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Chapter 2

Towards a Better Understanding of the Concept of ‘Indiscriminate Attack’—How International Criminal Law Can Be of Assistance



Harmen van der Wilt

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Abstract The concept of ‘indiscriminate attack’ is directly related to the principle of distinction and therefore serves an important function in international humanitarian law. For the purpose of attributing individual criminal responsibility, however, the concept is insufficiently precise, as it covers a wide array of *mens reae*, ranging from direct (malicious) intent to kill civilians, via callous disregard for civilian lives, to an intent to target military objects, while knowing that they will demand an excessive toll. International criminal law can thus assist in explaining how the rather elusive concept of indiscriminate attack can be understood in terms of human intents and purposes. In its turn, the determination that an attack is indiscriminate can inform the (international) criminal courts why the waste of civilian lives is clearly excessive to the anticipated military advantage, which is classified as a war crime under the Rome Statute. This chapter seeks to demonstrate how international humanitarian law and (international) criminal law can be complementary and mutually beneficial in elucidating this fascinating concept.

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2.1 Introduction

Despite its grandiloquent title—Convention Relative to the Protection of Civilian Persons in Time of War—, the Fourth Geneva Convention¹ has a rather limited scope of application: Article 4 of this Convention provides that only those are protected by the Convention “who [...] find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” Part II of the Convention which primarily deals with the special care for extra vulnerable civilians (sick, wounded, infirm, elderly people, children, expectant mothers) has a wider purview. Article 13 stipulates that this part covers the whole of the populations in conflict, without any adverse distinction based on race, nationality or political opinion.² Nonetheless, the Convention does not heed civilians who become the victims of aerial bombardments or other military operations. The 1949 Geneva Conventions do not address prohibited methods and means of warfare, because that would have overloaded the Convention and would have reduced the chance of ratification by the States.³

The Additional Protocols of 1977 have largely plugged the gap. Article 51 of the First Additional Protocol (AP I)⁴ and Article 13 of the Second Additional Protocol (AP II)⁵ proclaim the principle of distinction where they hold that the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. Both provisions reiterate the background philosophy of separation between combatants and civilians by clarifying that civilians only enjoy protection if they do not directly participate in hostilities.⁶ Consequently, Article 51(2) AP I prohibits the (direct) attack against the civilian population and

¹Geneva Convention (IV) relative to the Protection of Civilian Persons in Times of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

²Green 2000, p 230.

³Compare International Committee of the Red Cross 1958, p 10: “[...] the main object of the Convention is to protect a strictly defined category of civilians from arbitrary action on the part of the enemy, and not from the dangers due to the military operations themselves. Anything tending to provide such protection was systematically removed from the Convention.”

⁴Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I).

⁵Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (AP II).

⁶AP I, above n 4, Article 51(3); AP II, above n 5, Article 13(3). On the problems of drawing the line between ‘direct participation in hostilities’ and civilians who are entitled to protection, see Schmitt 2010.

civilian objects, a provision that is echoed in Article 13(2) AP II.⁷ Article 85(3) AP I qualifies the direct attack against civilians as a ‘grave breach’ which implies that the violation gives rise to criminal prosecution before national and international criminal courts. Article 51 AP I continues with the prohibition of ‘indiscriminate attacks’ which is the logical consequence of the principle of distinction and a further clarification of that concept. Apart from identifying those attacks which would qualify as ‘indiscriminate’ (Article 51(4)), the provision singles out two types of attack which “[a]mong others” are to be “considered as indiscriminate”. These attacks comprise area bombardments and the (in)famous ‘incidental, excessive damage’ clause: “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁸

Although the attack on civilians during an armed conflict is a war crime, several authors have observed that prosecutions before national and international criminal courts and tribunals have been sparse and arduous.⁹ Partially, this can be attributed to the difficulty of reconstructing—in hindsight—decisions which have to balance the (anticipated) military advantage against the incidental loss of civilian lives, all this during the fog of war, and often taken at the spur of the moment. But this evidential burden is aggravated by a complex legal framework that acknowledges several shades of responsibility, depending on differences in *mens rea*. This chapter focuses on the latter aspect. It aspires to explore whether the fascinating but, for criminal lawyers, sometimes arcane landscape of international humanitarian law (IHL) provisions governing this area can be elucidated by borrowing from (international) criminal law doctrine that clearly distinguishes between several categories of *mens rea*, ranging from direct intent to recklessness (in common law), or from *dolus directus* to *dolus eventualis* (in civil law). To that purpose, Sect. 2.2 starts with a brief survey, indicating how the IHL provisions, featuring in the Additional Protocols, are translated into specific war crimes in the Rome Statute of the International Criminal Court (Rome Statute)¹⁰ and the Statute for the International Criminal Tribunal for the former Yugoslavia (ICTY Statute).¹¹ Section 2.3 follows with a discussion of some judgments of the International Criminal Tribunal for the former Yugoslavia (ICTY) and—more recently—case law of the International Criminal Court (ICC) in which legal standards requiring different *mens rea*e have been confounded or lumped together. Section 2.4 seeks to clarify the confusion by applying the more rigid normative framework of criminal law that differentiates between distinct states

⁷In a similar vein, the attack on civilian objects is prohibited in AP I, above n 4, Article 52(1). Civilian objects are, negatively, defined as “objects which are not military objects as defined in paragraph 2”.

⁸AP I, above n 4, Article 51(5)(b).

⁹See, in particular, Fenrick 2004 and Wuerzner 2008.

¹⁰Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (Rome Statute).

¹¹UN Security Council (1993) Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), UN Doc. S/25704 (adopted through UN Security Council (1993) Resolution 827 (1993), UN Doc. S/RES/827).

of mind in the realm of cognition and volition. Section 2.5 rounds up with some final reflections.

It bears emphasis that the limited scope of this chapter does not allow for an in-depth analysis of the relationship between IHL and international criminal law (ICL). At least as far as (serious) violations of IHL and war crimes are concerned, the latter has emanated from the former and should, in the opinion of the author, therefore serve an auxiliary function. However, in view of both fields of law having distinct focus and objectives, this is by no means easily accomplished, as will appear from this chapter.¹²

2.2 Attacking Civilians as a War Crime in International Humanitarian Law and International Criminal Law

In his interesting contribution on the prosecution of unlawful attacks before the ICTY, William Fenrick defines an unlawful attack by distinguishing between three configurations: “attacks that are directed against civilians or civilian objects, attacks that are indiscriminate, or attacks that are directed against military objectives in circumstances where it can be reasonably anticipated that excessive (disproportionate) death or injury will be inflicted on civilians and/or excessive (disproportionate) damage will be caused to civilian objects.”¹³ The classification is apparently inspired by the legal framework of Article 51 AP I as expounded in the introduction. Whereas the differentiation enables a better understanding of the different shades of *mens rea* in criminal law, as I will demonstrate below, it is reduced to a binary one in the Rome Statute. Article 8(2)(b)(i) that applies to international armed conflicts criminalizes “[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”, while Article 8(2)(b)(iv) qualifies as a war crime the “[i]ntentional launching of an attack in the knowledge that such attack will cause incidental loss of life to civilians [...] which would be *clearly* excessive in relation to the concrete and direct overall military advantage anticipated”.¹⁴ The Rome Statute is thus silent on the concept of ‘indiscriminate attack’. The legal regime governing non-international armed conflicts has no counterpart to Article 8(2)(b)(iv) of the Rome Statute and only considers as a war crime the “[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” (Article 8(2)(b)(iv)). Referring to the “serious violations of the laws and customs applicable in armed conflicts not of an international character”, the provision mirrors Article 13 of AP II.

