Proportionality and Distinction in the International Criminal Tribunal for the Former Yugoslavia

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1. Introduction

The principles of distinction and proportionality are at the very kernel of the protection of civilians required by international humanitarian law.[1] However, how effective have they been in protecting civilians from the vagaries of modern conflict? Some reports, which admittedly may be based on unreliable data, suggest that the rate of civilian mortality in armed conflict situations has risen exponentially since the First World War, as per the following table:

Armed conflict	**Percentage of civilian in total mortality rate**
First World War	5 per cent
Second World War	48 per cent
Korean War	4 per cent[2]
Second Gulf conflict	90 per cent[3]

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1 The International Court of Justice described the principles of distinction and protection of the civilian population as the 'cardinal principles contained in the texts constituting the fabric of humanitarian law': *Legality of the Threat or Use of Nuclear Weapons* (*ICJ Advisory Opinion*) [1996] ICJ Rep 226 at [78]; Esbjorn Rosenblad, *International Humanitarian Law of Armed Conflict: Some Aspects of the Principle of Distinction and Related Problems* (1979) at 41.

2 Figures extracted from a statement in November 1970 made to the Third Committee of the UN General Assembly, whilst it was debating the question of 'Respect for Human Rights in Armed Conflicts' (UN Doc A/C 3/SR 1780) in Rosenblad, above n1 at 55–56.

3 There were 1,408 coalition military deaths in the period to November 2004: see Iraq Coalition Casualties website <http://icasualties.org/oif/default.aspx> accessed 21 November 2004. British Foreign Minister Jack Straw was said to have conservatively estimated the total Iraqi civilian deaths to November 2004 as approximately 10,000: Vytenis Didziulis, '100,000 Iraqi Deaths Civilian Deaths Projected' *The Washington Times* <http://washingtontimes.com/upi-breaking/20041029-043334-8991r.htm> accessed 1 November 2004.

Whilst the mortality rate for civilians caught in the Korean War may have been considerably exaggerated,[4] the overall trend is obvious. Why, notwithstanding substantial codification of the principles of distinction and proportionality in the four *1949 Geneva Conventions*[5] and the *1977 Additional Protocols*,[6] are civilian casualties in armed conflict increasing?

Evidently a comprehensive and causal analysis of the failures of States to observe the principles of distinction and proportionality is beyond the scope of this article. However, it is the hypothesis of this article that a partial and limited explanation may lie in ambiguities apparent in:

1. The application of the principles of distinction and proportionality, which have led some State parties to claim that relevant bodies lack jurisdiction to try alleged offenders for violations; and
2. The imprecise and highly subjective content of the principles, which has led to inconsistencies in application and a reluctance on behalf of relevant tribunals to fully embark upon the inquiry they appear to mandate.

This article will rely heavily on the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') as it contains the most recent modern judicial application of the principles of distinction and proportionality to situations of armed conflict.

2. The Principle of Distinction

The principle of distinction is essential to the protection of civilians under international humanitarian law.[7] In fact, in combat situations, the entire body of international humanitarian law can be reduced to the obligation to observe the principle of distinction.[8] It may be stated generally as requiring that, in the conduct of warfare, attacks must only be directed against military objectives.[9]

4 Rosenblad, above n1 at 56.

5 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135; *Geneva Convention Relative to Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 (together '*Geneva Conventions*').

6 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977 ('*Protocol I*'), 1125 UNTS 3; and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* ('*Protocol II*'), 8 June 1977 (together '*Additional Protocols*').

7 Rosenblad, above n1.

8 WJ Fenrick, 'Crimes in Combat: the Relationship between Crimes against Humanity and War Crimes' *The Hague: Guest Lecture Series of the Office of the Prosecutor* (5 March 2004) at 5.

9 See for example decision of the Trial Chamber of the ICTY in *Prosecutor v Galic* [IT-98-29-T] (5 December 2003) ('*Galic*') at [45].

A. *The Principle of Distinction in Customary International Law*

The Preamble to the *1868 Declaration of St Petersburg*[10] declared that:

> the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.[11]

The principle of distinction was subsequently incorporated into the *Regulations* annexed to the *1907 Hague Convention Respecting the Laws and Customs of War on Land*[12] which prohibited, *inter alia*, the attack or bombardment of any undefended towns or buildings and the destruction or seizure of enemy property, unless 'imperatively demanded by the necessities of war'.[13] The passage of the content of the *Hague Regulations* into international customary law was confirmed by the judgment of the Nuremberg Tribunal.[14] The principle of distinction has also been confirmed as constituting customary law.[15]

