29-T, Judgement and Opinion, ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

82. ICC Statute, *supra* note 20, art. 32(1).

83. There is no categorical prohibition of cluster bombs, but they are disproportionate because of their spread effects. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 17, at 250. However, there is already a treaty prohibition for the State Parties to the Convention on Cluster Munitions in force since August 1, 2010. *See* Convention on Cluster Munitions, May 30, 2008, 2688 U.N.T.S. 39.

84. Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶ 512 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) ("'[B]aby-bombs' are [] 'home-made mortars' [and] are difficult to guide accurately."); Prosecutor v. Martić, Case No. IT-95-11-T, Judgement, ¶ 463 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2007) ("[T]he M-87 Orkan [cluster bomb] is an indiscriminate weapon . . . ."); Rep. of the Special Rapporteur on Extraordinary, Summary or Arbitrary Executions, U.N. Doc. A/HRC/2/7, ¶¶ 52–57 (Oct. 2, 2006) (concerning cluster bombs).

be inferred from political statements.[85] In some cases, common sense and knowledge plus witness testimonies were fundamental to qualify the population of a town as substantially civilian.[86] Methods of combat used during the attack, number and status of victims, a discriminatory purpose underlying the attack, respect for precautionary measures under Article 57 of the AP I, and the type of resistance faced by the attacking party have also been used to evaluate whether the attack was primarily launched against civilians.[87]

IV. Problems Relating to the Notion of "Civilian Object/Military Objective" in Unlawful Attacks as War Crimes

Article 52.1 of AP I contains a negative definition of civilian objects "which are not military objectives."[88] Military objectives[89] are defined, under Article 52.2 of AP I, as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time offers, a definite military advantage."[90] This definition is considered customary IHL and is applicable to international and non-international armed conflicts.[91] However, it is still problematic, especially concerning attribution of criminal liability and regardless of some attempts to provide a non-exhaustive list.[92]

Since every object other than those under special protection[93] may potentially become a legitimate military target, the prosecution has to

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85. *Blaškić*, Case No. IT-95-14-T, ¶ 390.

86. Prosecutor v. Strugar, Case No. IT-01-42-T, Judgement, ¶ 287 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005).

87. Prosecutor v. Kunarac, IT-96-23 & 23/1-A, Judgement, ¶ 91 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

88. AP I, *supra* note 9, art. 52(1).

89. *See* SASSÒLI & BOUVIER, *supra* note 1, 202 n.151 (stating that only a material object under IHL can be a military objective).

90. AP I, *supra* note 9, art. 52(2).

91. ICRC, *supra* note 10, r.8.

92. *E.g.*, COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 56, ¶ 2002 (providing the list of ICRC's 1956 Draft Rules for the Limitation of Dangers incurred by the Civilian Population in Time of War).

93. *See* AP I, *supra* note 9, art. 56(2). However, if objects under special protection are used for military purposes, they can under restricted circumstances become military objectives. *Id.*; Geneva Convention Relative to the Protection of Civilian Persons

strictly apply the above-quoted two-pronged definition.[94] The objective prong consists of determining whether the object due to its nature, location, purpose, or use has "contribut[ed] effectively to military action of one side."[95] The prosecutor needs to know the nature, use, purpose, or location of the object at the time of the attack and what information the military possessed about the object to determine whether a commander could have reasonably thought that his targeted object contributed effectively to military action of the enemy.[96] The subjective prong is to assess whether the destruction, capture, or neutralization of the object in the circumstances at the time offered "a definite military advantage."[97] The prosecutor has to reconstruct the military's assessment of the military necessity of destroying an object, i.e., acquire knowledge of the parties' tactical and strategic goals—sometimes changing through the armed conflict and normally confidential—existent at the time of the attack.[98] The ICTY has thus considered the overall situation and result of the attack rather than every particular object when assessing whether an attack targeted civilian objects.[99] Nevertheless, military advantage needs to be linked to a definite event and not to a broad concept such as winning the entire armed conflict.[100]

Presuming that an object is civilian "[i]n case of doubt" of it being used to "make an effective contribution to military action"[101] has been interpreted by the ICTY as restricted to the defendant's expected conduct.[102] Only when the object is actually—at least secondarily—and not just potentially used for military purposes may it be targeted and only

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in Time of War art. 19, Aug. 12, 1949, 75 U.N.T.S 287 [hereinafter Fourth Geneva Convention]; SASSÒLI & Bouvier, *supra* note 1, at 201 n.149.

94. *See* Wuerzner, *supra* note 35, at 916–17.

95. SASSÒLI & Bouvier, *supra* note 1, at 202.

96. *See* Wuerzner, *supra* note 35, at 916–17.

97. Prosecutor v. Galić, Case No. IT-98-29-T, Judgement and Opinion, ¶ 51 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

98. *See* Wuerzner, *supra* note 35, at 917.

99. Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶ 509–10 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (analyzing the 1993 attack on Vitez and Stari Vitez and concluding the attack was out of proportion to the military necessity).

100. *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 86, 87 (2004).

101. AP I, *supra* note 9, art. 52(3).

102. Prosecutor v. Kordić, Case No. IT-95-14/2-A, ¶¶ 48, 53 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

if precautionary measures are adopted.[103] However, concerning the criminal liability of the defendant, the ICTY has placed the burden of proof on the prosecutor who has to determine whether an object is civilian.[104] The prosecutor shall thus prove beyond a reasonable doubt the defendant's criminal responsibility for having attacked a civilian object, which still may be understandable because battlefield commanders have to decide quickly whether an object is a military target.[105] Each case must be determined on its facts.[106]

Cases at the ICTY have mainly concerned ground warfare, involving military objectives such as military or paramilitary facilities, a few industrial sites, or transportation and communication nodes.[107] Nonetheless, the aerial campaign of the North Atlantic Treaty Organization (NATO) against the Federal Republic of Yugoslavia during the Kosovo War in 1999 led to an analysis of the concept of military objective in the context of aerial attacks, which was conducted by the Review Committee on the NATO campaign established by the ICTY prosecutor.[108] This Committee found that the great majority of targets attacked by NATO were military objectives.[109] Nevertheless, in its report, the Committee continuously casted doubt on the lawfulness of some targets including governmental ministries, oil refineries, infrastructure used by the military, and media facilities.[110] The Committee found that media facilities have not traditionally been military objectives,[111] even if they are only used for propaganda to undermine the morale of the adversary armed forces and population.[112] The Committee itself

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103. AP I, *supra* note 9, art. 57(2)(a)(i); ICRC, *supra* note 10, r.15–16.

