

International Humanitarian Law Teaching Supplement

## **VOLUME 2: INTERNATIONAL CRIMINAL LAW**

*Produced by the*  
**International Humanitarian Law Clinic**  
**at Emory University School of Law**  
**with the support of the**  
**Regional Delegation for United States and Canada,**  
**International Committee of the Red Cross**



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## **Volume 2: INTERNATIONAL CRIMINAL LAW**

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*The views expressed in this publication do not necessarily represent those  
of the International Committee of the Red Cross*

This supplement is designed to provide material for one to three class periods, depending on how in depth you intend to cover IHL/war crimes in your course. We find that the students are quite engaged with this topic in light of the United States' protracted involvement in overseas military engagements.

This document includes both supplemental reading materials for distribution to students and teacher's manual commentary, merged together into one comprehensive supplement. The supplement is divided into four main substantive chapters on IHL, selected for their relevance to International Criminal Law (ICL). Each chapter contains 1) materials for distribution to students, including an introduction to the main IHL concepts; cases and primary source materials; and notes and questions for discussion; and 2) materials for professors, including general commentary at the beginning of each chapter and suggested answers and comments for discussion in response to the questions.

For purposes of clarity, sections in italics are the teacher's manual commentary (with the exception of a few excerpted materials contained within those sections that are in regular type for accuracy purposes); sections in regular type are the student reading materials. For ease of distribution and use, the student reading materials are also available in a separate document, at <http://www.law.emory.edu/centers-clinics/international-humanitarian-law-clinic/teaching-ihl-workshop.html>.

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### PROBLEMS

### *Suggested Incorporations into International Criminal Law Syllabi*

In a class on International Criminal Law, Accountability, War Crimes, or International Tribunals, for example, use these materials in advance of, or in lieu of, whatever materials on war crimes have been assigned. This supplement could also be useful to add to an IHL course, many of which focus on the treaties but not on existing jurisprudence, and can be used specifically to add content to a war crimes unit in an IHL course. Finally, these materials can also provide more detailed content on IHL for a standard public international law class.

## INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMANITARIAN LAW

### I. Introduction

*Much of this introductory material is self-explanatory. We recommend you cover it partially through lecture and partially through the Socratic Method. One useful exercise is to invoke a current event (such as the November 2011 incident in which NATO/US jets fired on Pakistani border posts) and have the students discuss the ways in which the incident implicates the basic principles of IHL. For this, you can have them conduct the standard analysis: Does IHL apply? What is the operative conflict? How should the conflict be classified? Were the targets military objectives or civilians/civilian objects? If military objectives were targeted and civilians were nonetheless harmed, was the expected harm to civilians and civilian objects excessive in relation to the anticipated military advantage? At the outset, it is also helpful to map the various treaties, with an emphasis on which treaties and treaty provisions govern international versus non-international armed conflicts. You might also have the students look closely at Additional Protocol I in an effort to glean why the United States has resisted ratification. As a role-play, students can be assigned positions within the Senate Foreign Relations Committee to debate the issue.*

*Early on, you'll want to have a short discussion about the distinction between the jus ad bellum and the jus in bello. These bodies of law are often conceived of as applying sequentially: the jus ad bellum governs the lawfulness of the resort to force while the jus in bello governs the conduct of hostilities once an armed conflict exists. International law has traditionally maintained a strict separation between the two bodies of law, which is essential to fulfilling their respective purposes and key principles. Thus, jus in bello rests on the equal application of the law to all parties to an armed conflict. It is a bedrock principle of international law that no party to an armed conflict may disavow respect for the jus in bello based on an assertion that the opponent violated the jus ad bellum (i.e., launched an illegal war). Thus, an unlawful war can be fought lawfully, and vice versa. This acoustic separation between the two bodies of law exists for pragmatic as well as philosophical reasons. The point is to ensure the application of the regulatory jus in bello no matter the cause or legality of the underlying conflict so that both the aggressor state and the aggressed state—as well as the privileged combatant and the unprivileged combatant—are bound by the same rules of conduct, and that their respective civilian populations are equally protected (as the aggressor State's population should not be less protected because of the unlawful decision made by its government). The justness of one side's cause thus does not modify the application of the jus in bello between the parties. Nonetheless, students inevitably conflate these two bodies of law, and it is important that they understand the distinction between them.*