B. *The Principle of Distinction in the* Geneva Conventions *and* Additional Protocols

Provisions of the *Geneva Conventions* containing re-statements of the principle of distinction are contained in the *Additional Protocols*, and include article 48 of *Additional Protocol I*, which reflects the basic obligation of parties to a conflict to distinguish between civilians and civilian objects on the one hand, and military objectives on the other;[16] and article 52 of *Additional Protocol I*, which requires that attacks be strictly limited to military objectives, defined 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.[17]

Additional Protocol I does not expressly define civilians or civilian objects. Instead, civilians are defined as being persons not belonging to the armed forces, militia, volunteer corps, or resistance fighters as defined in article 4A of the *Third Geneva Convention* and article 43 of *Additional Protocol I*.[18] More importantly, civilian objects are all objects which are not military objectives, as defined in article 52(2).[19]

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10 Rosenblad, above n1 at 54.

11 *1868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight* in Adam Roberts & Richard Guelff (eds), *Documents on the Laws of War* (2nd ed) (1994) at 30–31.

12 *Regulations Respecting the Laws and Customs of War on Land annexed to The Hague Convention (IV) Respecting the Laws and Customs of War on Land*, 18 October 1907 (The '*Hague Regulations*') in Roberts & Guelff, above n11 at 52.

13 *Hague Regulations*, arts 23(g).

14 Judgment of the International Military Tribunal at Nuremberg, in *Nazi Conspiracy and Aggression, Opinion and Judgment* (1947) at 83; Daphna Shraga & Ralph Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia' (1994) 5 *European Journal of International Law* 380 at 386; *Prosecutor v Tadic* [IT-94-1-AR72 A Ch] (2 October 1995) ('*Tadic*') at [87].

15 Rosenblad, above n1.

16 *Additional Protocol I*, art 48.

17 *Additional Protocol I*, art 52(2).

18 *Additional Protocol I*, art 50(1); Roberts & Guelff, above n11 at 415.

19 *Additional Protocol I*, art 52(1); Roberts & Guelff, above n11 at 416.

C. *Ambiguities inherent in the Principle of Distinction*

(i) Ambiguities in the Application of the Principle of Distinction

There is some controversy with respect to the extent to which the *Additional Protocols*, which contain specific prohibitions related to the principle of distinction, have passed into customary international law.[20] Whilst the ICTY has generally concluded that the essence, or 'core', of the *Additional Protocols* reflect customary international law,[21] some of the more specific provisions including, relevantly, the definition of military objectives[22] and the prohibition on reprisals, may not.[23]

Acceptance of the definition of civilian and military objectives is crucial to compliance with the principle of distinction. The doubt surrounding the extent to which the detailed provisions contained in *Additional Protocol I* have become customary international law is significant, considering the States which have not ratified the *Additional Protocols* include Afghanistan, India, Indonesia, Israel, Singapore and the United States of America.[24]

Furthermore, differences in the wording of the *Additional Protocols* may lead to an argument that the principle of distinction does not apply, or applies to a lesser extent, in situations of non-international armed conflict.

The Geneva Conventions and *Additional Protocols* are structured so that international armed conflicts are regulated by Additional Protocol I, whilst internal armed conflicts are governed by *Additional Protocol II* and common article 3 of the *1949 Geneva Conventions*.[25] It was the original intention of the Conference considering the *Additional Protocols* that the rules relating to international and non-international armed conflict would be substantially identical.[26] However, a last minute disagreement between the parties to the Conference had the result that *Additional*

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20 George Abi-Saab, 'The 1977 Additional Protocols and General International Law: Some Preliminary Reflections' in Astrid Delissen & Gerard Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead* (1991) at 115; Shraga & Zacklin, above n14 at 385–386.

21 *Tadic*, above n14 at [98], in which the Appeals Tribunal of the ICTY stated that 'the core' of *Additional Protocol II* has become customary international law.

22 There is some debate as to whether the definition of 'military objectives' in *Additional Protocol I* represents customary international law: Fenrick, above n8 at 5. A recent comprehensive study conducted by the International Committee of the Red Cross did find that the obligation to attack only 'military objectives' has become customary international law: Jean-Marie Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 857 *International Review of the Red Cross* 175 at 187. However, the extent to which the definition of 'military objectives' is the same is not clear.

23 Frits Kalshoven, 'From International Humanitarian Law to International Criminal Law' *Guest Lecture Series of the Office of the Prosecutor* (28 October 2003) at 6; Secretary–General's Report on practical arrangements for the effective functioning of the International Tribunal for Rwanda, recommending Arusha as the seat of the Tribunal, UN Doc S/1995/134 of 13 February 1995 at 11–12: *Prosecutor v Akayesu* [ICTR-96-4-T] (1998) at 604.