104. *See Kordić*, Case No. IT-95-14/2-A, ¶ 53.

105. *See* Wuerzner, *supra* note 35, at 917.

106. Prosecutor v. Strugar, Case No. IT-01-42-T, Judgement, ¶ 295 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005).

107. *See* Fenrick, *supra* note 66, at 5.

108. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶ 3 (June 15, 2000), http://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal [hereinafter Review Committee on NATO].

109. *Id.* ¶ 55.

110. *See id.* ¶¶ 62, 70, 74, 78, 90.

111. *Id.* ¶ 55.

112. *Id.* ¶ 76.

considered that only when media facilities are used to incite crimes such as genocide can they be targeted.[113] This seemingly was not the case of the Radio Television of Serbia.[114] Accordingly, it would not be a military objective. However, the Committee found it to be a military objective as it was considered part of the enemy's system of command, control, and communications.[115] Be that as it may, the attack may still be unlawful (a disproportionate attack)[116] as analyzed in the next section.[117]

With regard to mens rea, the analysis under the previous section,[118] especially concerning the difference between the ICTY case law and the ICC Statute/Elements of Crimes, is applicable. In any event, some incidents investigated by the Review Committee on NATO may have qualified as reckless attacks against civilian objects and civilians.[119] This was arguably due to the "zero casualty war" approach under which NATO aircrafts operated at heights[120] enabling them to avoid the defenses but making them unable to distinguish between military and civilian objects on the ground.[121] Had those incidents been brought before the ICC, due to the higher mens rea required in the ICC Statute, it would have been difficult to attribute criminal liability for direct attacks against civilians or civilian objects. In any event, reckless actions like those that arguably occurred in the NATO campaign may be brought under other ICC Statute war crimes.[122]

On the other hand, bearing in mind the NATO campaign, when the prosecutor assesses *mens rea* of crimes of attacks against civilian objects,

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113. *Id.* ¶¶ 55, 76.

114. AMNESTY INT'L, NATO/FEDERAL REPUBLIC OF YUGOSLAVIA (FRY): "COLLATERAL DAMAGE" OR UNLAWFUL KILLINGS? 26 (2000).

115. Review Committee on NATO, *supra* note 108, ¶¶ 55, 76–77.

116. Amnesty Int'l, *supra* note 114, at 14, 20.

117. *See generally infra* Section V.

118. *See generally supra* Section III.

119. *See*, *e.g.*, Review Committee on NATO, *supra* note 108, ¶¶ 58–79, 86–89 (listing the attacks against Grdelica Railroad Bridge, the Serbian State Television and Radio, Rorisa village, and the Djakovica-Decan Road convoy).

120. *See id.* ¶ 56 (explaining the campaign adopted a minimum altitude of 15,000 feet).

121. *See* AMNESTY INT'L, *supra* note 114, at 17.

122. ICC Statute, *supra* note 20, art. 8(2)(b)(xiii), (e)(xiii) (listing both intentional and unintentional destruction of the enemy's property not justified by imperative military necessity as an instance where the Court has jurisdiction in respect to war crimes); *see also* OLÁSOLO, *supra* note 49, at 220.

he should determine what the attacker knew about the object, whether and what precautionary measures were adopted, and whether the principles of distinction and proportionally were enforced.[123] Elements that may prove the unlawfulness of an attack include weapons used, place and time of the attack, and its planning.[124] Be that as it may, incorrect legal analysis or statements must be avoided. For example, the ICTY inaccurately stated that: "[t]argeting civilian property . . . is an offence when not justified by military necessity."[125] Since attacking civilians or civilian objects is absolutely prohibited (based on the principle of distinction), the ICTY's reference to military necessity was misplaced.[126]

V. Problems Relating to the Principle of Proportionality in Unlawful Attacks as War Crimes

Serious violations of the principle of proportionality may consist in attacks directed against military objectives but that cause excessive "collateral damage," i.e., incidental damage to civilians or civilian property resulting from targeting military objectives[127] due to the lack of precautions in the attack.[128] These attacks have not been charged as a separate crime in most of the ICTY case law.[129] The ICTY has regarded

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123. Wuerzner, *supra* note 35, at 919.

124. *See id.*

125. Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶ 180 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

126. *See* Elements of War Crimes Under the Rome Statute, *supra* note 68, at 149.

127. *See* AP I, *supra* note 9, art. 51(5)(b); *see also* ICRC, *supra* note 10, r.14 (explaining that Rule 14 is applicable in both international armed conflicts and non-international armed conflicts).

128. *See* AP I, *supra* note 9, art. 57; *see also* ICRC, *supra* note 10, r.15, 17–21 (explaining the applicability of each rule in international armed conflicts and non-international armed conflicts).

129. *E.g.*, Prosecutor v. Galić, Case No. IT-98-29-T, Judgement and Opinion, ¶¶ 57–62, 752 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003); Blaškić, Case No. IT-95-14-T, ¶¶ 12, 180; Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgement, ¶¶ 321, 326–28 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001); *see also* OLÁSOLO, *supra* note 49, at 157; Prosecutor v. Strugar, Case No. IT-01-42-A, Judgement, ¶ 178 (Jan. 31, 2005). In addition to direct attack on civilians and civilian objects, the Prosecutor in Strugar charged alternatively with disproportionate attacks; *Id.*

those violations mainly as evidence of attacks directed against civilians or civilian objects.[130] This is different from the ICC Statute that criminalizes serious violations of the principle of proportionality as an independent offence. This is considered herein as appropriate. The fact that an object is a military objective does not automatically make it targetable is misunderstood by the U.S. Department of Defense.[131] This is because the anticipated collateral damage under the proportionality test has to be evaluated. Serious violations of the principle of proportionality may be used to infer the intent to launch attacks against civilians and civilian objects.[132] However, attacks targeting civilians and civilian objects are distinct from attacks that end up being unlawful.[133] This is because of the excessive incidental damage brought about by the latter kind of attacks even though they may have in principle been lawful as they were launched against a military objective.[134]

Nevertheless, the ICC prosecutor faces an extra challenge. This consists in that the ICC Statute does not include an autonomous or specific war crime of disproportionate attack in non-international armed conflicts. An option to indirectly fill this gap, as mentioned,[135] is to follow the ICTY case law. According to the ICTY, disproportionate attacks, which are a form of indiscriminate attack under AP I,[136] may lead

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However, the Chamber considered examination of this alternative charge to be unnecessary due to the circumstances of the case and found the accused guilty of direct attacks against civilians and civilian objects. *See id.* ¶¶ 478–79.