*It is also important that students recognize that the positive IHL governing international armed conflicts (IACs) is much more developed than the positive IHL governing non-international armed conflicts (NIACs). The historical distinction between these classes of conflict was rooted in the idea that international law was only implicated when states became embattled with each other. Truly internal conflicts were to be governed by domestic law and policy, and states had the sovereign right to protect themselves from rebellion and insurrection using military means. States have thus historically been resistant to the creation of binding norms that might someday regulate conflicts taking place within their borders. The lack of law governing NIACs is also due to the fear of "legitimizing" rebels; states prefer to treat such fighters as traitors or common criminals.*

*Although states were long reluctant to consent to the development of international law that regulates events wholly within their borders, the human rights treaties in many respects paved the way for more robust rules governing NIACs. Over the past few decades, there has also been an increasing recognition, particularly by international tribunals, of a convergence between many of the rules applicable in IAC and NIAC.*

### *Suggested readings*

- Marco Sassoli, “Ius ad bellum and Ius in Bello – The Separation between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?”, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES, ESSAYS IN HONOUR OF YORAM DINSTEIN 242-264* (Michael Schmitt and Jelena Pejic eds.), M. Nijhoff (2007)

International humanitarian law (IHL)—also called the law of armed conflict or the law of war—governs the conduct of hostilities and the protection of persons during armed conflict. It does not, however, govern the decision to use military force; this is the domain of the *jus ad bellum* and public international law. In a course on international criminal law, IHL—also known as the *jus in bello*—becomes relevant whenever war crimes charges are contemplated. Such charges are only appropriate where there is an armed conflict and where parties have breached the applicable IHL. Other International Criminal Law (ICL) crimes—such as genocide, crimes against humanity, and terrorism—may be committed within or without an armed conflict. Fully understanding the law governing war crimes thus requires a familiarity with IHL—the goal of this supplement.

As long as groups of people, and later states, have waged war, there have been rules in place defining acceptable behavior in armed conflict. Indeed, “[t]he end of a great war frequently brings a revision of the laws of war in its wake.” Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 1 (2006). Historically, IHL rules evolved along parallel tracks. One set of treaties emerging from international conferences in The Hague and elsewhere concerned the means and methods of warfare. These treaties sought to limit the tactics of war and prohibit the use of certain weapons that cause excessive suffering (“Hague Law”). The most important of the Hague treaties is the Fourth Convention Respecting the Laws and Customs of War on Land (1907) and its annexed regulations, which take as a basic premise that the means and methods of warfare are not without limits.

A second set of treaties sponsored by the International Committee of the Red Cross in Geneva (“Geneva Law”) established protections for individuals impacted by war, especially those who do not—or who no longer—participate directly in hostilities. Most importantly, the four Geneva Conventions of 1949—which enjoy universal ratification among the states of the world—provide specific protections to four classes of protected persons: the wounded and the sick in the field (Geneva Convention I); the wounded, sick and shipwrecked at sea (Geneva Convention II); prisoners of war (Geneva Convention III); and civilians (Geneva Convention IV). Certain forms of injurious conduct committed against these protected persons (such as acts of murder, torture, inhuman treatment, causing great suffering, destruction of property, unlawful confinement,

denials of due process, and hostage-taking) constitute so-called “grave breaches” of the treaties and are punishable as war crimes.\*

The law of war originally and almost exclusively addressed international armed conflicts (IACs), with notable exceptions such as the Lieber Code governing the Union Forces during the U.S. Civil War. Thus, the four Geneva Conventions primarily apply to such conflicts, defined at Article 2, common to all four Conventions, as “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” Within the Geneva Conventions, only Article 3, also common to all four Conventions and considered a convention-in-miniature, sets forth a minimum set of rules governing non-international armed conflicts. Note that commentators often speak of “international” versus “internal” armed conflicts. The drafters of the Geneva Conventions, however, deliberately chose the formulation “not of an international character.”