¹²In a similar vein, Bartels 2013, p 278. See also Corn 2014, p 191 observing that “[u]ltimately, criminal accountability must validate and complement the LOAC regulatory regime, not contradict or confuse.”

¹³Fenrick 2004, p 157.

¹⁴Emphasis added. On the meaning of the higher threshold in ICL when compared with IHL (*clearly* excessive versus excessive), see van den Boogaard 2019, pp 345-347.

Article 3 of the ICTY Statute that covers the “[v]iolations of the laws or customs of war” does not even mention the intentional attack against civilians, although it includes destruction, attack and bombardment of civilian objects.¹⁵ It is interesting to note that the direct attack of civilians surfaces in the Statute of the Special Court for Sierra Leone¹⁶ (Article 4(a)), while the Statute of the International Tribunal for Rwanda¹⁷ contains no references to direct attacks on civilians or civilian objects. In all likelihood, such subtle differences between the statutes reflect the nature of the conflicts and the predominant atrocities committed during these conflicts. As the provisions on violations of the laws or customs of war in the statutes of the *ad hoc* tribunals were not meant to be exhaustive,¹⁸ the ICTY in particular has taken the opportunity to extract the attack on civilians from the normative framework of the Additional Protocols and qualify it as a war crime under its jurisdiction, irrespective of whether the attack was launched during an international or a non-international armed conflict.¹⁹ It is to this case law that we now will turn.

2.3 Prosecutions of Attacks Against Civilians Before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court

2.3.1 *International Criminal Tribunal for the Former Yugoslavia*

The judgments of the ICTY in respect of attacks on civilians and civilian objects hailed from the shelling of Sarajevo, bombardments of Dubrovnik, attacks against Serbian villages during *Operation Storm* and military operations against Muslim dwellings and villages within the framework of the policy of ethnic cleansing. An extensive account of these events would clearly exceed the limited scope of this chapter. What all these cases have in common is that defendants moved to justify their actions by pointing out that their targets were not civilian or at least not exclusively civilian in nature. Whether the Chambers could easily refute such claims or

¹⁵Compare Article 3(b) (“wanton destruction of cities, towns or villages, or devastation not justified by military necessity”) and Article 3(c) (“attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings”).

¹⁶Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, opened for signature 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002).

¹⁷UN Security Council (1994) Statute of the International Tribunal for Rwanda, UN Doc. S/RES/995.

¹⁸Compare the findings of the Appeals Chamber in ICTY, *Prosecutor v Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1-AR72, para 87.

¹⁹*Ibid.*, para 137.

encountered more difficulties in assessing them obviously depended on the specific circumstances of the situation.

The Trial Chambers in the *Kordić* case and *Blaskić* case had indicated the standard *mens rea* for the offence of attacks on civilians and civilian objects as actions that were “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.”²⁰ The *Blaskić* Appeals Chamber overturned the Trial Chamber’s finding that military necessity might justify a direct attack on civilians, holding that there is an absolute prohibition on the targeting of civilians and civilian objects in customary international law.²¹ However, it left the rest of the definition unaltered. The *mens rea* standard is a very narrow one, which can be used in ‘easy’ cases where blatant attacks on civilians occur and any claim of military advantage is far-fetched, if not made in bad faith. Accordingly, in the *Strugar* case which addressed the shelling of the Old Town of Dubrovnik, which was clearly demarcated by its medieval walls, the Trial Chamber could quickly dismiss defences that the attack also served a military purpose. It applied the narrow reading of *mens rea* by holding that “such an attack must have been conducted with the intent of making the civilian population or individual civilians, or civilian objects, the object of the attack”, adding that “[...] the issue whether a standard lower than that of a *direct* intent may also be sufficient does not arise in the present case.”²²

