

Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals

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Abstract

Three main arguments may explain why few cases in international (and national) criminal law include charges for attacks against civilians or civilian objects. The law may be not sufficiently clear, there may be a lack of evidence or the selection of military targets may be based on mainly subjective considerations, which make it very hard to establish individual culpability. This article examines some legal and practical reasons for the difficulties the prosecutor faces when trying to charge individuals with such crimes. Although there are few examples, the ICTY has shown that it is generally possible to hold individuals responsible for such crimes.

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“NATO has admitted that mistakes did occur during the bombing campaign; errors of judgment may also have occurred. Selection of certain objectives for attack may be subject to legal debate. On the basis of the information reviewed, however, the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or

*investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high-level accused or against lower accused for particularly heinous offences”.*¹

This result of the International Criminal Tribunal for the former Yugoslavia (ICTY) Prosecutor’s Committee² reflects the main difficulties linked to the prosecution of conduct of hostilities charges. Fewer than 10 per cent of more than 100 judgments before the ICTY deal with attacks on civilians or civilian objects.³ Similarly, very few domestic cases deal with conduct of hostilities crimes.⁴ But what exactly makes it so hard to prosecute such crimes, and how can these difficulties be overcome? By looking at two specific crimes, namely the crime of attacking civilians and that of attacking civilian objects, I shall attempt to identify the main difficulties and examine the ways in which they have been dealt with in case law, in particular that of the ICTY.

Attacks on civilians or civilian objects

The most basic and essential principle for the conduct of hostilities is laid down in Article 48 of 1977 Protocol I Additional to the 1949 Geneva Conventions, namely that belligerents must distinguish between the civilian population and combatants and between civilian objects and military objectives. In addition, in non-international armed conflicts the main treaty rule is Article 13(2) of 1977 Protocol II, which prohibits belligerents from making the civilian population as such, or individual civilians, the object of attack. The protection of this article extends to all civilians, with the proviso ‘unless and for such time as they take a direct part in hostilities’. Protocol II does not, however, contain any provision protecting civilian objects in general. Only a few objects, namely those indispensable to the survival of the civilian population (Art. 13), those containing

- 1 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, para. 90, available at www.un.org/icty/pressreal/nato061300.htm (last visited 25 August 2008) (hereinafter NATO Bombing Campaign, ICTY Report).
- 2 The Committee was established by the Prosecutor to review the 1999 NATO bombing campaign against the Federal Republic of Yugoslavia. Its task was to advise the Prosecutor on whether to initiate investigations into the alleged violations of international humanitarian law (IHL) by NATO, in accordance with Article 18 of the International Criminal Tribunal for the former Yugoslavia (ICTY). It gave its final recommendation to the Prosecutor in September 2000. *Ibid.*
- 3 See in particular *The Prosecutor v. Dario Kordić and Mario Čerkez* (IT-95-14/2), *The Prosecutor v. Tihomir Blaškić* (IT-95-14), *The Prosecutor v. Stanislav Galić* (IT-98-29), *The Prosecutor v. Pavle Strugar* (IT-01-42), *The Prosecutor v. Milan Martić* (IT-95-11), *The Prosecutor v. Mirjan Kupreškić et al.* (IT-95-16), *The Prosecutor v. Slobodan Milošević* (IT-02-54), available at www.icty.org (last visited 14 January 2009).
- 4 One of the few examples is *The Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel and others*, HCJ 769/02, The Supreme Court Sitting as the High Court of Justice, 11 December 2005 (hereinafter the *Targeted-Killing case*), available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (last visited 25 August 2008).

dangerous forces (Art. 16) and cultural objects and places of worship (Art. 17), are placed under its protection.

Customary nature of the rules

The ICTY Appeals Chamber in the *Tadić* case established that the rules on the conduct of hostilities in international armed conflicts have been widely accepted as being very similar to those applicable to internal armed conflicts.⁵

Specifically concerning attacks on civilian objects, the trial chamber in the *Blaškić* case stresses that customary international law prohibits unlawful attacks upon civilians and civilian property whatever the nature of the conflict.⁶ The trial chamber in the *Strugar* case further underlines that Article 52, referred to in connection with the charge of attacking civilian objects, is a 'reaffirmation and reformulation of a rule that had previously attained the status of customary international law'.⁷ In the light of the debates about the classification of the conflict as international or non-international and the discussion on the customary nature of these conduct of hostilities offences, the Office of the Prosecutor in the *Blaškić* case used the 1977 Additional Protocols, together with customary international law, as its legal basis for the charge of unlawful attack on civilians. The 'unlawful attack on a civilian objective' charge was equally based on that law and Additional Protocol I.⁸ A further important statement in the *Blaškić* case is that 'the specific provisions of Common Article 3 [of the four 1949 Geneva Conventions] also satisfactorily cover the prohibition on attacks against civilians as provided for by Protocols I and II'.⁹

Although it has been established that the rules are applicable in any armed conflict, owing to their rather general and abstract nature they still leave much space for states and individuals to interpret them according to their own interests.

- 5 It claims that 'at present there exist general principles governing the conduct of hostilities (the so-called "Hague Law") applicable to international and internal armed conflicts'. ICTY, *The Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Appeals Chamber, Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 118, available at www.icty.org/x/cases/tadic/acdec/en/51002.htm (last visited 14 January 2009) (hereinafter *Tadić* Case, AC). The ICRC's Customary Law Study also includes these crimes in Rules 1, 6 and 7. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, *Rules*, ICRC, Cambridge University Press, Cambridge, 2005. 'Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians' (p. 3); 'Rule 6. Civilians are protected against attack unless and for such a times as they take a direct part in hostilities' (p. 19); 'Rule 7. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects' (p. 25).
- 6 ICTY, *The Prosecutor v. Tihomir Blaškić*, IT-95-14-T, Trial Chamber I, Judgement of 3 March 2000, para. 162 (hereinafter *Blaškić* Case, TC).
- 7 ICTY, *The Prosecutor v. Pavle Strugar*, IT-01-42-T, Trial Chamber II, Judgement of 31 January 2005, para. 223 (hereinafter *Strugar* Case, TC).
- 8 William J. Fenrick, 'A first attempt to adjudicate conduct of hostilities offences: Comments on aspects of the ICTY trial decision in the *Prosecutor v. Tihomir Blaškić*', *Leiden Journal of International Law*, Vol. 13 (2000), p. 937.
- 9 *Blaškić* Case, TC, above note 6, para. 170.