130. *See, e.g.*, Prosecutor v. Galić, Case No. IT-98-29-A, Judgement, ¶ 132 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006); Prosecutor v. Galić, Case No. IT-98-29-T, Judgement and Opinion, ¶ 57–62 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003); Prosecutor v. Martić, Case No. IT-95-11-T, Judgement, ¶ 69 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2007).

131. U.S. DEP'T OF DEF., FINAL REPORT TO THE CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR 613 (1992) ("Coalition forces also chose not to attack many military targets in populated areas.").

132. *See* OLÁSOLO, *supra* note 49, at 157.

133. *See id.*

134. *See id.*

135. *See supra* Section III.

136. AP I, *supra* note 9, arts. 51(5)(b), 85(3)(b)

> ("Among others, the following types of attacks are to be considered indiscriminate . . . (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof,

to inferences that civilians were the direct object of the attack in certain circumstances.[137] This conduct is criminalized even when committed in non-international armed conflicts under the ICC Statute.[138] Nevertheless, the circumstances that may trigger such inference are unclear. The ICTY has concluded that it depends on some factual circumstances such as means, methods, and nature of the crimes committed during the attack; resistance to the assailants at the time; and the extent to which the attacking force complied or tried to comply with precautionary measures.[139] The International Court of Justice (ICJ) and the ICTY have equated the use of indiscriminate weapons with a deliberate attack against civilians.[140] Applying the principle of proportionality in criminal trials is complex as this involves a value-based judgment that requires that military commanders weigh expected harm or damage to civilians and civilian objects against the anticipated military advantage from the attack.[141]

A problem in the ICC Statute negotiations was how to adapt the formulation of proportionality contained in the AP I.[142] The compromise

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> which would be excessive in relation to the concrete and direct military advantage anticipated.");

COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 56, ¶¶ 1976–79; *see also* Protocol II to the 1980 Convention on Certain Conventional Weapons Convention as amended on 3 May 1996 art. 3(8)(c), May 3, 1996, 2048 U.N.T.S. 93 (entered into force Dec. 3, 1998) (applying to international armed conflicts and non-international armed conflicts). Although AP I does not consider those attacks as an independent category, but as a sub-category of indiscriminate attacks, they are actually directed against military objectives. *See* OLÁSOLO, *supra* note 49, at 19.

137. *See* Prosecutor v. Galić, Case No. IT-98-29-A, Judgement, ¶ 132 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006). The ICTY concluded that indiscriminate attacks do not always amount to direct attacks but rather they may qualify as such. *Id.*

138. ICC Statute, *supra* note 20, art. 8(2)(e)(iv).

139. *Galić*, Case No. IT-98-29-A, ¶ 132.

140. Legality of the Threat or Use of Nuclear Weapons, *supra* note 13, ¶ 78; Prosecutor v. Martić, Case No. IT-95-11-T, Judgement, ¶ 69 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2007) ("[I]ndiscriminate attacks . . . may also be qualified as direct attacks on civilians . . . . [A] direct attack against civilians can be inferred from the indiscriminate character of the weapon used.") (footnotes omitted).

141. ICC Elements of Crimes, *supra* note 59, art. 8(2)(b)(iv) n.36 (2011). The ICC Elements of Crimes read that "'concrete and direct overall military advantage'" means "a military advantage that is foreseeable by the perpetrator at the relevant time." *Id.*

142. *See* Roberta Arnold & Stefan Wehrenberg, *Article 8 Para. 2(b)(iv)*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 375, 377

reached was to take the AP I as a basis and add the words "clearly" and "overall," raising the evidentiary threshold.[143] Considering that the principle of legality requires specificity, that addition may be understood to mean that the defendant will have a wider margin of appreciation.[144] The ICC prosecutor has to prove that the accused knew that the attack would cause incidental death or injury to civilians of a clearly excessive nature in relation to the military advantage sought.[145] This has to be assessed by the ICC objectively from the perspective of a reasonable commander[146] and considering the defendant's knowledge of the "information available to the perpetrator at the time" that led him make a value judgment[147] and not on the basis of subsequent information.[148] However, the "reasonable commander" standard may be considered as not very useful. This corresponds to the fact that even among military commanders such evaluation may change according to their national military history, military backgrounds and combat experience.[149] The "reasonable person" standard used by the ICTY[150] is even broader. For example, a lawyer normally possesses an understanding of "excessive" that differs from that of a military commander.[151] Such level of subjectivity makes it difficult to bring charges for the war crime of a disproportionate attack. Although the "reasonable military commander"

(Otto Triffterer & Kai Ambos eds., 3rd ed. 2016); WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 264 (2d ed. 2016).

143. *See* Arnold & Wehrenberg, *supra* note 142, at 377; SCHABAS, *supra* note 142, at 264–66.

144. *See* Arnold & Wehrenberg, *supra* note 142, at 377; SCHABAS, *supra* note 142, at 265–66.

145. ICC Elements of Crimes, *supra* note 59, art. 8(2)(b)(iv).

146. Elements of War Crimes Under the Rome Statute, *supra* note 68, at 164.

147. ICC Elements of Crimes, *supra* note 59, art. 8(2)(b)(iv) n.37.

148. *See* William Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 61, 109 (1982).