24 Kalshoven, above n23 at 6; ICRC Schedule of Major Treaty Ratifications (21 July 2005).

25 See also *Prosecutor v Akayesu* [ICTR-96-4-T] (1998) at 601–02.

26 Report prepared by the International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (28th International Conference of the Red Cross and Red Crescent, 2-6 December 2003) at 15.

Protocol II is a truncated, more rudimentary, and less comprehensive statement of the international humanitarian law relating to purely internal armed conflict.[27]

Accordingly, whilst *Additional Protocol II* contains prohibitions on starvation of citizens[28] and terror attacks[29] as a means of warfare, there is no explicit re-statement of the applicability of the principle of distinction to internal armed conflicts.[30] *Additional Protocol II* also lacks specific provisions prohibiting indiscriminate attacks, other than terror attacks, such as target area bombing.[31] Whilst the applicability of the principle of distinction may be inferred from the provisions prohibiting starvation and terror attacks[32] and from its status as customary international law,[33] the absence of an explicit codification is notable and provides a potential legal loophole for aggressor States.

The practical difficulties inherent in a legal system with two sets of laws that depend on whether a conflict is international or internal is apparent in the jurisprudence of the ICTY.[34] For example, the appellant in *Tadic* challenged the jurisdiction of the ICTY to try him for violations of the laws or customs of war, including certain breaches of the *Hague Regulations* prohibiting the killing of civilians and destruction of civilian property, on the basis that the *Hague Regulations* were adopted for the purpose of regulating international armed conflict, whereas he alleged that the conflict in the former Yugoslavia was purely internal.[35]

The Appeals Chamber rejected this argument, concluding that the conflict in the former Yugoslavia had both international and non-international aspects,[36] and further that customary international law recognized the principle of distinction as being applicable to internal armed conflicts in any case.[37] However, the ICTY went to great lengths to demonstrate and prove the existence of a rule of customary international law prohibiting attacks on civilians and civilian objects in internal conflicts.[38] Judge Li also delivered a separate opinion on this issue, disputing the jurisdiction of the ICTY to try *all* violations of the laws or customs of war committed in an internal conflict,[39] and highlighting the statement by the majority that only:

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27 Ibid.

28 *Additional Protocol II*, art 15.

29 *Additional Protocol II*, art 7(2).

30 *Additional Protocol II* contains article 13(2) that provides, generally, that the civilian population shall not be the subject of an attack. However it does not contain a provision mirroring article 48 of *Additional Protocol I*, which obliges States parties to an international armed conflict to distinguish between civilians and civilian objects, and military objectives: Rosenblad, above n1 at 142. In fact, *Additional Protocol II* has no further provisions relating to unlawful attacks on civilians beyond article 13(2): Fenrick, above n8 at 6.

31 Rosenblad, above n1 at 142.

32 Ibid.

33 *Tadic*, above n14 at [127]; *Prosecutor v Kupreskic* [IT-95-16-T] at [521]. The Trial Chamber of the ICTY presented much evidence to support the existence of a customary international rule consisting of the principle of distinction in *Galic*, above n9 at [45].

34 Kalshoven, above n23 at 6.

35 *Tadic*, above n14 at [85].

36 Id at [78].

37 Id at [100]–[118].

38 Ibid.

> a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts.[40]

In discharging its mandate, the ICTY has been continually required to determine whether certain phases of the conflict in the former Yugoslavia were international or non-international in order to found its jurisdiction over the relevant violation.[41] The jurisprudence of the ICTY therefore demonstrates the pitfalls associated with having a dichotomy in international humanitarian law between international and internal conflict. As the Appeals Chamber has noted, such a dichotomy is entirely inconsistent with the doctrine of human rights.[42]

(ii) Ambiguities in the Terms of the Principle of Distinction

The effectiveness of the principle of distinction in protecting civilians in times of conflict will depend, at least partially, on the extent to which it is easily interpreted and applied to real life circumstances. By definition, the inquiry which a court or tribunal must make into whether the targeting of a particular person or object was lawful[43] will involve complex questions of military strategy and evidential proof. The codification of the principle in *Additional Protocol I* therefore provided a unique opportunity to remove, or at least ameliorate some of the inherent ambiguities associated with the inquiry.

However, to the contrary, the way in which the principle of distinction was codified in *Additional Protocol I* has been heavily criticized.[44] Firstly, it is claimed that the method by which civilians and civilian objects are defined, that is, by what they are *not*, is neither helpful nor conducive to consistency in interpretation.[45] Secondly, the definition of 'military objectives' contained in article 52(2) of *Additional Protocol I* has come under fire for being vague, nebulous, and highly subjective.[46] An examination of the terminology employed in article 52 seems to support this view. For example, what amounts to an 'effective contribution to military action' and what sort of object 'by its nature' makes an effective contribution?[47] What constitutes a 'definite military advantage'? Neither *Additional Protocol I* nor the four *Geneva Conventions* provide express guidance, by way of specific examples, as to what objects constitute military objectives.[48]

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39 Separate Decision of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction [IT-94-1-AR72 A Ch] at 10–11.