Such an approach does not suffice in more complicated scenario’s where civilians and military (objects) intermingle and are therefore difficult to distinguish, for instance in case of ‘dual-use’ objects. In the *Kupreskić* case, the Defence had challenged the civilian character of the Muslim population of the village of Ahmići that had been attacked by Croatian forces by alleging that the village of Ahmići was not an undefended village and questioning the non-combatant status of the inhabitants. The Trial Chamber responded by recalling the crucial relevance of the principle of proportionality, “whereby any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack”, adding that “attacks even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians.”²³

The Trial Chamber applied the concept of ‘indiscriminate attack’, crucial in IHL, but largely unknown in ICL, in order to expand the *mens rea* for attacks against civilians, suggesting that it could be considered on the same par as direct intent. This line of reasoning was followed and made explicit by the Trial Chamber in the *Galić* case which concerned the attacks on Sarajevo from surrounding hills by Bosnian

²⁰ICTY, *Prosecutor v Tihomir Blaskić*, Judgment, 3 March 2000, Case No. IT-95-14-T, para 180; ICTY, *Prosecutor v Dario Kordić and Mario Čerkez*, Judgment, 26 February 2001, Case No. IT-95-14/2, para 328.

²¹ICTY, *Prosecutor v Tihomir Blaskić*, Judgment, 29 July 2004, Case No. IT-95-14-A, para 109.

²²ICTY, *Prosecutor v Pavle Strugar*, Judgment, 31 January 2005, Case No. IT-01-42-T, para 283 (emphasis added).

²³ICTY, *Prosecutor v Zoran Kupreškić et al.*, Judgment, 14 January 2000, Case No. IT-95-16-T, para 524.

Serb forces, including the shelling of a soccer-stadium during a match followed by a mixed audience of civilians and military. Agreeing with previous Trial Chambers, the Chamber held that “indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objects without distinction, may qualify as direct attacks against civilians”.²⁴ This point of view may not appear to be very startling, as it tallies with earlier holdings that seek to deduce evidence of direct intent from the indiscriminate character of the attack.²⁵ The Trial Chamber continued by finding that “one type of indiscriminate attack violates the principle of proportionality”, an opinion that was again not very sensational as it hails from AP I that considers the incidental loss of civilian lives which is excessive to military advantage as a species of indiscriminate attacks.²⁶

In the *Gotovina* case,²⁷ which concerned the attack by Croatian forces on four Serbian towns that harboured enemy artillery, the Trial Chamber had ventured to demarcate the line between lawful and indiscriminate attacks in case of remote shelling of targets of opportunity.²⁸ The Chamber consistently employed a distance of 200 metres between a given impact site and one of the artillery targets as a benchmark, indicating that impact sites within 200 metres would be evidence of a lawful attack, while sites beyond 200 metres were evidence of an indiscriminate attack.²⁹ The impact analysis was predicated on expert witnesses' testimony on the accuracy of weaponry, from which the 200 metre radius was deduced as margin of error. The Appeals Chamber was not convinced by the Trial Chamber's findings and held that the Chamber had “failed to provide a reasoned opinion in deriving the 200-meter Standard”. It concluded that “absent an established range of error, [...] it cannot exclude the possibility that all of the impact sites considered in the Trial Judgment were the result of shelling aimed at targets that the Trial Chamber considered to be legitimate.”³⁰

It is no coincidence that the concept of indiscriminate attack looms large in the case law of the ICTY. In the absence of a specific provision, qualifying attacks on civilians as a war crime, in the ICTY Statute, the Tribunal had to mould the elements of the crime from customary international law and it naturally resorted to the Geneva Conventions and the Additional Protocols, in which the concept holds great prominence. However, as 'indiscriminate attack' covers conduct with diverging

²⁴ICTY, *Prosecutor v Stanislav Galić*, Judgment, 5 December 2003, Case No. IT-98-29-T (*Galić*), para 57.