149. Review Committee on NATO, *supra* note 108, ¶ 52.

150. Prosecutor v. Galić, Case No. IT-98-29-T, Judgement and Opinion, ¶ 58 n.110 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

151. *See* Wuerzner, *supra* note 35, at 922; REVIEW COMMITTEE ON NATO, *supra* note 108, ¶ 50. The above-mentioned difference consists in the scope of what is permissible as "excessive" determined by *inter alia* dissimilar doctrinal backgrounds, combat experience and/or national military history. *Id.*

standard is more suitable to apply the principle of proportionality,[152] civilian judges would need to be trained on war-related matters to assess serious violations thereof.[153]

Like Article 85.3(b) of the AP I, the ICC Statute/Elements of Crimes require that the attack was launched in the knowledge that the consequences described will occur.[154] The ICRC considers that recklessness would not be included as mens rea of this crime.[155] The expression "intentionally launching [the] attack" in Article 8(2)(b)(iv) of the ICC Statute also leads to conclude that the prosecutor has to prove *dolus*.[156] The actual results of the attack, a material element in the ICC Statute/Elements of Crimes, may help to infer the intent and knowledge of the attacker.[157] To prove the expectation of excessive incidental losses or damages, the prosecutor may consider: i) location of military objectives (vicinity of civilian objects); ii) accuracy of the weapon including its dispersion, range, ammunition used; iii) weather conditions such as wind or low visibility; iv) technical skills of combatants; and v) specific nature of the military objective.[158] For example, in the NATO aerial campaign during the Kosovo War in 1999, the NATO pilot who continued his attack after hitting a train on a bridge suggests that he understood his mission as destroying the bridge regardless of civilian casualties, which would violate the principle of proportionality.[159]

There are three possible approaches or frames of analysis under which evidence may be examined: i) the overall objective sought, i.e., mission's objective (the strategic level); ii) the attack in question (the operational

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152. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 56, ¶ 2208 (discussing "common sense and good faith for military commanders").

153. *See* Michael Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on Report to the Prosecutor of the ICTY*, 12 EUR. J. INT'L L. 531, 535 (2001).

154. ICC Statute, *supra* note 20, art. 8(2)(b)(iv); ICC Elements of Crimes, *supra* note 59, art. 8(2)(b)(iv).

155. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 56, ¶ 3479.

156. ICC Statute, *supra* note 20, art. 8(2)(b)(iv).

157. *See* Wuerzner, *supra* note 35, at 920–21.

158. *See id.* at 922.

159. AMNESTY INT'L, *supra* note 114, at 2. *See* AP I, *supra* note 9, art. 57(2)(c) (discussing the effectiveness of advanced warning); ICRC, *supra* note 10, r.20 (explaining that Rule 14 is application in both international armed conflicts and non-international armed conflicts).

level); and iii) objective-by-objective or incident-by-incident (the tactical level).[160] This article argues that the tactical level should be mainly considered as complemented by the operational level analysis rather than the strategic level for the following reasons.

First, the ICRC arguably adopts the above-suggested approach because it considers that both: i) the attack must be directed against a military objective with means not disproportionate in relation to the objective; and ii) these means are suited only to destroy that objective and in relation to it.[161] Also, the ICRC mentions that precautionary measures are not concerned with "strategie objectives but with the means to be used in a specific tactical operation."[162] The ICRC AP I Commentary concludes that the military advantage must be "substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded."[163] In turn, the use of "concrete" and "direct" as qualifiers of "military advantage" in the ICC Statute[164] is not compatible with an analysis at the strategic level. Conversely, the common denominator in the AP I and the ICC is that a definite military advantage is required for each selected target.[165]

Second, proportionality at the strategic level risks equating the proportional use of force in an offensive and defensive combat action (*ius in bellum*) with the lawful resort to armed force in self-defence (*ius ad bellum*).[166] The strategic level was indeed partially considered by the U.S. during the 1991 Persian Gulf War.[167] The Report on NATO also partially used a strategic level approach in the analysis of the attack against the headquarters of the Radio Television of Serbia.[168] As

160. *See* William Fenrick, *The Prosecution of Unlawful Attacks before the ICTY*, *in* 7 Y.B. OF INT'L HUMANITARIAN L. 153, 176 (2004); OLÁSOLO, *supra* note 49, at 170.

161. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 56, ¶ 1979.

162. *Id.* ¶ 2207.

163. *Id.* ¶ 2209.

164. ICC Statute, *supra* note 20, art. 8(2)(b)(iv).

165. Arnold & Wehrenberg, *supra* note 142, at 378.

166. *See* ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE, *supra* note 68, at 171; OLÁSOLO, *supra* note 49, at 174. *See also* ICC Elements of Crimes, *supra* note 59, art. 8(2)(b)(iv), n.36 ("It does not address justifications for . . . other rules related to *jus ad bellum*.").

167. U.S. DEP'T OF DEF., *supra* note 131, at 613 (noting that "military advantage" is "linked to the full context of a war strategy . . . the liberation of Kuwait").

168. *See* REVIEW COMMITTEE ON NATO, *supra* note 108, ¶¶ 71–79.

discussed in the previous section, whether these headquarters were a legitimate military objective is controversial.[169] However, even assuming so, under the tactical level approach that attack would have been found disproportionate as the Radio Television of Serbia was operative again only after three hours.[170] Also, this attack was without effective advance warning, was launched at night, and killed 16 civilians.[171] Nevertheless, the Committee on NATO found it not to be disproportionate by using the strategic level approach as the collateral damage was compared with the military advantage anticipated from the achievement of excessively broad goals such as the partial or total disruption of the command, control, and communications system of the Yugoslav Armed Forces.[172] The use of the strategic level approach may be a reason why no investigation was opened.

Third, the principle of proportionality at the strategic level largely increases the amount of lawful incidental civilian losses and damages and decreases the protection granted to civilians and civilian objects under the principle of distinction, as implied by the ICRC.[173]

Fourth, the ICTY case law has applied tactical level analysis with regard to specific targets,[174] rejecting the strategic level approach.[175] An important deal of the ICTY case law has also applied the operational level analysis.[176] Two reasons may explain the use of the operational level analysis. On the one hand, the ICTY cases on prosecutions of unlawful attacks have dealt with top military commanders or, at least, middle ranking commanders who normally give orders at the operational

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169. *See supra* Section IV.

170. AMNESTY INT'L, *supra* note 114, at 26; *see also* Review Committee on NATO, *supra* note 108, ¶ 77.

171. AMNESTY INT'L, *supra* note 114, at 49.

172. Review Committee on NATO, *supra* note 108, ¶¶ 77–78.

173. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 56, ¶ 1979.

174. Prosecutor v. Galić, Case No. IT-98-29-T, Judgement and Opinion, ¶¶ 208, 387 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (explaining that the Trial Chamber analyzed specific incidents of sniping and shelling of civilians).

175. *Galić*, Case No. IT-98-29-T, ¶¶ 208–09.