40 Id at 11.

41 Kalshoven, above n23 at 7.

42 *Tadic*, above n14 at [83].

43 'Lawful' in the sense that it complies with the principle of distinction.

44 Rosenblad, above n1 at 71; Marco Sassoli, 'Legitimate Targets of Attacks under International Humanitarian Law' *Background Paper prepared for the Informal High-Level Expert Meeting on the Re-affirmation and Development of International Humanitarian Law* (27–29 June 2003).

45 Rosenblad, above n1 at 71; Sassoli, above n44 at 1–3.

46 Rosenblad, above n1 at 63; Sassoli, above n44 at 1–3; Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia ('Report') at [42] <www.un.org/icty/pressreal/nato061300.html>.

47 Rosenblad, above n1 at 71.

The absence of express guidance as to the type of objects which are properly military objectives may lead judicial bodies charged with applying the principle to resort to statements made by persons responsible for planning or executing the attack as to the nature of their intended target. Criticisms of the principle of distinction relating to the lack of an appropriate definition of civilian objects and military objectives have therefore gone as far as claiming that it has, in the past, contributed to the commission of serious human rights abuses.[49]

However, such obstacles should not mean that combat-related offences escape prosecution.[50] Significant criticism of the Nuremberg Tribunals related to their failure to prosecute crimes committed in combat.[51] There is also jurisprudence from the ICTY suggesting that difficulties interpreting and applying the principle of distinction have had the result that courts of first instance have been unwilling or unable properly to assess the evidence available, preferring instead either to enter judgment in accordance with the *prima facie* case, or simply to defer to the military commander responsible for planning the attack.

For example, in the judgment of the Appeals Chamber of the ICTY in *Prosecutor v Blaskic*,[52] the appellant stood accused of planning, instigating or ordering a crime against humanity,[53] being murder, extermination, enslavement, deportation, imprisonment, torture, rape, or persecution on political, racial or religious grounds, when committed in an armed conflict, whether international or internal, and directed against civilian population.[54] The indictment alleged that he was responsible for ordering the attack, by certain military forces, of a civilian village, the murder of its inhabitants, and the destruction of their houses and religious institutions.[55]

The Trial Chamber at first instance found in favour of the Prosecutor, and concluded that as the village was of no strategic importance, there was no military objective justifying the attack.[56] The Appeals Chamber reversed this, finding that the impugned order given by the appellant was militarily justified[57] on the basis that:

48 The International Committee of the Red Cross ('ICRC') provided a list of categories of military objectives annexed to their 'Rules for the Limitation of Danger Incurred by the Civilian Population in Time of War' (1956). However, unfortunately this list was not adopted due to absence of support at the 1957 ICRC Conference in New Delhi. See François Bugnion, *Le Comite International de la Croix-Rouge et la Protection des Victims de la Guerre* (1994) at 840–41; Paolo Benvenuti, 'The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (2001) 12 *European Journal of International Law* 503 at 516.

49 ICRC Doc III, 1971; Rosenblad, above n1 at 63.

50 Fenrick, above n8 at 2.

51 Ibid.

52 *Prosecutor v Blaskic* [IT-95-14-A] (29 July 2004) ('*Blaskic*').

53 ICTY Statute, art 7(1).

54 ICTY Statute, art 5.

55 *Blaskic*, above n52 at [325].

56 Id at [331].

57 Id at [335].

1. A road linking the village to another was of strategic importance;[58]
2. The evidence suggested that there was a significant enemy military presence in the village;[59] and
3. The appellant was aware that enemy military forces were in transit to the village and were preparing to launch an offensive in the area.[60]

Thus the Appeals Chamber concluded that the finding of fact of the Trial Chamber was 'wholly erroneous',[61] and so unreasonable that no reasonable trier of fact would have made such a finding.[62]

How did the Trial Chamber of the ICTY come to such a flawed conclusion? The Appeals Chamber implied that the Trial Chamber made its determination without having apprised itself of either the full set of facts or the reasons advanced by the appellant for issuing the order.[63] However, the text of the decision of the Trial Chamber clearly indicates that it did have evidence to support each of the appellant's assertions: specifically, that there was a military presence in the village and there were reasons to believe an attack was imminent.[64] The evidence admitted on appeal only served to strengthen the appellant's case. It therefore seems likely that the Trial Chamber either refused to examine the defence counsel's submissions, or failed to accord sufficient weight to the defence's evidence. It is possible that reasons for this failure include the highly subjective nature of decisions made pursuant to the principle of distinction. It may have been easier to conclude that the principle had been breached on the basis of what *appeared* to be the case.