This explains the importance of dealing with them before courts. ‘The more frequently courts of law pronounce upon the permissibility and impermissibility of military actions, the more extensive and forceful are preventive restraints on military behaviour’.¹⁰

Criminalization of certain conduct

In international armed conflicts, Article 85(3) of Additional Protocol I criminalizes attacking the civilian population and individual civilians by recognizing such an act as a grave breach when committed wilfully and when the act causes death or serious injury to body or health. It also criminalizes indiscriminate attacks against civilian objects, wilfully launched in the knowledge that the consequences thereof will be excessive. In non-international armed conflicts there is no treaty-based criminalization of such attacks, but in the *Tadić* case the ICTY has stated that ‘serious violations of Common Article 3, as well as general principles and rules on the protection of victims of internal armed conflict and fundamental principles and rules regarding means and methods of combat in civil strife are criminalized under customary law’.¹¹

Application of the provisions before the ICTY

The crime of attacking civilians or civilian objects is chargeable under Article 3 of the ICTY Statute. This article, entitled ‘Violations of the laws and customs of war’, includes a non-exhaustive list of breaches of international humanitarian law (IHL), which the ICTY has understood as including conduct of hostilities charges. When a case brought to the attention of the Prosecutor includes the injury or death of one or more civilians or damage to civilian objects during combat activities, the principle of distinction leads to the *prima facie* assumption that this could constitute a war crime. For this article to apply, however, certain conditions must be fulfilled.

The application of Article 3 of the ICTY Statute

The elements required for the prosecution of such war crimes are enumerated in the *Tadić* case. According to the ICTY Appeals Chamber, war crimes must be ‘serious’ violations of IHL, meaning that they must ‘constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim’.¹² Furthermore, the Chamber stresses that the rule violated must be a

10 Antonio Cassese, ‘On some merits of the Israeli judgment on targeted killings’, *Journal of International Criminal Justice*, Vol. 5, No. 2 (2007), p. 341.

11 *Tadić* Case, AC, above note 5, para. 134.

12 *Ibid.*, para. 94.

rule of international humanitarian law, based on either treaty law or customary law. The third element needed to charge a person for having committed a war crime is the criminalization of such a violation. This means that the rule must entail individual criminal responsibility.

In the *Galić* case the ICTY trial chamber clearly stated that ‘the act of making the civilian population or individual civilians the object of attack (such as attacks committed through a campaign of sniping and shelling as alleged in the Indictment), resulting in death or injury to civilians, transgresses a core principle of international humanitarian law and constitutes without doubt a serious violation of the rule contained in the relevant part of Article 51(2) of Additional Protocol I. It would even qualify as a grave breach of Additional Protocol I [Art. 85(3)(a)].’¹³ In addition, the chamber subsequently notes in the *Strugar* case that ‘the purpose of this prohibition is not only to save lives of civilians, but also to spare them from the risk of being subjected to war atrocities. The Chamber is of the opinion that the experiencing of such a risk by a civilian is in itself a grave consequence of an unlawful attack, even if he or she, luckily, survives the attack with no physical injury.’¹⁴

The statement that no result is required to find that there has been a serious violation of IHL is strange, as the trial chamber in the *Blaškić* case, basing its findings on the grave breaches provision of Additional Protocol I (Art. 85(3)), had stated that the attack against civilians and civilian property must have ‘caused deaths and/or serious bodily injury within the civilian population or damage to civilian property’.¹⁵ There thus seems to be a contradiction between the two statements.

Nonetheless, it is surprising that the Court requires a result when bringing charges for the crime of attacking civilians or civilian objects under Article 3, as there is no such express requirement.¹⁶ It is not quite clear why the ICTY introduced this result requirement of the said Article 85. Its customary law status is more than questionable, as demonstrated by the fact that the Statute of the International Criminal Court (ICC), which is largely seen as an expression of customary law, does not require a result for the crime of attacking civilians and civilian objectives to have been perpetrated.

The Court finds in the *Strugar* case that ‘similarly to what it has found in respect of the attacks on civilians, the Chamber considers that, in view of the fundamental nature of this prohibition, any attack against civilian objects, even if it did not cause any damage, can be considered a serious violation of international

13 ICTY, *The Prosecutor v. Stanislav Galić*, IT-98-29, Trial Chamber, Judgement of 5 December 2003, para. 27 (hereinafter *Galić* Case, TC). This statement may be misleading, as it can only be considered a grave breach and thus fall under Article 2 of the ICTY if it resulted in death or serious injury. See Additional Protocol I, Art. 85(3).

14 *Strugar* Case, TC, above note 7, para. 221.

15 *Blaškić* Case, TC, above note 6, para. 180.

16 If it were charging under Article 2, which criminalizes grave breaches of the Geneva Conventions, this would be necessary.

humanitarian law'.¹⁷ However, it also stresses that the question as to whether the threshold of 'grave consequences' is met if no harm or damage occurred would have to be examined on a case-by-case basis.

Therefore, in order to charge a person for committing the crime of attacking civilians or civilian objects, the Prosecutor will have to prove that there has been a serious violation of a criminalized rule of IHL. This must include proof that (i) the attack was directed at civilians or a civilian object, (ii) this was done wilfully, and (iii) the attack resulted in serious injury, death or damage.

Apart from the practical difficulties this may pose, there are a number of others linked to the legal classification of the attack as an attack directed against civilians or civilian objects as defined under IHL. These include the determination of whether the attack really did constitute an 'attack' in accordance with the definition given in IHL, whether it was really 'directed' at civilians or civilian objects and whether the objects were indeed 'civilian'. Where it is not clear that it was directed at civilians or civilian objects, it is also necessary to examine whether it was a 'proportional' attack and whether the requisite 'precautionary measures' were taken. These notions are defined in IHL. However, as their definitions are very general, their application in criminal cases presents various problems. For practical reasons, this article will be confined to examining the notions of 'civilian', 'direct participation in hostilities', 'civilian object' and 'proportionality'.

The notion of 'civilian'

The *Kupreškić* trial chamber judgment identified three exceptional circumstances in which this protection of civilians may cease entirely or be reduced or suspended: '(i) when civilians abuse their rights; (ii) when, although the object of a military attack is comprised of military objectives, belligerents cannot avoid causing so-called collateral damage to civilians; and (iii) at least according to some authorities, when civilians may legitimately be the object of reprisals'.¹⁸

When charging a person with attacking civilians, the special challenge is to show that the alleged perpetrator knew that the people he attacked were civilians and that his attack was not based on the reasonable belief that one of the two first exceptions mentioned above applied.

When it came to determining the *mens rea*, the trial chamber in the *Galić* case decided that 'the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person, that person shall be considered to be a civilian.

17 *Strugar* Case, TC, above note 7, para. 225.

18 ICTY, *The Prosecutor v. Kupreškić et al.*, IT-95-16-T, Trial Chamber II, Judgement of 14 January 2000, para. 522 (hereinafter *Kupreškić* Case, TC). The latter circumstance is controversial.

However, in such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.¹⁹

This raises two important elements for the prosecution of such a crime. First, there is the expression 'should have been aware of the civilian status', which lowers the mental requirement of knowledge about the civilian nature of the target. As mentioned above, this can be justified, because the ICTY requires the attack to have resulted in serious consequences.²⁰ Second, the Tribunal establishes that the standard of proof must be that of a 'reasonable person'. It must be stressed that even the existence of some military activities would not necessarily deprive the population of its civilian character. This is consistent with the fact that, in the *Blaškić* case, little attention was paid to the activities of poorly armed or trained part-time 'soldiers' defending their own villages when assessing whether or not the villages contained military objectives.²¹

Relevant evidence that an attack was wilfully directed against a civilian population can include a variety of things. One of those the trial chamber relied on in the *Strugar* case to show that an attack had been directed at civilians, and that the commander knew or should have known this, is that the existence of the Old Town of Dubrovnik as a living town was 'a renowned state of affairs which had existed for centuries'.²² The trial chamber further stated that 'Common sense and the evidence of many witnesses in this case, confirms that the population of Dubrovnik was substantially civilian'.²³ Whilst this may be enough to prove the existence of a civilian population in the most clear-cut cases, there are many cases where the situation is not as straightforward.