²⁵Compare ICTY, *Prosecutor v Milan Martić*, Judgment, 12 June 2007, Case No. IT-95-11-T (*Galić*), para 69 finding that “[...] a direct attack against civilians can be inferred from the indiscriminate character of the weapons used.” And see also ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, Advisory Opinion, 8 July 1996, [1996] ICJ Rep 225, para 78 equating the use of indiscriminate weapons with a deliberate attack on civilians.

²⁶*Galić*, above n 24, para 58.

²⁷For an extensive analysis of this case, see Bartels 2013, pp 286-292.

²⁸ICTY, *Prosecutor v Ante Gotovina*, Judgment, 15 April 2011, Case No. IT-06-90-T.

²⁹*Ibid.*, paras 1898-1945.

³⁰ICTY, *Prosecutor v Ante Gotovina & Mladen Markač*, Judgment, 16 November 2012, Case No. IT-06-90-A, paras 64-65.

mens rea, it is difficult to translate it into the more rigid conceptual framework of (international) criminal law.

2.3.2 *International Criminal Court*

Judgements of Trial Chambers of the ICC do not display spectacular new legal insights in respect of the *mens rea* for attacks against civilians, but they are interesting because of the fact pattern they were called to address. Both the *Katanga* case and the *Ntaganda* case concerned the armed attacks by militias against villages comprising a mixture of civilians and military from an enemy tribe. In the *Ntaganda* case, the Lendu fighters were the attackers and the Hema tribe were the victims, while in the *Katanga* case it was exactly the other way round.

In the *Ntaganda* case, the Trial Chamber observed in particular the random character of killings, noting that “during the assault, the UPC/FPLC soldiers [under the command of Ntaganda] fired at everyone in Mongbwalu, including the “civilian population”.”³¹ Commenting on the shooting of civilians who attempted to escape death by fleeing to nearby forest environments, the Chamber held that “no reasonable person could have believed that they were directly participating in hostilities and thereby targetable.”³²

In *Katanga*, the Trial Chamber moved cautiously, mindful that the attack on the village of Bogoro took place within the context of a non-international armed conflict and Article 8(2)(e) of the Rome Statute does not provide the backstop of incidental loss of civilian lives (as explained above). The Trial Chamber correctly held that Article 8(2)(e) requires the civilian population (or individual civilians) to be the *primary* object of the attack.³³ It continued by confirming prior findings of ICTY Chambers that “indiscriminate attacks [...] may qualify as intentional attacks against the civilian population or individual civilians, *especially where the damage caused to civilians is so great that it appears to the Chamber that the perpetrator meant to target civilian objectives.*”³⁴ The language is reminiscent of the reasoning in the *Martić* Trial Judgement, but (far) more explicit than the *Galić* Trial Judgement, as the Trial Chamber suggests that only those ‘indiscriminate attacks’ that betray the intent to strike at civilians in particular, would meet the elements of Article 8(2)(e)(iv) of the Rome Statute. The Chamber corroborated this point of view by adding that “an indiscriminate attack does not [...] automatically constitute an attack against the

³¹ICC, *Prosecutor v Bosco Ntaganda*, Judgment Pursuant to Article 74 of the Statute, 8 July 2019, Case No. ICC-01/04-02/06, para 922.

³²*Ibid.*, para 927.

³³ICC, *Prosecutor v Germain Katanga*, Judgment Pursuant to Article 74 of the Statute, 7 March 2014, Case No. ICC-01/04-01/07 (*Katanga*), para 802 (emphasis added).