There is also evidence suggesting that hesitation to pass judgment on what was perceived to be essentially military decisions influenced the decision of the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia ('Committee')[65] to recommend to the Prosecutor that, on the basis of the existing law, there was insufficient evidence to justify the commencement of proceedings against certain individuals within NATO for crimes within the jurisdiction of the ICTY.[66]

Specifically, the Federal Republic of Yugoslavia ('FRY') alleged that certain targets selected by NATO for military attack were not legitimate military objectives, and that

58 Id at [333].
59 Ibid.
60 Id at [331]–[333].
61 Id at [333].
62 Id at [335].
63 Id at [331–333]. Note that some of the evidence the Appeals Chamber found persuasive was only admitted on appeal.
64 Ibid.
65 The Committee was established by the Office of the Prosecutor of the ICTY for the purpose of assessing allegations made by the Federal Republic of Yugoslavia that in the conduct of its campaign, NATO caused excessive civilian casualties amounting to war crimes within the jurisdiction of the ICTY. The Committee was tasked with advising the Prosecutor as to whether sufficient evidence existed to charge individuals within NATO for war crimes: Report, above n46 at [3].
66 Id at [90].

therefore NATO violated the principle of distinction. Targets selected by the Committee for specific consideration included the (accidental) attack on a civilian passenger train,[67] and the attack on a village resulting in a large number of civilian deaths.[68]

In the first of the impugned attacks mentioned above, a NATO aircraft with instructions to destroy a railway bridge within the FRY accidentally hit a five-carriage civilian passenger train, which did not enter into the sight of the pilot of the aircraft until after the bomb had been released.[69] Observing his failure to destroy the bridge, the pilot launched a second guided laser bomb at the other end. Unfortunately, the impact of the first bomb had thrown parts of the train on to the opposite end of the bridge, so that the second bomb caused additional damage to the train and further loss of civilian life.[70]

Leaving aside for the moment the questionable legality of the second deployment,[71] whether the bridge was a legitimate military object in the first instance does not appear to have been substantively considered by the Committee. The Committee referred to the list of categories of military objectives annexed to the ICRC's 1956 'Rules of Limitation of Danger Incurred by Civilian Population in Time of War'[72] which state that lines and means of communication such as railways, roads, bridges, tunnels, and canals are only to be considered military objectives if 'of fundamental military importance'.[73] Yet the Committee seemed to simply accept the declaration of General Clark, the Supreme Allied Commander for NATO in Europe, that the bridge was part of 'the integrated communications supply in Serbia'[74] and therefore a legitimate military objective,[75] without requiring any evidence as to its making an effective contribution to FRY military action or its destruction providing NATO with a definite military advantage, as required by the principle of distinction.

Further evidence that the Committee was prepared to accept statements as to the subjective belief of NATO command that targets were legitimate military objectives can be found in the Committee's view of the bombing of Korisa Village. NATO believed, on the basis of apparently credible intelligence, that there was a military camp and command post next to the village,[76] and that it had determined that there were no civilians present.[77] After the attack, it became apparent that as many as 87 civilians had been killed and 60 wounded.[78]

The Committee concluded that:

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67 Id at [58]–[62].
68 Id at [80]–[85].
69 Id at [59].
70 Id at [59].
71 The Report itself notes that members of the Committee were divided as to the legality of the second deployment at [62].
72 ICRC, above, n48.
73 Id at [39]; Benvenuti, above n48 at 516.
74 Report, above n46 at [59].
75 Id at [62]; Benvenuti, above n48 at 516.
76 Report, above n46 at [86].
77 Id at [89].
78 Id at [86].

> the credible information available is not sufficient to tend to show that a crime within the jurisdiction of the tribunal has been committed by the aircrew or superiors in the NATO chain of command.[79]

But what were the sources of this 'credible information'? The Report cited the following in support of its conclusion:

> According to NATO officials, immediately prior to the attack, the target was identified as having military revetments.[80]
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> …
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> … General Jetz [of NATO] twice affirmed that the target was, in NATO's opinion, legitimate since military facilities were present at the site.[81]
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> …
>
> According to NATO, all practicable precautions were taken and it was determined civilians were not present.[82]

The high number of civilian deaths suggests that all practicable precautions were not taken. However the Committee accepted the assertions made by NATO, seemingly without the need for independent verification. That the Committee relied heavily on the self-serving pronouncements of NATO is plain:

> [The Committee] has tended to assume that the NATO and NATO countries' press statements are generally reliable and that explanations have been honestly given.[83]

The approach of the Committee to the principle of distinction has diluted its effectiveness. In each case, the Committee appeared to have been reluctant, unwilling, or unable to go behind the statements of high-ranking NATO command to the effect that the principle of distinction had been observed, or to examine the evidence justifying target selection in order to determine whether NATO had been compliant. Whereas the principle of distinction requires an objective assessment of the legitimacy of the targeting of a particular assessment, the Committee's approach reduced the test to one of subjective belief, where it was sufficient that the person responsible for planning the attack subjectively believed the target was a military objective. Furthermore, the approach of the Committee did not even require that such belief be held on reasonable grounds. It is the hypothesis of this article that this approach has resulted from ambiguities in the nature of the principle of distinction, which codification in *Additional Protocol I* has not remedied.