When the cases become more complicated, '[t]he clothing, activity, age, or sex of a person are among the factors which may be considered in deciding whether he or she is a civilian'.²⁴ In the *Strugar* case the Court even uses testimony from a JNA (Yugoslav People's Army) officer, who stated that he did not feel jeopardized by the 'civilians', as additional proof of the civilian character of the population.²⁵ Although this is a subjective judgement, it can thus serve as evidence.

Other relevant factors taken into account to determine whether the perpetrator could have reasonably ascertained the non-combatant status of the individuals targeted in the *Galić* case²⁶ were the distance of the victim(s) from the

19 *Galić* Case, TC, above note 13, para. 55.

20 See Gerhard Werle, *Principles of International Criminal Law*, Asser Press, Cambridge, 2005, p. 344.

21 Fenrick, above note 8, p. 943.

22 *Strugar* Case, TC, above note 7, para. 285.

23 *Ibid.*, para. 287.

24 *Galić* Case, TC, above note 13, para. 50.

25 *Strugar* Case, TC, above note 7, para. 287.

26 See Daniela Kravetz, 'The protection of civilians in war: the ICTY's *Galić* case', *Leiden Journal of International Law*, Vol. 17 (2004), p. 531.

alleged perpetrator(s),²⁷ the visibility at the time of the event²⁸ and the proximity of the victim(s) to possible military targets.²⁹

The latter factor is very important, because if there are military objectives and the attack was launched in the belief that those objectives existed, the attacks could be justified.³⁰ But even the presence of military objectives does not, of course, necessarily mean that the attacks were not directed at civilians. In the *Blaškić* case there were Bosnian Muslim troops present in the towns that were attacked. Nevertheless, no Bosnian military casualties were reported. The vast majority of victims were civilians and, moreover, Muslim areas of the town were shelled, whereas Croatian or mixed areas were not damaged during the attack.³¹ These facts were evidence that the attack was directed against civilians, not against the military objects present in the area at the time of the attack.

In some cases, such as the *Blaškić* case, the incident is part of a plan or strategy that can be inferred from public statements. In this case, the planning and organization that preceded the attack were accompanied by political statements that showed the nature and purpose of the attack, namely, to exterminate the Muslim civilian population.³²

Another possibility is to examine the means used to carry out the attack. If, for example, it is claimed that a precise, geographically limited military objective was the object of attack, it is unlikely that weapons would be used that cannot be precision-guided, or which have a very large radius of destruction. In the *Blaškić* case, ‘baby bombs’ were used during the attack on Stari Vitez, leading primarily to civilian casualties and the destruction of civilian objects. As these are blind

27 *Galić* Case, TC, above note 13, paras. 355–356. In one instance the Chamber held that ‘At a distance of 1100 metres ... the perpetrator would have been able to observe the civilian appearance of Zametica, a 48 year old civilian woman, if he was well equipped, or if no optical sight or binoculars had been available. The circumstances were such that disregarding the possibility that the victim was civilian was reckless. Furthermore, the perpetrator repeatedly shot toward the victim preventing rescuers from approaching her. The Trial Chamber concludes that the perpetrator deliberately attacked the victim. The mere fact that the chance of hitting a target deteriorates at the distance of 1100 metres does not change this conclusion.’ *Ibid.*, para. 355.

28 *Ibid.*, para. 522: ‘Although it is convinced that at 6:00 hours in a July morning there is light, given the absence of explicit indications as to the exact level of luminosity at the time of the incident, the Majority cannot exclude the possibility that the person firing at Mejra Jusović failed to notice that she was a middle-aged civilian woman carrying wood. Nonetheless, the Majority is satisfied that the absence of military presence in the area of the incident, which consisted of open space except for three nearby houses, should have cautioned the perpetrator to confirm the military status of his victim before firing.’

29 *Ibid.*, para. 428, ‘Ramiza Kundo acknowledged that from 1992 to 1994 there was fighting and gunfire in the area where she lived but that there were no soldiers, military equipment or military activity in the vicinity at the time of the incident. Given the circumstances of the incident, the occurrence of similar incidents in the vicinity, the positions of the warring parties beneath the hill of Brijesko brdo, and evidence that there was no on-going combat activity in the relevant area at the time of the incident, the Majority does not accept the Defence’s suggestion that the victim was hit by a stray bullet or a ricochet as a consequence of a regular combat activity.’

30 *Strugar* Case, TC, above note 7, para. 284.

31 *Blaškić* Case, TC, above note 6, paras. 509–511.

32 *Ibid.*, para. 390.

weapons, their use was held to be indiscriminate and was considered proof that the attack was directed against civilians.³³

The notion of 'direct participation in hostilities'

The evaluation of whether the attack was unlawful includes an examination of whether the civilians who were the object of the attack had lost their immunity by taking a direct part in hostilities. This is important, as civilians may only be attacked if they are taking a direct part in hostilities. If they do so, they lose their immunity from attack. According to the *Galić* judgment, confirming the ICRC *Commentary* (see note 40 below), 'to take a "direct" part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel or matériel of the enemy armed forces Combatants and other individuals directly engaged in hostilities are considered to be legitimate military targets.'³⁴

The practical question is, of course, how a commander or simple soldier is to know when civilians are taking a direct part in hostilities and when they are not. This is especially difficult where the armed groups mingle with the civilian population.

The trial chamber in the *Galić* case 'understands that a person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant'.³⁵ This, of course, requires the Prosecutor to know what the person contemplating the attack knew at the time he decided to attack. In the absence of clear evidence, it may be sufficient to show that the commander should have known that the population was civilian, based on common sense, or because it was a known state of affairs.³⁶

The notion of 'civilian object'

Civilian objects are defined in Article 52 of Additional Protocol I. However, even though the definition of this article is generally recognized as reflecting customary law, there is no agreement among all states about the exact definition of a military objective. The United States, for example, has included the specification that they 'effectively contribute to the opposing force's war-fighting and war-sustaining capability' in its definition of military objectives.³⁷ The term 'war-sustaining capability' is broader than the definition given in Article 52 of Protocol I, as it

33 *Ibid.*, para. 512.

34 *Galić* Case, TC, above note 13, para. 48.

35 *Ibid.*, para. 50.

36 On the precise meaning of the notion of 'direct participation in hostilities', see the ICRC report in this issue of the *International Review of the Red Cross*.