³⁴*Ibid.* (emphasis added).

civilian population under article 8(2)(e)(i), as the subjective element is decisive in respect of the second case.”³⁵

In the factual assessment of the attack, the Trial Chamber sometimes distinguished between killings with machetes, which obviously revealed the intent of the perpetrators to target civilians,³⁶ and killings by fire guns. In the latter case, civilians might have been killed during a cross-fire between the rivalling militias. In considering the killing of civilians who, together with soldiers, tried to escape, the Chamber’s reasoning took a peculiar turn. Acknowledging that the soldiers might at that time have been a legitimate target, the Chamber continued that “the loss of human life ensuing from the shots fired at the group of fleeing persons was excessive in relation to the military advantage [...] anticipated.”³⁷ Apparently, the Chamber had forgotten that the incidental loss of civilians would not constitute a war crime in non-international armed conflicts (at least not under the Rome Statute).³⁸ More to the point was the Chamber’s observation that the Lendu and Ngiti, by indiscriminate shooting at fleeing persons “showed scant regard for the fate of the civilians among the soldiers in the *melée* and knew that their death would occur in the ordinary course of events.”³⁹

Compelled by the criminal law framework of the Rome Statute, Trial Chambers of the ICC have made some progress in discovering the relationship between indiscriminate attack and the requisite *mens rea* of provisions of the Rome Statute. However, the final findings in the *Katanga* case reveal that not all complexities have been perceived and clarified. The confusion comes particularly to the fore in the Trial Chamber’s confounding intentional attacks on civilians with intentional attacks causing incidental but foreseeable loss of life amongst civilians, the latter not constituting a war crime in non-international armed conflicts under the Rome Statute.

2.4 Transition from International Humanitarian Law to International Criminal Law

The concept of ‘indiscriminate attack’ is of paramount importance in IHL. That makes sense, because it is the very antithesis of the principle of distinction. As was elucidated in the previous sections, indiscriminate attacks may encompass both

³⁵Ibid.

³⁶See, for instance, *ibid.*, para 858: “[...] the Chamber notes that the children were killed with machetes and that the nature of this weapon and the necessary proximity it entails with the victim unequivocally show the intentional character of the act.”

³⁷*Katanga*, above n 33, para 865.

³⁸See on this issue also Bartels 2013, pp 296 who acutely observes that the fact that the Rome Statute created separate provisions for intentionally directing an attack against civilians (Article 8(2)(b)(i)) and for intentionally launching a disproportionate attack (Article 8(2)(b)(iv)) in international armed conflicts disallowed the Court to surreptitiously expand the notion of the latter, in order to bring it under the heading of Article 8(2)(e)(i).

³⁹*Katanga*, above n 33, para 865.

direct, ‘malicious’ intent as well as incidental loss of civilian lives. However, the *mens rea* is secondary; what counts is that the principle of distinction has been flouted. As will be explained in more detail below, *mens rea*e are lumped together and become blurred.

Criminal law converts the opaque concept of indiscriminate attack in a clear-cut, binary system, which is predicated on knowledge and volition. Civilians are either directly and intentionally attacked, or they are—perhaps to the regret of the attackers—sacrificed to the anticipated military advantage. To be sure, the paradigmatic cases in both distinct crimes do not reveal ‘indiscriminacy’. On the contrary, Article 8(2)(b)(i) of the Rome Statute (in international armed conflicts) and Article 8(2)(e)(i) (in non-international armed conflicts) take for granted that civilians are targeted on purpose. Reversely, Article 8(2)(b)(iv) of the Rome Statute—which has no counterpart in the war crimes provision governing non-international armed conflicts—suggests that the attack is primarily launched against a military target. The provision owes its existence to the Catholic doctrine of ‘double effect’.⁴⁰ The psychological-social connotation of both (sets of) provisions in the Rome Statute is that of operational control, implying the capability to choose specific targets and to abide by the principle of distinction. *Prima facie*, the concept of ‘indiscriminate attack’ seems hard to reconcile with the presumption of determined action. It rather connotes either wanton and callous disregard for civilian lives or the incapacity to engage in surgical operations that only target military objects. In the absence of evidence of clear intentions, the criminal law framework of the Rome Statute compels courts to ‘chop up’ indiscriminate attacks in either direct attacks on civilians or the launching of attacks, causing incidental loss of civilian lives that would be clearly excessive to the direct military advantage anticipated. Different from what the Trial Chamber suggested in the *Katanga* case, the first category would not necessarily be limited to purposeful attacks on civilians. Both Article 8(2)(b)(i) and Article 30(2)(b) of the Rome Statute accommodate the common law concept of oblique intent, in which the perpetrator, though not specifically desiring the outcome, is virtually certain about the consequences of his actions.⁴¹