These decisions of the ICTY (and its subsidiary entity, the Committee) therefore suggest that ambiguities in the content of the principle of distinction have influenced its application to combat situations. Complexities inherent in the nature and

79 Id at [89].
80 Id at [87].
81 Id at [88].
82 Id at [89].
83 Id at [90].

definition of military objectives have resulted in an unwillingness to fully examine the evidence, and a deference to the subjective claims of persons responsible for attacks. Such ambiguities may therefore provide a possible (if only partial) explanation as to recent failures of the principle to protect civilians caught in armed conflict.

3. The Principle of Proportionality

The principle of proportionality is related to the principle of distinction, and provides that attacks must not be launched against military objectives if they may be expected to cause loss of civilian life or damage to civilian property excessive to the military advantage gained.[84] Thus, the obligations imposed on a commander responsible for an attack by the principles of distinction and proportionality are cumulative.[85] An attack may still be unlawful, notwithstanding that the target is a legitimate military objective, if the civilian casualties caused are excessive, and could have been expected to be excessive.[86]

A. The Principle of Proportionality in Customary International Law

The origins of the principle of proportionality can be located in the principle of 'military necessity',[87] itself part of customary international law,[88] which is defined as:

> that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.[89]

The principle of military necessity is rooted in the understanding that belligerents do not enjoy an unlimited right to employ any means of warfare at their disposal for the purpose of injuring the enemy.[90] This principle was codified in article 22 of the *Hague Regulations*. The *Hague Regulations* also specifically prohibited, *inter alia*:

a) the employment of poison or poisoned weapons;[91]
b) the use of arms, projectiles, or material intended to cause unnecessary suffering;[92] and

84 *Additional Protocol I*, art 51(2).
85 Sassoli, above n44 at 2–3.
86 Fenrick, above n8 at 6.
87 The origin of the principle of proportionality in that of necessity can be inferred from, *inter alia*, articles 15 and 22 of the *Lieber Code* of 1868 and article 24 of the *1924 Hague Air Warfare Rules*; *Galic,* above n9 at [58].
88 See text to n14 above.
89 US Military Manual, *The Law of the Land Warfare* FM27-10 (1956) at [3a] cited in Rosenblad, above n1 at 57.
90 *The Trial of Gunther Thiele and George Steinhert* (United Nations War Crimes Commission) (1945): Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, volume III, London, HMSO 1948 at 59.
91 *1907 Hague Regulations*, art 23(a).
92 *1907 Hague Regulations*, art 23(e).

c) the destruction or seizure of enemy property, unless 'imperatively demanded by the necessities of war'.[93]

During sieges and bombardments, military forces were also exhorted to take all necessary steps to spare, as far as possible, hospitals, monuments, and other places of cultural and religious significance.[94] The passage of the content of the *Hague Regulations* into international customary law was confirmed by the judgment of the Nuremberg Tribunal.[95] Thus under customary international law, the killing and destruction of enemy personnel and property is limited to what is necessary.

However, for what purpose must the deployment be deemed necessary? Neither the *Hague Regulations* nor principles of customary international law define or provide examples of situations of 'military necessity'. As the foregoing analysis seeks to prove, application of the principle of military necessity will often be guided by the subjective claims made by the military commander responsible for the deployment.

B. *The Principle of Proportionality in the* Geneva Conventions *and* Additional Protocols

The principle of proportionality is codified in article 51 of *Additional Protocol I*, which prohibits indiscriminate attacks, described as including:

> an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects … which would be excessive in relation to the concrete and direct military advantage anticipated.[96]

This provision is mirrored in article 57 of *Additional Protocol I* relating to precautions to be taken by 'those who plan or decide upon an attack',[97] including refraining from launching an indiscriminate attack as defined in article 51(5)(b).

C. *Ambiguities Inherent in the Principle of Proportionality*

(i) Ambiguity in the Application of the Principle of Proportionality

Given the differences between the *Additional Protocols*, it cannot automatically be presumed that the principle of proportionality applies to internal armed conflicts to the same extent that it applies in international armed conflicts.[98] *Additional Protocol II* does not contain a prohibition against indiscriminate attacks or a codification of the principle of proportionality. In order to overcome this jurisdictional hurdle, the ICTY has argued that:

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93 *1907 Hague Regulations*, art 23(g).