37 US Department of Defence, Military Commission Instruction No. 2, available at www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf (last visited 25 August 2008).

implies ‘something not quite so directly connected with the actual conduct of hostilities’.³⁸

Nevertheless, the definition given in IHL is the one used as the basis for this crime before the ICTY. In the *Blaškić* case, civilian property was interpreted as covering any property that could not be legitimately considered a military objective.³⁹

In order to clarify better what constitutes a military objective, there have been attempts to draw up non-exhaustive lists of objects that are generally recognized as military objectives. The ICRC, for instance, made such an attempt in 1956.⁴⁰ The defence counsel in the *Strugar* case also gave a list of examples of military objectives, namely buildings and objects that provide administrative and logistical support for military objectives, as well as examples of objects that in certain circumstances may constitute military objectives: transport systems for military supplies and transport centres where lines of communication converge.⁴¹ It is, however, impossible to rely on a list in order to define the term ‘military objective’. Practically everything can become a legitimate target, as long as two conditions are cumulatively met: the object’s contribution to military action must be ‘effective’, and the military advantage of its destruction must be ‘definite’.⁴² Both criteria must be fulfilled ‘in the circumstances ruling at the time’.⁴³ Furthermore, in this definition of the term ‘military’ the said advantage and contribution are strictly limited to what is purely military, thus excluding objects of political, economic and psychological importance to the enemy.⁴⁴

Whether the aforesaid elements are present depends on what exactly was considered, at that time, to offer a ‘definite military advantage’ and on whether the object in question offered an ‘effective contribution to military action’. The applicable test thus includes two steps and contains an objective and a subjective element. The objective element is the determination of whether the object offers an effective, that is, direct, contribution to military action, according to its nature, location, purpose or use. Thus, for the Prosecutor to determine whether the targeted object contributed effectively to the military action, he or she needs to

38 Horace B. Robertson, Jr, ‘The principle of the military objective in the law of armed conflict’, *United States Air Force Academy Journal of Legal Studies*, Vol. 8 (1997), p. 50.

39 *Blaškić* Case, TC, above note 6, para. 180.

40 Yves Sandoz, Christoph Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987)*, Martinus Nijhoff, The Hague, 1987, pp. 632–3. The list was drawn up by the ICRC with the help of military experts and presented as a model, subject to modification.

41 *Strugar* Case, TC, above note 7, para. 278.

42 Possible exceptions are those objects that benefit from special protection, such as dams and hospitals, which should never be used for military actions and thus cannot become military objectives. See Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, Vol. I, ICRC, Geneva, 2nd edn, 2006, p. 201.

43 Marco Sassòli, ‘Legitimate targets of attacks under international humanitarian law’, background paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, 27–29 January 2003, p. 3, available at www.ihlresearch.org/ihl/pdfs/Session1.pdf (last visited 25 August 2008).

44 See *ibid.* for a further discussion of this subject.

know what the use, purpose, location or use of the object was at that time and what information the military had about the object. Could a commander have reasonably thought that this target contributed effectively to the enemy's military action?

The subjective element is that referred to in the *Galić* case, namely the assessment of whether the object's destruction, capture or neutralization, in the circumstances ruling at the time, offered a definite military advantage.⁴⁵ This excludes potential or indeterminate advantages or advantages that are not substantial. It further requires the commander to have sufficient information about the object before attacking it. In order to determine whether the destruction offered a definite military advantage, the Prosecutor must therefore reconstruct the assessment carried out by the military regarding the military necessity of destroying the target. This requires knowledge of the tactical and strategic goals of the belligerents at that time, as the determination of what is militarily necessary may be relative to the goals of the warring party concerned – which may change during the conflict and are usually confidential.

A case before the ICTY illustrates how this provision has been applied in practice. In the *Blaškić* case, the defence claimed that civilian buildings destroyed in the course of the attack on Vitez and Stari Vitez had been used for military purposes and had thus been turned into legitimate military targets. However, the trial chamber came to the conclusion that this was not the case, as there was no military installation, fortification or trench in the town on that day, there were no reports of any military victims or of the presence of soldiers from the Bosnia-Herzegovina army, and the Muslim military did not put up any defence. It further stated that the houses that were torched belonged to civilians and could not in any circumstances be construed as military targets.⁴⁶ 'Consequently, it was impossible to ascertain any strategic or military reasons for the 16 April 1993 attack on Vitez and Stari Vitez.'⁴⁷ The chamber thus looked at the overall situation and result of the attack, rather than at every specific object, in order to conclude that the attack was directed at civilian objects rather than military ones. This facilitated the task of proving that the attack was unlawful, but may only have been possible because the nature of the targets seems to have been pretty clear and did not require a more detailed analysis.

In a less clear situation, the trial chamber in the *Galić* judgment stresses that

In case of doubt as to whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used. The Trial Chamber understands that such an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the

45 *Galić* Case, TC, above note 13, para. 51.

46 *Blaškić* Case, TC, above note 6, para. 509.

47 *Ibid.*, para. 510.

information available to the latter, that the object is being used to make an effective contribution to military action.⁴⁸

The Appeals Chamber in the *Kordić* case further clarifies that ‘the imperative “in case of doubt” is limited to the expected conduct of a member of the military. However, when the latter’s criminal responsibility is at issue, the burden of proof as to whether an object is a civilian one rests on the Prosecution.’⁴⁹ The Israeli Supreme Court, on the other hand, took a different approach. In the case of the targeted killings, it states that ‘if there is an alleged attack against civilians, the burden of proof on the attacking army is heavy’.⁵⁰ The ICTY may have chosen the expression more in favour of the accused, because it took into account the difficulty commanders face when having to decide rapidly whether an object is military or civilian. For the Prosecutor, however, this means that where the situation is not clear-cut, which is very often the case, it is up to him or her to prove beyond reasonable doubt the culpability of the perpetrator for having attacked a civilian object.

When it comes to the mental element, the attack must have been conducted ‘intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity’.⁵¹ In other words, the civilian character of the object must or should have been known to the perpetrator and, similar to the *mens rea* of the crime of attacking civilians, the attack must have been wilfully directed at civilian objects.⁵²

Furthermore, the Prosecutor’s report on the NATO bombing campaign analyses the nature of a number of targets, thus giving some guidance for future cases. The Commission stressed that all targets must meet the criteria of military target. ‘A general label is insufficient’⁵³ and it is also not sufficient to claim that the objects are traditional military objectives.⁵⁴ It further specified that as a bottom line, civilian morale as such is not a legitimate military objective.⁵⁵

However, there remain many open questions and a broad grey zone in which it is hard to define an object as military or civilian. The classification becomes especially difficult when the objects are dual-use objects, that is, they can be used for both civilian and military purposes. With many objects, including communications systems, transport systems, manufacturing plants and so on, the question of how to classify them is of great importance. However, there is no relevant case law that could help resolve this question. As a general rule, it can be said that as soon as the object is actually (not potentially) used for military

48 *Galić* Case, TC, above note 13, para. 51.

49 *The Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-A, Appeals Chamber, Judgement of 17 December 2004, para. 53 (hereinafter *Kordić* Case, AC).

50 *The Targeted-Killing* Case, above note 4, para. 40.