More difficult is the assessment of the precise relationship between indiscriminate attack and incidental loss of civilian lives. The crucial difference between Article 8(2)(b)(i) and Article 8(2)(b)(iv), as indicated before, is the intent on the primary target. Fletcher criticizes the easy assumption that direct attacks on civilians are more blameworthy than intentional attacks on military targets with civilian casualties as side effect, claiming that the sentiment is apparently predicated on an unproven

⁴⁰On the doctrine of ‘double effect’ as a source of inspiration for IHL, see Ohlin 2013, pp 116-119. Ohlin explains how the doctrine was presented by Thomas Aquinas, in order to cope with the moral dilemma of self-defence involving lethal force. The person who acted in self-defence could reason that his intention was on saving his life, while the death of his assaulter was merely foreseen.

⁴¹Rome Statute, above n 10, Article 30(2)(b) defines intent in terms of consequences as the situation that the person means to cause that consequence *or is aware that it will occur in the ordinary course of events* (emphasis added). The final part reflects oblique intent. In House of Lords (United Kingdom), *R. v Woollin*, Judgment, 22 July 1998, [1998] 4 All E.R. 103 the House of Lords introduced the ‘virtual certainty’ test. See also Williams 1987.

difference in the degree of control over the outcome.⁴² Although I share Fletcher’s criticism on this misapprehension, the true reason for the distinction between the two crimes lies elsewhere, to wit the necessity to fence off criminal excesses from legitimate ‘collateral damage’. The modern law of warfare accepts the incidental loss of civilian lives as a deplorable but inevitable fact of life. It draws the line at the point where the civilian casualties are excessive, compared to the anticipated military interests.⁴³ Article 8(2)(b)(i) and Article 8(2)(b)(iv) do not differ as to the requisite knowledge of prospective civilian losses. After all, the latter (also) requires that the accused has *knowledge* that the attack will cause incidental loss of life or injury to civilians. According to Article 30(3) of the Rome Statute, knowledge implies that a consequence will occur in the ordinary course of events. Mere recklessness or *dolus eventualis* would not suffice.⁴⁴ The military commander who ‘reconciles himself’ with the potential negative outcome that civilians will perish as a consequence of an attack (*dolus eventualis*), or ‘consciously disregards a substantial and unjustifiable risk’ that civilians will be killed (recklessness) is not guilty of a violation of Article 8(2)(b)(iv).⁴⁵

The question whether the commander must also have possessed positive knowledge that the loss of civilian lives was ‘clearly disproportionate’ compared with the military advantage is more difficult to answer, as it involves a balancing exercise of interests which has an inherently subjective component. However, in order to weed out too much subjectivism that would make the application of the provision unmanageable, courts tend to gauge the performance of the accused against the actions and judgments that the proverbial ‘reasonable commander’ would take in a similar position.⁴⁶ An indiscriminate attack can yield useful information that may buttress the evidence against the accused.⁴⁷ Lack of precautionary measures that are meant

⁴²Fletcher 2007, p 315. In footnote 50, Fletcher asserts that “everyone seems to think that intentionally attacking innocent civilians is worse than doing so as a side effect of a military mission. Compare Rome Statute Article 8(2)(b)(1) with Article 8(2)(b)(4). But the distinction is not adequately theorized in the literature of international criminal law.”

⁴³As indicated earlier, ICL even raises the bar by requiring that the losses are *clearly* excessive, see n 14 and accompanying text.