176. Prosecutor v. Strugar, Case No. IT-01-42-T, Judgement, ¶ 214 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005); Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgement, ¶¶ 565–76, 646–49, 738–53 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

level.[177] On the other hand, an excessively narrow tactical level analysis might in certain circumstances ignore difficulties faced by modern warfare strategies based on an integrated set of targets as part of a military operation or attack.[178]

Although single attacks against military objectives causing incidental damage are not in principle unlawful, if repeated "the cumulative effect of such acts . . . may not be in keeping with international law."[179] The minimization of collateral damage is the responsibility not only of the attacker but also of the defender due to the obligation to adopt precautions against the effects of the attack,[180] including the prohibited use of human shields[181] which is also a war crime.[182] However, the fact that the defenders disregard those precautions does not exonerate the attacker from adopting precautionary measures in attacks.[183] In IHL, the burden is always on the attacker and hence this cannot be shifted.[184] This is not opposed to the prosecutors' burden of proof relating to individual criminal responsibility.[185] Even civilians who voluntarily become human shields do not, without more, lose their protection as civilians.[186]

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177. Olásolo, *supra* note 49, at 172.

178. *See* Stefan Oeter, *Methods and Means of Combat, in* HANDBOOK OF INT'L HUMANITARIAN L. 105, 186 (Dieter Fleck ed., 2d ed. 2008). HENCKAERTS & DOSWALD-BECK, *supra* note 17, at 49. Some states when ratified the AP I declared that the military advantage anticipated has to be considered as a whole attack and not from isolated parts thereof. *Id.*

179. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, ¶ 526 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

180. AP I, *supra* note 9, art. 58; ICRC, *supra* note 10, r.22–24; *see* SASSÒLI & BOUVIER, *supra* note 1, at 214. This is also called "Conduct of Defence." *Id.*

181. ICRC, *supra* note 10, r. 97.

182. *See* ICC Statute, *supra* note 20, art. 8(2)(b)(xxiv); Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶¶ 715–16 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); HENCKAERTS & DOSWALD-BECK, *supra* note 17, at 580.

183. Henckaerts & Doswald-Beck, *supra* note 17, at 71.

184. *See id.*

185. ICC Statute, *supra* note 20, arts. 66, 67(1)(i) (discussing presumption of innocence and not reversing the burden of proof for the accused).

186. Melzer, *supra* note 29, at 57.

VI. Practical Problems Relating to Prosecution of Unlawful Attacks as War Crimes

A. Access to Evidence

As seen, the reconstruction of the decision-making process which underlies war crimes of unlawful attacks is fundamental to attribute criminal liability.[187] However, a hurdle facing such reconstruction is that the respective information, especially documents, normally involves highly confidential issues and, therefore, is rarely made public.[188] Nevertheless, the determination of criminal responsibility cannot be made with hindsight, namely, such a finding needs to be based on the information available to the offender(s) or the existence of the offender's reckless failure to obtain information when the crime was committed. .[189] The ICTY and the ICC as international judicial institutions depend on the cooperation of national justice authorities, but states can attempt to block disclosure of information to the prosecution on the ground of national security, which actually happened at the ICTY.[190] This is even more difficult at the ICC. While the ICTY as a Security Council subsidiary organ can request cooperation, including access to evidence, by all U.N. Member States, the ICC can only obligate States that are parties to the ICC Statute,[191] unless the situation was referred to the ICC by the Security Council.[192]

The ICTY's broader powers to access evidence actually constitute a strong reason to criticize the recommendation by the Review Committee on NATO that consisted in not opening an investigation. This was based

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187. *See supra* Sections III–V.

188. *See* Wuerzner, *supra* note 35, at 927–28.

189. *See id.* (invoking *The Hostages Trial: Trial of Wilhelm List and Others*, 8 L. RPTS OF TRIALS OF WAR CRIMINALS 34, 57 (U.N. War Crimes Comm. ed., 1948), ¶ 69).

190. *See* Prosecutor v. Blaškić, Case No. IT-95-14-AR108 *bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶¶ 61–63 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997).

191. *See* Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 29 (Sept. 2009), [hereinafter ICTY Statute]; ICC Statute, *supra* note 20, arts. 86–87.

192. *See* ICC Statute, *supra* note 20, art. 13(b).

on the following controversial conclusion: "investigations [were] unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences."[193] This should have been a reason for the prosecutor and the ICTY to make use of their powers,[194] which were unavailable to the Committee.[195] Had the NATO situation been brought to the ICC, the ICC prosecutor would, however, have faced a tougher decision as, even concerning States that are parties to the ICC Statute, grounds for state objection to disclosure are broader under the ICC Statute.[196]

International tribunals, unlike domestic courts, lack the ability to seize evidentiary material, make searches, compel witnesses to give testimony, or execute arrests without the cooperation of national authorities.[197] To compensate the lack of access to evidence, the ICTY prosecutor, in war crimes of unlawful attacks, has relied on a wide variety of evidentiary material. This has included *inter alia*:[198] i) open source material such as newspapers containing accounts tracking down the casualties and gains of both sides, particularly of the accused, or media interviews of the accused or both; ii) witness statements including "insider" witnesses from the same military of the defendant; iii) expert witnesses on command and control as well as artillery or weapons issues; and iv)

193. Review Committee on NATO, *supra* note 108, ¶ 90.

194. *See, e.g.*, ICTY Statute, *supra* note 191, art. 18 (concerning investigation and preparation of an indictment); Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, r. 39, IT/32/Rev. 50 (July 8, 2015) [hereinafter ICTY Rules].

195. *See* Paolo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 12 EUR. J. INT'L L. 503, 505 (2001).

196. *See* ICC Statute, *supra* note 20, art. 72(4–6).

197. *See* Matthew R. Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 J. INT'L CRIM. JUST. 71, 88 (2004).