51 *Blaškić* Case, TC, above note 6, para. 180.

52 Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2005, p. 152.

53 NATO Bombing Campaign, ICTY Report, above note 1, para. 55.

54 *Ibid.*

55 *Ibid.*

purposes, or where its secondary use is military, it is a military objective and may, in principle, be attacked. In the *Strugar* case, the trial chamber emphasized that each case must be determined on its facts.⁵⁶

The Prosecutor's report on the NATO bombing campaign also stresses that in determining whether or not the *mens rea* requirement of an unlawful attack has been met,

[I]t should be borne in mind that commanders deciding on an attack have duties: a) to do everything practicable to verify that the objectives to be attacked are military objectives, b) to take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or, in any event to minimizing incidental civilian casualties or civilian property damage, and c) to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage.⁵⁷

The questions that must thus be asked by the Prosecutor are what the attacker knew about the object, whether the necessary precautionary measures were taken and whether the principles of proportionality and distinction were respected. Some of the factors that can serve as evidence that the attack was unlawful are the time and place of the attack, its planning, the weapons used and the balance between the anticipated military advantage and the expected loss of civilian life or damage to civilian objects. This is valid for all attacks, not only attacks against civilian objects.

The above examination of cases dealing with the very general IHL norms of 'civilians', 'direct participation in hostilities' and 'civilian objects' shows that whilst these notions have been clarified to some extent, their application remains extremely difficult. The cases in which the norms were applied made it possible to find an individual criminally responsible for a violation because the nature of the people attacked was easy to determine and clearly known to the perpetrator. However, there remain many open questions and situations that have not yet been addressed.⁵⁸ Existing case law can thus serve only as a rough guideline and as a source of clarification that may enhance the principle of legality.

The notion of 'proportionality'

In order to show that a civilian or a civilian object was targeted, the possibility of that person or object being 'collateral damage' justified by military necessity, for instance, must be excluded.⁵⁹ What can be considered 'collateral damage' or not

56 *Strugar* Case, TC, above note 7, para. 295.

57 NATO Bombing Campaign, ICTY Report, above note 1, para. 28.

58 For instance, if a person takes up arms to defend him/herself or his/her family – is this always considered as directly participating in hostilities, or could it be individual self-defence, as indicated in the UNSCR 780 Commission of Experts Report (UN Doc. S/1994/674)? For further discussion see William J. Fenrick, 'The prosecution of unlawful attack cases before the ICTY', *Yearbook of International Law*, Vol. 7 (2004), pp. 172–4.

59 See discussion in this paper and in Fenrick, above note 58, p. 157.

depends, among other things, on whether or not an attack was proportionate. In the *Galić* case, ‘the Trial Chamber considers that certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of attack. This is to be determined on a case-by-case basis in light of the available evidence’.⁶⁰ Concerning the notion of proportionality and indiscriminate attacks, the trial chamber in the *Kupreškić* case states that the rule of proportionality must be applied in conjunction with the prohibition of negligent and indiscriminate attacks.⁶¹

Any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack. In addition, attacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians.⁶²

The *Galić* case further clarifies that ‘one type of indiscriminate attack violates the principle of proportionality’.⁶³

The link between the crime of attacking civilians or civilian objects and indiscriminate attacks is that the latter may in certain circumstances give rise to the inference that civilians or civilian objects were actually the object of the attack.⁶⁴ However, whether and in which circumstances this would be the case is not clear. The Appeals Chamber in *Galić* refers to the *Kunarac et al.* and *Blaškić* appeals judgments when clarifying that whether an attack is ‘directed’ against a civilian or a civilian population depends on the factual circumstances, which could for example include the

means and methods used in the course of the attack, ... the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of the war.⁶⁵

An example is the use of indiscriminate weapons, which was equated with a deliberate attack on civilians by the ICJ in its advisory opinion on the legality of the threat or use of nuclear weapons.⁶⁶ This possibility was also mentioned by the

60 *Galić* Case, TC, above note 13, para. 60.

61 Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge Studies in International and Comparative Law, Cambridge, 2004, p. 95. Cf. also *Kupreškić* Case, TC, above note 18, para. 524.

62 *Kupreškić* Case, TC, above note 18, para. 524.

63 *Galić* Case, TC, above note 13, para. 58. This also implies that indiscriminate attacks generally do not need to be disproportionate in order to constitute unlawful attacks.

64 *Ibid.*, paras. 57–58. This was also confirmed by the Appeals Chamber.

65 ICTY, *The Prosecutor v. Stanislav Galić*, IT-98-29-A, Appeals Chamber, Judgement of 30 November 2006, para. 132 (hereinafter *Galić* Case, AC).

66 *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, Advisory Opinion, [1996] ICJ Rep. 225, para. 78.

trial chamber in the *Martić* case.⁶⁷ In the *Strugar* case, the trial chamber reaffirms the theoretical possibility that attacks incidentally causing excessive damage could qualify as attacks directed against civilians or civilian objects, but avoids addressing the question any further.⁶⁸

The prohibition on causing disproportionate injury, death or damage is very difficult to apply before a court of law, as it implies a value-based judgement. It requires military commanders to strike a balance between the expected harm to civilians or civilian objects and the anticipated military advantage of the attack. Complete good faith on the part of the belligerents and the desire to comply with the general principle of respect for civilians in combat operations are thus required to put this provision into practice.

The Final Report to the ICTY Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia draws up a list of unresolved questions with regard to the application of the principle of proportionality:

- a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and/or the damage to civilian objects?
- b) What do you include or exclude in totaling your sums?
- c) What is the standard of measurement in time or space? and
- d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?⁶⁹

The first crucial step is to define the term 'concrete and direct military advantage'. This poses difficulties similar to those of defining the term 'definite military advantage' (Protocol I, Art. 52(2)), which was discussed above. The other question is, what should be considered when determining whether foreseeable damage, injury or death is proportional?

A further uncertainty is whether the cumulative effect of attacks can be taken into consideration. In the *Kupreškić* case, the Court clarifies that

[I]t may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in

67 ICTY, *The Prosecutor v. Milan Martić*, IT-95-11-T, Trial Chamber I, Judgement of 12 June 2007, para. 69 (hereinafter *Martić* Case, TC). 'In particular, indiscriminate attacks, that is attacks which affect civilians or civilian objects and military objects without distinction, may also be qualified as direct attacks on civilians. In this regard, a direct attack against civilians can be inferred from the indiscriminate character of the weapon used.'

68 *Strugar* Case, TC, above note 7, para. 280.