94 *1907 Hague Regulations*, art 27.

95 Judgment of the International Military Tribunal at Nuremberg in *Nazi Conspiracy and Aggression, Opinion and Judgment* (1947) at 83; Shraga & Zacklin. above n14 at 386; *Tadic* at [87].

96 *Additional Protocol I*, art 51(5)(b).

97 *Additional Protocol I*, art 57(2).

98 ICRC, above n48 at 27–28.

1. article 13(2) of *Additional Protocol II*, requiring that civilians not be the subject of attacks, imports the entire content of the principles of distinction and proportionality into situations of internal armed conflict;[99] or
2. the principle of proportionality exists, through the principle of necessity, in customary international law.[100]

A recent report prepared by the International Committee of the Red Cross has found that the principle of proportionality exists in customary law relating to internal armed conflicts.[101] However, the conclusion was based on the study of a 'tremendous amount of practice in the area of international humanitarian law'[102] and was not a foregone conclusion.[103] The applicability of the principle of proportionality to internal armed conflict is therefore not without question. States may argue, if unsuccessfully, that it therefore does not bind them.

(ii) Ambiguity in the Terms of the Principle of Proportionality

There are several features of the content of the principle of proportionality which render its interpretation highly subjective and capable of a multitude of divergent outcomes. Firstly, *Additional Protocol I* presents something of a philosophical difficulty in that it requires the user to compare civilian loss, on the one hand, with military advantage on the other.[104] These two elements may be, to some, incomparable. Secondly, because *Additional Protocol I* refers to the civilian loss 'expected' and military advantage 'anticipated', the question of whether an attack is proportionate must be determined in light of the circumstances prevailing at the time of the attack, and not with the benefit of hindsight.[105] Finally, the initial (and most important) decision that an attack is not expected to cause excessive civilian casualties will often be made in the heat and urgency of battle.[106] The Trial Chamber of the ICTY thus stated that:

> it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information

99 Fenrick, above n8 at 6.

100 Such an argument was suggested in *Galic*, above n9 at [57]–[59]. That the Trial Chamber applied the principle of proportionality is further evidence that they thought of it as customary international law.

101 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict* (2003) at 16.

102 Ibid.

103 Kalshoven, above n23 at 5.

104 As to the inadequacy of simply conducting a number-crunching exercise: Fenrick, above n8 at 5. It may also be difficult to determine the military advantage: Sassoli, above n44 at 7.

105 See *Additional Protocol I*, Statements of Understanding made by Germany (14 February 1991), Switzerland (17 February 1982), Italy (27 February 1986), Belgium (20 May 1986), The Netherlands (26 June 1987), New Zealand (8 February 1988), Spain (21 April 1989), Canada (20 November 1990), and Australia (21 June 1991). There have been no objections to these statements by other State parties: *Galic*, above n9 at [58].

106 The Canadian 'Law of Armed Conflict at the Operational and Tactical Level' states that 'consideration must be paid to the honest judgment of responsible commanders, based on the information reasonably available to them at the relevant time, taking fully into account the urgent and difficult circumstances under which such judgments are usually made' (1992) (Section 5 [27]); *Galic*, above n9 at [58].

> available to him or her, could have expected excessive civilian casualties to result from the attack.[107]

However, this helpful summary presents further problems. As pointed out by the Appeals Chamber of the ICTY, gaining access to sufficient information *ex-post facto* in order to determine the legality of a deployment is extremely difficult and fraught with diplomatic obstacles.[108] These evidentiary hurdles are compounded by States, which may sometimes adopt a policy of releasing deliberately misleading information with the aim of deceiving the enemy and sometimes even their own civilian population.[109] This has led some commentators to conclude that the principle of proportionality, as with necessity, is 'inherent and infinitely manipulable'.[110]

Unsurprizingly, some international judicial bodies have simply refused to pass judgment on the attacks of a State party which has seemingly blatantly disregarded the principle of proportionality. Following the conclusion of the Second World War, the Nuremberg Tribunal was established for the purpose of trying, *inter alia*:

> war crimes: namely violations of the laws or customs of war. Such violations … include[d] … wanton destruction of cities, towns or villages, or devastation not justified by military necessity.[111]

Yet on the issue of the legality of the sustained and protracted aerial bombing campaigns inflicted upon the civilian population of Germany and Great Britain by both the Allied and Axis powers, the Tribunal remained 'eloquently silent',[112] declaring that cities and towns had indeed been 'wantonly destroyed without military justification or necessity',[113] but refusing to elaborate on how precisely that had occurred[114] or punishing any individual responsible for such planning or execution.