⁴⁴Compare Werle and Jessberger 2005, pp 51-55. The authors contend that it is “subject to dispute whether recklessness or *dolus eventualis* are sufficient to establish criminal responsibility under the provisions of the Statute”, but confirm later on that (unless otherwise provided) “the Statute leaves no room for *dolus eventualis* or recklessness.”

⁴⁵Compare for the definition of recklessness, American Law Institute 1962, § 2.02(2)(c). Fletcher 2007, pp 317-318, footnote 28 acutely points out that *dolus eventualis* and recklessness are often confused, adding that the former refers to the negative attitude toward causing harm, while the latter puts the emphasis on the knowledge.

⁴⁶For a discussion of the assessment by the ‘reasonable commander’ as an appropriate yardstick in case of collateral damage, see Corn 2014, pp 198-200.

⁴⁷I am obliged to Rogier Bartels who drew my attention to an observation of Professor Corn who, acting as an expert in the *Gotovina* case, seems to corroborate this line of reasoning (Bartels 2013, p 298 (footnotes omitted; emphasis added)):

In his expert report in the *Gotovina* case, Corn suggested that the criminal application of the proportionality rule could be compared to the common law concept of implied malice in murder.

to minimize collateral damage does not only reveal callousness towards the fate of civilians but is also an infringement of IHL.⁴⁸ Even if the primary objective of an attack is a military target, the forbearance of the principle of distinction is of decisive importance, because it demonstrates that the accused has not paid heed to the value of civilian lives in the first place.

2.5 Final Reflections

While they ultimately pursue the same objectives, the perspective and emphasis of IHL and ICL are different. The principle of distinction and the concomitant prohibition of indiscriminate attacks are a direct outgrowth of the protective function of IHL. ICL's essence is to hold individuals responsible for their actions and if found guilty to punish them. Because the consequences are grave, criminal law enforcement is guided by the principles of legality, strict construction and individual culpability. IHL's concepts must therefore be translated into more concrete and precise categories of *actus reus* and *mens rea*. To put it succinctly: the concept of indiscriminate attacks is not sufficiently discriminate for criminal law purposes. It actually covers a wider array of *mens rea*, ranging from direct (malicious) intent to kill civilians, via callous disregard for civilian lives, to an intent to target military objects, while knowing that they will demand an excessive toll. The latter category borders on, but probably does not encompass recklessness or *dolus eventualis*. ICL can thus assist in explaining how the rather elusive concept of indiscriminate attack can be understood in terms of human intents and purposes.

In its turn, the determination that an attack is indiscriminate can inform the (international) criminal courts why the waste of civilian lives is clearly excessive to the anticipated military advantage. IHL and (international) criminal law are therefore complementary and mutually beneficial. There is yet another way in which IHL can inspire developments in ICL, in particular the regime applicable in non-international armed conflicts. While Additional Protocol II has no prohibitive provision on disproportionate attacks, the rule has been incorporated in other treaties that are applicable in non-international armed conflicts.⁴⁹ It is high time that ICL follows suit by

Common law allows for the imputation of malice to a defendant who acts without the (express) intent to kill, but whose actions show a *wanton disregard* for the lives of others as the result of the risk created. Similarly, the proportionality rule attributes an improper purpose to an otherwise lawful attack based on the commander's disregards for the consequences of the risk created by the attack: the law imputes to the commander (implied) intent to engage in an *indiscriminate attack*.

⁴⁸ AP I, above n 4, Articles 57 and 58.

⁴⁹ See Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, opened for signature 10 April 1981, 1342 UNTS 137 (entered into force 2 December 1983), Articles 3 and 8(c). Compare also Sivakumaran 2012, p 349 who adds that its applicability in non-international armed conflicts is considered a rule of customary international law.

incorporating the counterpart of Article 8(2)(b)(iv) in sub-paragraph 8(2)(e) of the Rome Statute. There is no good reason why the launching of indiscriminate attacks during international and non-international armed conflicts should produce different outcomes in the realm of ICL.

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