69 NATO Bombing Campaign, ICTY Report, above note 1, para. 49.

keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.⁷⁰

However, instead of acknowledging that a number of attacks, although deemed to be lawful, can amount to a disproportionate attack, the NATO Bombing Review Committee interpreted this statement as referring to an overall assessment of the totality of civilian victims as against the goals of the military campaign.⁷¹

When looking for further guidance in case law, it is noticeable that only very few of the above-mentioned questions have been examined by the ICTY. In the *Galić* case, the trial chamber stated that '[i]n determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.'⁷² This statement sets the standard of 'a reasonable person', but is not very helpful, as the evaluation of what is excessive mainly depends on who makes the evaluation. A human rights lawyer will have a different understanding of what is excessive than a military commander, for example. And even among military commanders, this evaluation can vary largely, depending on their doctrinal backgrounds, their combat experience or their national military history.⁷³

In fact, it is mainly this subjectivity that makes it so hard to charge individuals for disproportionate attacks. The trial chamber in the *Galić* case notes that the rule of proportionality does not refer to the actual damage caused nor to the military advantage achieved by an attack, but instead uses the words 'expected' and 'anticipated'.⁷⁴ It goes on to say that 'To establish the *mens rea* of a disproportionate attack the Prosecution must prove ... that the attack was launched wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties.'⁷⁵ Such circumstances, which influence the danger incurred by civilians, can include the location of the military objective (vicinity of civilian objects), the accuracy of the weapon (its dispersion, range, ammunition used, etc.), the weather conditions (wind or low visibility), the specific nature of the military objective (fuel tanks, main roads, etc.), technical skills of the combatants and so on.

The trial chamber also goes on to emphasize that even if a party does not comply with its obligation to remove civilians, to the maximum extent feasible, from the vicinity of military objectives, and to avoid locating military objectives within or near densely populated areas (see Protocol I, Art. 58), this does not

70 *Kupreškić* Case, TC, above note 18, para. 526.

71 NATO Bombing Campaign, ICTY Report, above note 1, para. 52.

72 *Galić* Case, TC, above note 13, para. 58.

73 NATO Bombing Campaign, ICTY Report, above note 1, para. 50.

74 *Galić* Case, TC, above note 13, para. 58.

75 *Ibid.*, para. 59.

relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack.⁷⁶

Practical difficulties of bringing charges for conduct of hostilities crimes

Determination of the facts

As described by Fenrick, 'a first step in conducting an investigation concerning unlawful attacks should be an attempt to develop a general overview of the military situation, including, if possible, an indication of the relevant information available or readily available to the potential accused'.⁷⁷ This step already involves a series of complications.⁷⁸ In order to get an accurate overview of the military situation it is necessary to examine the tactics of both sides, the means and methods of warfare used by them, their objectives and constraints and the number of civilians and civilian objects in the area. With respect to the mental element of the crime, this overview should include knowledge of the information available to the military at the time of the attack and at the time of the decision-making process. The Prosecutor must rely not only on military and weapons experts, but also on witnesses who have survived the attack and, most importantly, on the armed forces themselves.

Establishing the big picture vs. identifying separate incidents

One of the first steps in establishing the extent of the harm an attack has caused is to conduct an investigation after the event. This may be extremely difficult, as it is not always practicable to determine precisely when and how particular incidents occurred. When reconstructing the facts, it may not always be possible to assess each single incident, as the number of attacks and incidents may simply be too high to allow an incident-by-incident approach.⁷⁹ It might therefore be necessary to make a global assessment and focus on the total effect of an attack. This may, however, be problematic when it comes to determining guilt. In the *Strugar* case, for instance, the chamber acknowledged the difficulty of identifying particular buildings damaged during the attack on Dubrovnik of 6 December 1991, but while

76 Ibid., para. 61.

77 William J. Fenrick, 'Riding the rhino: attempting to develop usable standards for combat activities', *Boston College International and Comparative Law Review* (Winter 2007), p. 108.

78 Although not all the complications described are limited to the crimes of attacking civilians and the civilian population, they must nevertheless be considered, as they add to the difficulty of bringing charges for these crimes. They may also become especially relevant when combined with the legal difficulties inherent in the prosecution of unlawful attacks on civilians and civilian objects, which makes the whole process particularly complicated.

79 William J. Fenrick, 'Attacking the enemy civilian as a punishable offense', *Duke Journal of Comparative & International Law*, Vol. 7 (1997), p. 564.

finding that there was widespread and substantial damage to the Old Town of Dubrovnik, it stated that ‘it is only this particularised and proved damage ... which will be taken into account for the purpose of determining guilt and innocence’.⁸⁰

As this may not always be satisfactory, because it does not fully reflect the widespread and systematic nature of the attack, the Prosecutor in the *Galić* case alleged that the sniping and shelling directed at civilians amounted to a campaign. In this case, the court thus also looked at evidence that demonstrated whether the alleged planned incidents, if proved attacks, were not isolated incidents but representative of a ‘widespread’ or ‘systematic’ pattern of behaviour. It nevertheless ‘[t]ried to the extent that was possible and reasonable to assess each scheduled incident on its own terms, *but also with a limited reference to other evidence concerning the situation of civilians in Sarajevo*’.⁸¹ While having managed to move from the micro to the macro level to some extent, the Prosecutor must nevertheless particularize a number of incidents in the indictment and focus on proving their unlawfulness, rather than referring only to the whole situation.

Independently of this, acknowledgement of the overall situation is important, as it can be an indicator of culpable conduct such as disproportionate attacks on military objects, indiscriminate attacks, a lack of precautionary measures or deliberate attacks on civilians or civilian objects.

The problem with focusing only on a few incidents is that the Prosecutor will, obviously, choose those incidents that clearly constitute violations and can be proved reasonably easily. The few cases brought before the ICTY so far, therefore, have not obliged the judges to deal with very complicated situations, such as those where the loss of civilian life is not clearly disproportionate or where the nature of the population is unclear.

Battlefield damage assessment

A second difficulty in conducting inquiries is to guarantee impartial and effective investigations into the legality of particular aspects of the attack. While the attacks continue, it may be extremely dangerous to gather information as to where projectiles landed, what they damaged and who they wounded or killed. Right after the attack, it is often the armed forces themselves that will, by carrying out a ‘battlefield damage assessment’ (BDA), record the damage caused. In many situations there are also independent investigations and damage assessments, carried out by the UN or other third parties present in the area of conflict. In any case, it is necessary to ensure that the investigations are impartial and efficient. In the *Strugar* case, a commission made up of JNA officers conducted an investigation into the attack of 6 December only two days after the attack.⁸² In the commission’s report, the attack

80 *Strugar* Case, TC, above note 7, para. 179.

81 *Galić* Case, TC, above note 13, para. 207 (emphasis added).

82 *Strugar* Case, TC, above note 7, para. 177. A retired lieutenant-general of the then JNA (Yugoslav Peoples’ Army), Pavle Strugar was charged with crimes allegedly committed from 6 to 31 December 1991

was claimed to have caused very little damage. This evaluation was found by the chamber to misrepresent the true situation and to give misleading views; the chamber consequently deemed that the investigation was not a genuine attempt to record the nature or extent of the damage caused by the attack.

Need for military experts

A further difficulty with regard to establishing the facts is the need for military and weapons experts. Information as to the weapons and tactics used, the number of projectiles fired and the geographical location from which the attack originated can be necessary to prove who launched the attack, whether it was deliberate or whether the damage, injury or death it caused was perhaps a mistake that could possibly eliminate criminal responsibility.