198. *See* Fenrick, *supra* note 160, at 185–86.

maps, computer graphics[199] and site visits known as "crime scene visits."[200]

Evidence showing that forces under the defendant's command caused death, injury, or damage is insufficient without bringing relevant evidence of the surrounding circumstances.[201] The circumstances and context (the "big picture"), which are frequently proved via circumstantial evidence, are a prosecutor's powerful tools to prove the commission of the war crimes of unlawful attacks.[202] In *Katanga*, the ICC Trial Chamber considered the following elements to find criminal responsibility for the war crime of attack against civilians: i) timing of the attack; ii) means and method used (encirclement of the village whilst its inhabitants were asleep); iii) use of machetes; iv) indiscriminate or direct shooting; and v) the civilian death toll (including children, women, and elderly people).[203]

In some contexts, state cooperation may indeed be in the own interest of the state to accurately determine whether and to what extent a party to an armed conflict violated IHL and its members committed war crimes. This is illustrated by the U.N. Fact Finding Mission on the Gaza Conflict, which "had no access to information from the Israeli armed forces about what particular commanders or soldiers knew at the time of the attacks,"[204] as reaffirmed by the Head of the said mission Richard Goldstone when he later commented on the Mission's findings.[205]

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199. *See* Prosecutor v. Galić, Case No. IT-98-29-T, Judgement and Opinion, ¶¶ 275, 280 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003). For example, computer graphics and 360 degree panoramic pictures and films to indicate what probably happened during the snipping incidents were used. *Id.*

200. *See* INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA & UNITED NATIONS INTERREGIONAL CRIME AND JUSTICE RESEARCH INST., ICTY MANUAL ON DEVELOPED PRACTICES 100–02 (2009).

201. *See* Fenrick, *supra* note 160, at 187.

202. *See id*. at 186–88.

203. Prosecutor v. Katanga, ICC-01/04-01/07, Judgement Pursuant to Article 74 of the Statute, ¶ 878 (Mar. 7, 2014).

204. Laurie R. Blank, *The Application of IHL in the Goldstone Report: A Critical Commentary*, 12 Y.B. INT'L HUMANITARIAN L. 347, 392 (2009).

205. Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, WASH. POST (Apr. 1, 2011), https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html?utm_term=.8efd1acd9570

At the ICC, lack of evidence also affects the determination of criminal liability for unlawful attacks.[206] In *Prosecutor v. Katanga*, concerning a particular incident, people fleeing a camp included both civilians and troops.[207] Due to evidence limitations, the Chamber could not find the exact proportion of civilians and soldiers within this group.[208] Thus, the Chamber could not conclude that the civilian population was targeted as such since Article 8(2)(e)(i) of the ICC Statute "requires the Chamber to establish that the perpetrator meant the civilian population, as such, to be the object of the attack."[209]

B. Selecting Modes of Liability Suitable for Prosecutorial Strategy

The ICTY has mostly used three criminal responsibility modes in cases of senior military commanders: ordering, aiding and abetting, and command responsibility.[210] These modes are also incorporated in the ICC Statute.[211] They complement the modes of liability as a principal, i.e., direct perpetration, co-perpetration, and perpetration through another person, enunciated in the ICC Statute,[212] and used by the ICC when confirming charges[213] or when issuing arrest warrants concerning direct attacks on civilians, civilian objects, or both.[214] If there is enough

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("Israel's lack of cooperation with our investigation meant that we were not able to corroborate how many Gazans killed were civilians and how many were combatants. The Israeli military's numbers have turned out to be similar to those recently furnished by Hamas . . . . The purpose of the Goldstone Report was never to prove a foregone conclusion against Israel . . . . We made our recommendations based on the record before us, which unfortunately did not include any evidence provided by the Israeli government.").

206. *See Katanga*, ICC-01/04-01/07, ¶ 875.
207. *Id.*
208. *Id.*
209. *Id.*
210. ICTY Statute, *supra* note 191, arts. 7(1), (3).
211. ICC Statute, *supra* note 20, art. 25(3)(b–d).
212. *Id.* art. 25(3)(a).
213. *See* Prosecutor v. Katanga, ICC-01/04-02/07, Decision on the Confirmation of Charges, ¶ 575 (Sept. 30, 2008).
214. For a discussion on arrest warrants, *see, e.g.*, Prosecutor vs. Al Bashir, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against

evidence about the existence of an order to launch an unlawful attack, the prosecutor's strategy should be to charge the defendant with having ordered an unlawful attack. If not so, command responsibility, which is responsibility for omission with a lower mens rea and hence easier to prove, may be applied as an alternative mode of responsibility.[215] The access to direct evidence is normally difficult. However, this gap has been filled with circumstantial evidence to prove the existence of responsibility of superiors for unlawful attacks based on:

(a) The number of illegal acts;

(b) The type of illegal acts;

(c) The scope of illegal acts;

(d) The time during which the illegal acts occurred;

(e) The number and type of troops involved;

(f) The logistics involved, if any;

(g) The geographical location of the acts;

(h) The widespread occurrence of the acts;

(i) The tactical tempo of operations;

(j) The modus operandi of similar illegal acts;

(k) The officers and staff involved; [and]

(l) The location of the commander at the time.[216]

Omar Hassan Ahmad Al Bashir, ¶¶ 4, 7 (Mar. 4, 2009); Prosecutor v. Ali Kushayb, ICC-02/05-01/07, Warrant of Arrest For Ali Kushayb, counts 1, 6 (Apr. 27, 2007).

215. *See* Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶¶ 342, 402 (June 15, 2009).

216. Prosecutor v. Delalic, Case No. IT-96-21-T, Judgement, ¶ 386 (Nov. 16, 1998); *see also* Bemba, Case No. ICC-01/05-01/08, ¶ 429.

With regard to mens rea of command responsibility, the ICTY Statute follows to an important extent the AP I[217] requirement that the commander knew or had reason to know that his subordinate was about to commit or committed unlawful attacks.[218] However, the ICC Statute has introduced two different mens rea thresholds depending on whether the accused is a military superior—where negligence is sufficient—or a non-military superior—where dolus is required.[219] The evidentiary threshold to charge and convict military superiors has thus been lowered as the ICC prosecutor only needs to prove that the military superior behaved negligently.[220] Although the mens rea of the mode of liability and that of the crime itself are two different things, it still results in the difficult to accept idea that unlawful attacks requiring intent as mens rea under the ICC Statute may be committed with mere negligence of the military commander.[221]

In Prosecutor v. Katanga, which is so far the only ICC conviction for the war crime of attacks against civilians, the defendant was found guilty as an accessory to the crime under Article 25(3)(d) of the ICC Statute.[222] This conviction followed a change pursuant to Regulation 55 (Authority of the Chamber to modify the legal characterisation of facts) of the Regulations of the Court.[223] Thus, considering the circumstances of the

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217. AP I, *supra* note 9, art. 86(2) ("[I]f they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he [his subordinate] was committing or was going to commit such a breach . . . ."); *see also* AP I, *supra* note 9, art. 87(3) (Titled "Duty of commanders," referring to being "aware"); ICTY Statute, art. 7(3) ("[The superior] knew or had reason to know that the subordinate was about to commit [ICTY crimes] or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators thereof.").