Has the ICTY, with the added assistance of codification of the principle of proportionality in *Additional Protocol I*, fared any better? The Report into the NATO Bombing Campaign suggests not. For the purpose of analysing the application of proportionality, this section of the article will examine the Committee's assessment of the bombing of the Serbian Television and Radio Station ('RTS') in Belgrade.[115] This incident involved the deliberate targeting by NATO of the central studio of the RTS which killed between 10 and 17 people.[116]

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107 *Galic*, above n9 at [58].

108 *Tadic*, above n14 at [99].

109 Ibid.

110 Edward Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application* (1992) at 37.

111 The Charter annexed to the *1945 London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, art 6: Rosenblad, above n1 at 59.

112 George Schwarzenberger, *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* (vol 2, 1968) at 136; Rosenblad, above n1 at 60.

113 The Trial of German Major War Criminals, vol 22 at 450 cited in Rosenblad, above n1 at 59.

114 War Crimes Report, vol 15 at 110, cited in Rosenblad, above n1 at 59.

115 Report, above n46 at [71]–[79].

116 Id at [71].

Leaving aside the initial inquiry whether targeting of the RTS as a military objective was lawful, upon which the Committee expressed some doubt, it appears that the question whether the attack was proportionate was brushed over by the Committee.[117] It will be recalled that in order to be lawful, an attack upon a military objective must not be expected to cause incidental loss of civilian life which is excessive in relation to the concrete military advantage obtained.[118]

In determining whether the attack was proportional, the Committee hypothesized that, to the extent that the attack had the purpose of disrupting the command and communications network, it was lawful.[119] If, however, the aim was to attack the propagandist functions of the RTS and general Serbian civilian morale, then proportionality would be in question.[120] This analysis implies that whilst destruction of a communications network is 'worth' 10 civilian lives, interference with the propagandist capacity of a regime is not. The Committee accepted NATO's submission that the intended target was the military radio relay transmitter and not the television transmitter, thus concluding that the attack was proportionate.[121] However, NATO realized that the attack would only disrupt communications for a brief period, and the Committee admitted that broadcasting recommenced within hours.[122] Is the conclusion still valid? Is the 'expected' loss of civilian life still not excessive in relation to the 'concrete and direct' military advantage 'anticipated'? The Committee questionably found that it was not.[123]

The inadequacy of the comparison invited by the principle of proportionality is highlighted here in its application by the Committee. The reluctance of the Committee to pass judgment on the acts of top-level NATO commanders stands in contrast to the unequivocally expressed conclusion of the Trial Chamber of the ICTY in *Prosecutor v Galic*.[124] In that case, the ICTY considered the lawfulness of a shelling attack by Serbian forces upon a crowd watching a football match, which was estimated to have killed an equal proportion of civilians and combatants.[125] Whilst the ICTY was not that convinced that the attack was directed at a military objective in the first instance, it continued to find that in any case, such an attack would have been clearly disproportionate notwithstanding conflicting evidence suggesting that up to half of the spectators might have been uniformed soldiers.[126] This suggests that the

117 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?' (2000) 840 *International Review of the Red Cross* 1017 at [8].

118 See text to n96 above.

119 Report, above n46 at [75].

120 Id at [76].

121 Id at [76]–[77].

122 Id at [78].

123 George Aldrich, 'Yugoslavia's Television Studios as Military Objectives' (1999) 1 *International Law Forum* 149 at 149–50: WJ Fenrick, 'Targeting and Proportionality During the NATO Bombing Campaign Against Yugoslavia' (2001) 12 *European Journal of International Law* 489 at 496; Benvenuti, above n48 at 522–24.

124 *Galic*, above n9.

125 Id at 386.

126 Id at [386]–[387].

balancing act required by the principle of distinction is generally only likely to be of some effect in cases of obvious violations. In subtler situations, given the inaccessibility of the definition enshrined in Additional Protocol I, is more likely than not that a court will defer to the unsubstantiated claims of the military commander responsible for the attack.

4. Conclusions

The concluding remarks of the Committee indicated that although target selection might have been controversial, overall no investigation or proceedings were warranted as:

> 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 level accused for particularly heinous offences.[127]

It is true that in many respects, the principles of proportionality and distinction are not unambiguous. However, it appears that in some decisions, these uncertainties have led to judicial reluctance to even attempt to apply the principles, resorting instead to reliance on the *ex-post facto* statements made by the attacking forces. Such circularity jeopardizes the effectiveness of the law in protecting civilians. The effects of this trend are further compounded by jurisdictional difficulties in relation to the application of the principles to internal armed conflict. Whilst this analysis does not propose that these concerns are the root cause of civilian suffering in modern warfare, it suggests that they constitute a part, if only a small part, of the problem.

127 Report, above n46 at [90].