In addition to the evidence that may be found in military communications or logs, the facts of the case may be indicators of culpable conduct. If, for example, a tactic is used by which ‘mortar shells are fired from mortars in fixed emplacements aimed at specific areas, it is reasonable to conclude that the specific areas are intentionally hit’.⁸³ And concerning the choice of weapon, it is reasonable to assume that if a precision weapon such as a sniper rifle is used and the sniper hits a child, it was his intention to do so. The planning of an attack, including the choice of weapon, can thus be evidence for the lawfulness or otherwise of the attack. There are manuals for each type of weapon system that show the effective zone, that is, the area around the point of impact within which the munition may cause death or injury.⁸⁴ These manuals also contain tables that can be used to predict the size of the error ellipse, or area around the point of aim within which the munition could land, and they show how many munitions of certain types are necessary to destroy a certain military objective. Artillery doctrine requires the use of these manuals as part of a ‘methodical and deliberate targeting process for the use of artillery’.⁸⁵ The process also includes drawing up a list of targets and their descriptions, together with fire plans and allocations of ammunition.

Ideally, it should be possible to reconstruct whether and how the different steps were taken by looking at the plans, logs and diaries. However, as with the battlefield damage assessment, it may happen that some documents are falsified in order to avoid criminal culpability, as in *Strugar*.⁸⁶ If the Prosecutor finds that the

during a JNA military campaign in and around Dubrovnik in Croatia in October, November and December 1991. The Indictment alleges that in the course of an unlawful attack by the JNA on the Old Town of Dubrovnik on 6 December 1991, two people were killed, two were seriously wounded and many buildings of historic and cultural significance in the Old Town, including institutions dedicated to, *inter alia*, religion and the arts and sciences, were damaged.

83 Fenrick, above note 79, p. 565.

84 Cf. Fenrick, ‘The prosecution of unlawful attack cases’, above note 58, pp. 161–3.

85 *Ibid.*, p. 163.

86 *Strugar* Case, TC, above note 7, para. 96: ‘The Chamber notes that in this report, Admiral Jokić ornamented the story even further by adding that Captain Kovačević acted in the general action plan of the Attack Order of 9 November 1991, which had included the objective of taking Srd, an objective which had not been achieved by 6 December 1991. In the Chamber’s finding, these entries were contrived and

said process was flawed or was not carried out at all, this may also be evidence of an indiscriminate attack or an attack directed at civilians or civilian objects. The questions that must be asked when examining whether this is the case are: was the type of weapon system and ammunition selected appropriate for the target, was the effect limited to that necessary to do the job, and was a BDA actually conducted? In any case, the principles of distinction and proportionality must be complied with – even in situations where the commander did not have the appropriate weapon system available and thus had to rely on a different weapon to achieve his or her military goal.

If the logs do not contain the requisite information on the above-mentioned factors or the Prosecutor has no access to them, it may not always be easy to determine what weapon was used or who launched the attack. A good example of the difficulty involved in establishing these facts was an incident examined by the court in the *Galić* case – an explosion in a Sarajevo market that killed 60 people and injured 140.⁸⁷ Four different expert reports were compiled to ascertain from where the attack had been launched, as this information was crucial to determine whether it had been launched from an SRK (Sarajevo Romanija Corps) position or not. To determine this, it was necessary to know what explosive had been used and from what distance and direction it had been fired. The level of technical precision and detail required – which also explains the different results reached by the experts – shows how hard it is to reconstruct the facts and reach a decision ‘without reasonable doubt’ concerning such an attack if there is no other evidence.

Access to confidential information

A further problem is that in some cases it might be necessary to know the overall plans for the defence of the country, such as the weaponry stocked for that purpose or the separation of military objectives from civilian objectives. As this information is usually confidential, the Prosecutor has access to it only insofar as the armed forces permit. An example of the limits imposed by the confidential nature of facts relating to military and high-level political decisions can be found in the Israeli Winograd Commission’s report on the 2006 Lebanon war. It states

false. The reports were deliberately deceptive. The attack was not spontaneous on the part of Captain Kovačević on 6 December 1991. The attack was entirely pre-planned and coordinated on 5 December 1991 by 9 VPS staff including Warship-Captain Zec.’

87 *Galić* Case, TC, above note 13, para. 397, n. 1351. The Indictment alleges that on 4 February 1994 ‘a salvo of three 120 mm mortar shells hit civilians in the Dobrinja residential area. The first landed to the front of a block of flats at Oslobodilaca Sarajeva Street hitting persons who were distributing and receiving humanitarian aid and children attending religious classes. The second and third landed among persons trading at a market in an open area to the rear of the apartment buildings at Mihajla Pupina Street and Oslobodilaca Sarajeva Street. Eight people, including 1 child under the age of 15 years, were killed and at least 18 people, including 2 such children, were wounded. The origin of fire was from VRS-held territory, approximately to the east’, available at www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf (last visited 25 August 2008).

that 'the unclassified Report does not include the many facts that cannot be revealed for reasons of protecting the state's security and foreign affairs'.⁸⁸

Determination of the individual responsible

Further difficulties are linked to the choice of the accused. As the offence of attacking civilians or civilian objects is usually the result of a decision taken by military leaders or is even part of a general military tactic or strategy, the accused is most likely to be a high-level official. Charging these people thus also corresponds to the aim of international criminal tribunals to prosecute the 'big fish', rather than the ordinary soldier who is following an order.

Military structure

It might be difficult to identify the person or persons responsible for the attacks and to ascertain whether civilians or civilian objects were deliberately attacked. Especially in the case of rebel groups with a loose hierarchical structure, it may be hard to determine who is responsible for the attack, either directly or indirectly. And, as mentioned above, when taking their decisions commanders rely heavily on military or intelligence information, which could be incorrect, without always having the opportunity to check the accuracy of the information they are given.

Establishment of the required intent

There is thus always a possibility that the attack was a mistake, or that the commander did not know the object was civilian rather than military. In the *Galić* case, these two possibilities were ruled out without further explanations when it came to examining the attack on the market (see above).⁸⁹ However, to rule on the deliberate nature of the attack and the qualification of an object or person as civilian by the military is not as simple as it seems when reading this part of the *Galić* judgment. Without going into the legal questions related to the *mens rea* of the offence of attacking civilians or civilian objects, which was discussed above,⁹⁰ it must be remembered that the Prosecutor needs to gain insight into what the attacker knew about the target before and at the time of the attack. This is required, for to create criminal culpability, the attack must be 'deliberate', meaning that the perpetrator wilfully directed his attack against civilians or civilian objects.⁹¹ This reconstruction of the decision-making process before and during military operations is extremely arduous, as these are obviously highly confidential issues that are rarely made public. But it is precisely this information that is so important, as 'an individual

88 'Summary findings of the Winograd Commission on Israel's 2006 Lebanon War', available at <http://middleeast.about.com/od/israel/a/me080130.htm> (last visited 25 August 2008).

89 *Galić* Case, TC, above note 13, para. 449.