218. *See* Prosecutor v. Strugar, IT-01-42-A, Judgement, ¶¶ 301–02 (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008). The standard "had reason to know" has been interpreted as requiring that military commanders have had information available to them that should have put them on notice of the need to set in motion an investigation. *Id.*

219. *See* ICC Statute, *supra* note 20, art. 28(a)(i) ("knew or, owing to the circumstances at the time, should have known"); *see also id.* art. 28(b)(i) ("knew, or consciously disregarded information which clearly indicated . . . .").

220. *See* Bemba, Case No. ICC-01/05-01/08, ¶ 429.

221. *See* OLÁSOLO, *supra* note 49, at 213.

222. Prosecutor v. Katanga, ICC-01/04-01/07, Judgement Pursuant to Article 74 of the Statute, ¶ 658 (Mar. 7, 2014).

223. *See id.* ¶¶ 1423–595.

case and with respect for the rights of the accused, the legal characterisation of the mode of liability initially applied to *Prosecutor v. Katanga* under Article 25(3)(a) of the ICC Statute (indirect co-perpetration) was changed with Article 25(3)(d) ("accessoryship through a contribution made 'in any other way to the commission of a crime by a group of persons acting with a common purpose.'").[224] This outcome arguably evidences the challenges to identify the mode of criminal responsibility that better reflects the acts of the accused and accords with available evidence.

C. Prosecutorial Discretion to Open Investigations and/or Bring Charges

Even assuming that the prosecutor has managed to gather enough evidence, he can use his discretion not to open investigations, bring charges, or both.[225] This discretion, however, as illustrated in the decision of not opening an investigation into the alleged commission of unlawful attacks by NATO effectives, may be highly controversial. Former ICTY Prosecutor Del Ponte concluded that "there [was] no basis for opening an investigation into any of the allegations or into other incidents related to the NATO air campaign."[226] Even though it was conceded that NATO made some mistakes, she surprisingly announced that she was "satisfied that there was no deliberate targeting of civilians or unlawful military targets by NATO during the campaign."[227] Although this decision not to investigate was welcomed by NATO members, most of the legal literature has suggested that it was not a legal but a political factor that determined the ICTY Prosecutor's decision.[228] Notwithstanding the

224. *Id.* ¶ 658.

225. *See* Situation on Registered Vessels of the Union of Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, ICC-01/13 OA, Decision on the Admissibility of the Prosecutor's Appeal Against the "Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision not to Initiate an Investigation," ¶ 59 (Nov. 6, 2015).

226. Press Release, Prosecutor, Prosecutor's Report on the NATO Bombing Campaign, U.N. Press Release PR/ P.I.S./ 510-e (June 13, 2000).

227. *Id.*

228. *See, e.g.*, Anne-Sophie Massa, *NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion*, 24

necessity of prosecutorial discretion and case selectivity,[229] the ICTY has said that exercise of prosecutorial discretion is not unlimited.[230] As analyzed,[231] some of the "mistakes" made by NATO actually merited an investigation. This in turn is the *sine qua non* condition to later determine criminal responsibility for unlawful attacks.[232] Unfortunately, the fact that there was no investigation increased some perception of the ICTY as a manifestation of victor's justice against Serbs.[233]

At the ICC, prosecutorial discretion has two important restrictions. First, when the prosecutor wants to initiate an investigation *proprio motu*,[234] the Pre-Trial Chamber's authorization is necessary.[235] Second, when the prosecutor decides not to investigate or prosecute because investigation or prosecution "would not serve the interests of justice," the Pre-Trial Chamber shall be informed.[236] This decision may be reviewed by the Chamber and only becomes effective if the Chamber decides so.[237] When a situation is referred to the ICC by the Security Council or by a State Party to the ICC Statute, the ICC prosecutor must also inform the Chamber and the respective referring entity when the prosecutor decides not to investigate or prosecute based on the "contrary to the interests of justice" ground.[238] The review request can also be brought by the referring entity and based on something other than the "interests of

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BERKELEY J. INT'L L. 610, 642 (2006); Natalino Ronzitti, *Is the Non Liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia Acceptable?*, 82 INT'L REV. RED CROSS 1017, 1020 (2000).

229. *See* ICTY Statute, *supra* note 191, art. 18(1) (discussing ICTY Prosecutor's discretion to proceed).

230. Prosecutor v. Delalic, Case No. IT-96-21-A, Judgement, ¶ 602 (Feb. 20, 2001).

231. *See supra* Sections IV–V.

232. *See* REVIEW COMMITTEE ON NATO, *supra* note 108, ¶ 90–91.

233. *See* Victor Peskin, *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 4 J. HUM. RTS. 213, 228 (2005); *See generally* YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS: A GOAL-BASED APPROACH (2014).

234. ICC Statute, *supra* note 20, art. 15(1).

235. *Id.* art. 15(4).

236. *Id.* arts. 53(1), 53(1)(c), 53(2)(c) (concerning investigation and prosecution respectively).

237. *Id.* art. 53(3)(b).

238. *Id.* art. 53(2)(c).

justice" ground.[239] Thus, the ICC Statute has set some judicial control over excessive prosecutorial discretion. Had a NATO-like situation been brought before the ICC, it is reasonable to believe that a Chamber would not have confirmed a prosecutor's hypothetical decision not to investigate based on the "contrary to the interests of justice" ground. The prosecutor would have hence been compelled to reconsider his decision. It has been said that the ICC should adopt the policy of generally not investigating cases based entirely on collateral damages.[240] However, this article argues that the ICC prosecutor should investigate this kind of case in order to implement the principle of proportionality. In any event, concerning unlawful attacks, the ICC has so far found responsibility only for attacks against civilians in *Katanga*.[241]

Additionally, following the ICTY, for evidentiary purposes and according to the circumstances, investigating cases based on collateral damages may allow an inference that an attack targeted civilians or civilian objects.[242] These factors should be considered to bring charges in the investigation in the situation in Libya referred to the ICC by the Security Council.[243] This would also be the case if the ICC prosecutor decides to open an investigation into alleged war crimes committed in Palestine.[244] This article argues that the recommendations of the U.N. Special Rapporteurs on Mission to Israel/Lebanon given to an International Commission of Inquiry[245] and Israel[246] to investigate whether war crimes of disproportionate attacks were committed may be

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239. *Id.* arts. 53(1)(c), (3)(a).

240. Richard Galvin, *The ICC Prosecutor, Collateral Damage, and NGOs: Evaluating the Risk of a Politicized Prosecution*, 13 U. MIAMI INT'L & COMP. L. REV. 1, 89 (2005).

241. Prosecutor v. Katanga, ICC-01/04-01/07, Judgement Pursuant to Article 74 of the Statute, ¶¶ 871–79 (Mar. 7, 2014).

242. Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶¶ 509–11 (Mar. 3, 2000).

243. *See* S.C. Res. 1970, ¶¶ 4–8 (Feb. 26, 2011).

244. *See* Rep. of the United Nations Fact-Finding Mission on the Gaza Conflict, *supra* note 36, ¶¶ 1767, 1773.

245. Rep. of the Special Rapporteur on Extraordinary, Summary or Arbitrary Executions, *supra* note 84, ¶ 107(a); *see also* Rep. of the Comm. of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1, A/HRC/3/2, ¶ 342 (Nov. 23, 2006) (finding war crimes).

246. Rep. of the Special Rapporteur on Extraordinary, Summary or Arbitrary Executions, *supra* note 84, ¶ 103(f).

considered *mutatis mutandi* by the ICC prosecutor when deciding to open an investigation.

Although the Security Council mentioned serious IHL violations in its referral of the Libyan situation to the ICC, it decided that non-Libyan nationals involved in international crimes committed in Libya would be out of the ICC's jurisdiction and be judged in their respective States.[247] This is criticized herein. This article considers that the said Security Council's restriction concerning non-Libyan nationals prevents investigations into and prosecutions of alleged unlawful attacks related to the 2011 NATO's air strikes in Libya. Thus, individuals have been pushed to look for justice at national foreign jurisdictions. Civil litigation for alleged excessive collateral damage out of NATO's strikes in Libya before Belgian courts illustrates this point.[248] Moreover, the ICC has only considered three Libyan cases: two already closed because of Gaddafi's death and the ICC's decision respectively, and the third one against Gaddafi's eldest son (detained in Libya) has not included attacks against civilians as war crimes.[249]

On the other hand, the investigation into the situation in Georgia opened in 2016 involves attacks against civilian population allegedly committed in the context of the international armed conflict between Russia and Georgia between July and October 2008 in and around South Ossetia.[250] Additionally, ICC's preliminary investigations into Ukraine, Iraq, Afghanistan, Colombia, and Palestine may lead to investigations.[251] Unlawful attacks should be considered in both the Libyan situation and, potentially, if and once the said preliminary investigations become investigations. Finally, the ICC, a special international or hybrid criminal court, or both must prosecute unlawful attacks committed in Syria. As Syria is not a State Party to the ICC Statute, the referral of the situation

247. S.C. Res. 1970, *supra* note 243.

248. *See* Peter Olson, *Immunities of International Organizations: A NATO View, in* IMMUNITY OF INTERNATIONAL ORGANIZATIONS 161, 167 (Niels Blokker & Nico Schrijver, eds., 2015); Eric De Brabandere, *Belgian Courts and the Immunity of International Organizations,* 10 INT'L ORGS. L. REV. 464, 498-99 (2013).

249. *See Situation in Libya*, ICC, https://www.icc-cpi.int/libya (last visited Jan. 1, 2017).

250. *See Situation in Georgia*, ICC, https://www.icc-cpi.int/georgia (last visited Jan. 1, 2017).

251. *See Preliminary Examinations*, ICC, https://www.icc-cpi.int/pages/preliminary-examinations.aspx (last visited Nov. 6, 2017).

in Syria by the Security Council to the ICC is the mechanism to trigger the ICC jurisdiction.[252] However, this would demand the consensus of the five permanent members of the Security Council.[253] Unfortunately, this referral seems unlikely in the near future due to *realpolitik* considerations.[254]

VII. Conclusions

Prosecuting unlawful attacks as war crimes at the international level proves to be quite challenging. "Civilian," "civilian object," and "proportionality" are elusive notions. In criminal prosecutions, the situation is even more complex due to *inter alia* the need for evidence of the required mens rea.[255] The ICC Statute both eases and increases the job of the ICC prosecutor. On the one hand, the ICC Statute has for the first time in an international instrument criminalized attacks against civilians and civilian objects committed in non-international armed conflicts.[256] Additionally, as examined in this article, the war crimes of unlawful attacks are well-detailed in the ICC Statute/Elements of Crimes and attacks against civilians and civilian objects are mere action crimes as they do not require a result.[257] In these points, this article concludes that the job of the prosecutor should be easier at the ICC than at the ICTY. However, the war crimes of attacks against civilians and civilian objects, unlike the ICTY case law, require evidence of intent and, thus, evidence of recklessness is insufficient.[258] Moreover, the absence of a war crime of attacks against civilian objects and of a war crime of disproportionate attacks in non-international armed conflicts under the ICC Statute does not match customary IHL. Nonetheless, this article concludes that the ICC may partially fill this gap by adopting the ICTY case law, namely, to consider the outcome of a flagrantly

252. ICC Statute, *supra* note 20, art. 13.
253. *See id.* art. 13(b); U.N. Charter art. 27, ¶ 3.
254. *See* Amanda Kramer & Rachel Killean, *Security Council Referrals to the ICC: A Politicised System, in* 7 IRISH Y.B. INT'L L. 117, 117 (FIONA DE LONDRAS & SIOBHAN MULLÁLLEY EDS., 2014).
255. *See* CASSESE, *supra* note 7, at 56–75, 92–94.
256. *See* ICC Statute, *supra* note 20, art. 8(2)(e)(i).
257. *See supra* Sections II-V.
258. *See supra* Section III.

disproportionate attack to infer that it was actually a direct attack against civilian objects and civilians.[259]

Additionally, some major challenges are beyond the purely legal realm. These challenges are related to the ICC prosecutor's access to evidence, selection of a mode of liability to suit the evidence gathered, and use of prosecutorial discretion to open an investigation and bring charges. The prosecutorial decision should be taken based on legal and not political considerations to avoid the aura of suspicion that has accompanied the decision not to investigate into the NATO campaign during the Kosovo war in 1999. In the end, at international criminal tribunals, the lack of political obstruction from states and, ideally, the existence of state cooperation are key elements that allow investigation into and prosecution of events that constitute war crimes of unlawful attacks.

259. *See supra* Sections III, V, VI.C.