90 The *mens rea* of attacking civilians or civilian objects was discussed elsewhere in this paper.

91 *Galić* Case, TC, above note 13, para. 56.

should not be charged or convicted on the basis of hindsight but on the basis of information available to him or information he recklessly failed to obtain at the time in question'.⁹² The Prosecutor therefore has to make a great effort to gain access to this information, possibly by negotiating with the armed forces or the government and, if necessary, even by applying political pressure on them to co-operate.

Decisions taken in the 'fog of war'

The defence counsel in the *Strugar* case further claimed that commanders cannot be held to a standard of perfection in reaching their decisions.⁹³ This argument raises questions as to the standard of proof required when charging a high-level official for decisions he or she took in the 'fog of war'. Given the importance of these decisions and the consequences they may have, leaders should be expected to act with due responsibility, precaution and foresight. They can also be held individually responsible for failing to prevent or repress unlawful attacks committed by subordinates who are under their effective command and control or effective authority and control (ICC Statute, Art. 28(a)). On the other hand, their task is to defeat the enemy, which obliges them to make fast and difficult decisions based on the information available to them at the time. When prosecuting them for wrong choices, it is therefore important to strike a balance between the rights of the accused and the aim of preventing the use of unlawful methods of combat in future wars. Whilst intentional acts must be punished (according to ICTY case law, this means wilful acts, which include recklessness), due regard must be paid to the circumstances leading to the death or injury of civilians or damage to civilian objects. The Final Report on the NATO bombing campaign thus warns that simply establishing the fact that civilian deaths have occurred does not unequivocally lead to the assumption that war crimes have taken place.⁹⁴ It further notes that there are numerous reasons why unintended civilian deaths are not necessarily unlawful.⁹⁵ The challenge of prosecuting conduct of hostilities crimes is precisely to exclude all these possibilities 'without reasonable doubt'.

Access to direct evidence of culpability

In order to achieve this, the Prosecutor needs information about the decision-making process within the armed forces. The difficulty here is that the information must be given to the Prosecutor by members of the armed forces themselves. It is

92 'The Hostages Trial: Trial of Wilhelm List and Others' (Case No. 47), 8 *L.Rpts. of Trials of War Criminals* 34, 57 (U.N. War Crimes Comm. 1948), para. 69.

93 *Strugar* Case, TC, above note 7, para. 278.

94 See Richard John Galvon, 'The ICC Prosecutor, collateral damage, and NGOs: evaluating the risk of politicized prosecution', *University of Miami International and Comparative Law Review* (Fall 2005), pp. 58–9.

95 NATO Bombing Campaign, ICTY Report, above note 1, para. 51.

easy to imagine why this could cause problems. Either the other military officers involved in the decision-making process or otherwise involved in the attack fear incriminating themselves and therefore do not give reliable evidence,⁹⁶ or there is a general reluctance to support the Prosecutor in his endeavour to prove the guilt of the accused. From a military point of view, this latter attitude is understandable to some extent. States are reluctant to have the 'judgement of leaders on the front line second-guessed by hostile judges at the risk of incurring long terms of imprisonment' for having taken 'on the spot decisions as to what is a military or civilian target or whether an assault on a particular target will cause extreme collateral damage, disproportionate to its military benefits, so as to bring it within the definition of a war crime'.⁹⁷ Such a risk of prosecution, it is said, will deter those leaders from making the hard choices and courageous judgements that make the difference between victory and defeat.

This fear is further accentuated by the loose and opaque nature of the rules governing the conduct of hostilities, as these create uncertainty about the kind of attack that may end up constituting a war crime. It is in fact the combination of imprecise rules and practical difficulties that explains why there have been so few cases concerning attacks against civilians and civilian objects.

Conclusion

Detailed examination of some of the difficulties, both legal and practical, has shown how hard it is to charge individuals for attacks on civilians or civilian objects. One such difficulty is the loose nature of the rules. These rules were originally created to guide states in their conduct of hostilities and to determine state responsibility for unlimited military operations, not for evaluating the individual responsibility of commanders in specific incidents. This also explains why the rules include highly subjective notions such as 'proportionality' or 'military advantage'. While such notions may serve for a general qualification of military operations, applying them before a court of law is an uphill task, as they involve value-based, individual judgements. Finally, there is the practical difficulty of collecting the evidence needed to prove the individual's guilt. It includes knowledge of the orders

96 One example is the *Strugar* case (above note 7, para. 88): Lieutenant-Colonel Jovanović had testified that there had been a meeting (Kupari meeting) with Admiral Jokić before the attack on the Old Town, and that his presence gave him every justification for understanding that the attack was authorized. As stated by the Court, 'Lieutenant-Colonel Jovanović has a significant personal interest in having Admiral Jokić present at the Kupari meeting. Lieutenant-Colonel Jovanović, curiously, was temporarily appointed to command the 3/5 mtbr on 5 December 1991, the actual commander having been granted temporary leave, and was summarily relieved of his temporary command on the evening of 6 December 1991 on the order of Admiral Jokić. It is Lieutenant-Colonel Jovanović's evidence that he was never told the reason for his removal but that he knew it had nothing to do with the shelling of the Old Town. Admiral Jokić testified that he replaced Lieutenant-Colonel Jovanović because he had given artillery support to Captain Kovačević without his approval.'

97 Patricia M. Wald, 'Is the United States' opposition to the ICC intractable?', *Journal of International Criminal Justice*, Vol. 2, No. 1 (2004), pp. 23–4.

given, the weapons used, the strategic goals of each party, the information available to them at that time and the decision-making process within the military. It is the combination of these elements that makes a prosecution for this type of offence so laborious.

However, the underlying problem behind these difficulties is a political one. While states have readily agreed in the past that crimes against humanity or other crimes committed away from the battlefield must be punished, crimes related to the conduct of hostilities are a much more delicate matter. They are at the very heart of war, and the dividing line between necessary military operations in order to win the conflict and attacks targeting civilians or causing disproportionate suffering and destruction is very thin. To bring prosecutions in this area is seen as limiting the freedom of manoeuvre of states and discouraging commanders from taking 'bold' decisions in cases where information about the target may be unclear.

Nevertheless, the prosecution must continue its efforts to bring such cases before the court, as there must be some form of sanctioning that goes beyond the determination of state responsibility in order to punish and prevent unlimited, incautious and badly planned military operations. Even if only the most clear-cut and obvious violations of the rules of conduct of hostilities are prosecuted, this will have some effect on military commanders' behaviour. If the means and methods of war are to be limited, the fact that decisions on the battlefield must be taken rapidly and based on intelligence information cannot excuse mistakes caused by inadequate precautions, nor can it on any account excuse indiscriminate attacks or attacks directed against civilians or civilian objects. It is the duty of commanders to know and apply the rules in good faith and to do everything feasible to protect civilians from the effects of war. This is a sufficiently clear obligation, and where the *actus reus* and *mens rea* of such a crime can be proven, the perpetrators must be punished. The existing cases before the ICTY, which have dealt with these questions, have shown that it is indeed possible to prosecute individuals for such crimes. This development should continue before the ICC.