In 1977, the Geneva Conventions were supplemented by two Protocols\*\* to reflect the changing nature of armed conflict. Protocol I provides a detailed set of rules concerning the obligation to discriminate between military and civilian targets; mandates that all parties take precautions to protect civilians during military operations; defines *international* conflicts as including “armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”; and further defines and clarifies rules governing mercenaries. Protocol II elaborates on the minimum rules in Common Article 3 governing non-international armed conflicts (NIACs) and reflects a trend toward minimizing the differences between the rules that govern international and non-international armed conflicts.

Neither Common Article 3 nor Protocol II by their own terms contains a penal regime on the theory that crimes committed by individuals within NIACs would be prosecutable under domestic law. Nonetheless, when the U.N. Security Council created the statutes governing the first two *ad hoc* international tribunals for the former Yugoslavia and Rwanda, it contemplated that war crimes could be charged under international law in non-international armed conflicts. Indeed, the armed conflict in Rwanda was primarily internal, and even the conflict in the former Yugoslavia had both international and internal aspects.

A web of bilateral and multilateral treaties has rendered international humanitarian law the most codified area of international law. A rich body of customary international law has also developed to supplement this extensive treaty regime. *See Customary International Humanitarian Law* (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2005). In many respects, the customary international law of IHL reflects the convergence of these various strands of IHL and the creation of a more complete corpus of law. The legacy of evolution, codification, and now enforcement of IHL belies the claim by Cicero that *silent enim leges inter arma*—the laws are silent among those at war.

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\* See Articles 50, 51, 130, and 147 of the four Geneva Conventions respectively.

\*\* A third Protocol adopted in 2005 added a new and entirely secular distinctive emblem (a red crystal) to mark military and civilian medical units, services and personnel, as well as the international organizations of the Red Cross and Red Crescent Movement.

## II. When Does International Humanitarian Law Apply?

*You might ask your students at the outset why the Limaj defendants fought the existence of an armed conflict in Kosovo so assiduously. They should understand that had the defendants prevailed, the tribunal would have dismissed the war crimes counts against them.*

*Students should understand that the triggering of IHL is no longer dependent on a declaration of war but rather turns pragmatically on empirical facts on the ground, most saliently the presence of hostilities or a situation of occupation. It is widely accepted that an armed conflict is deemed to exist when “there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State” as articulated by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the seminal Tadić case. Although this statement covers both international (IACs) and non-international armed conflicts (NIACs), the triggering conditions of IHL differ depending on how the conflict is classified. Common Article 2 of the 1949 Geneva Conventions indicates that those treaties apply in all cases of “declared war or any other armed conflict which may arise between two or more of the High Contracting Parties.” The law of armed conflict thus applies wherever and whenever the armed forces of at least two states are embattled. Pictet’s authoritative commentary suggests that those treaties become activated upon a very low threshold of inter-state violence, namely when there is “any difference arising between two States and leading to the intervention of members of the armed forces.” This view, however, has been qualified in several modern sources, which do not consider certain border incidents and other small-scale military confrontations between states to be full-fledged armed conflicts. Indeed, the U.S. has argued that military responses undertaken pursuant to the inherent right of self-defense as set forth in Article 51 of the U.N. Charter do not under all circumstances rise to the level of an armed conflict.*

*Article 3 common to the four Geneva Conventions (generally referred to as “common Article 3”) applies to all conflicts “not of an international character occurring in the territory of one of the High Contracting Parties.” Because the scope of application of common Article 3 (CA3) is different from the rest of the Geneva Conventions, it is often deemed a “convention in miniature.” In contrast to IACs, a higher threshold exists for establishing the existence of a NIAC. This higher threshold exists to distinguish such conflicts from a number of situations that do not trigger IHL, even if such events involve acts of violence and provoke a military response by the state. These include: small scale operations involving military assets that cannot be deemed to be part of a larger armed conflict; situations of “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature,” as stated in Article 1(2) of the Convention on Prohibitions on Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to have Indiscriminate Effects; as well as acts of “banditry, unorganised and short-lived insurrections, or terrorist activities.” Prosecutor v. Tadić, Case No. IT-94-1-T, Judgement, para. 562 (7 May 1997).*

*The International Committee of the Red Cross (ICRC) commentary emphasizes that common article 3 should be applied as broadly as possible. Although the vagueness of the provision leaves open the question of the scope of application of CA3, the Commentary offers several criteria that are relevant for determining whether a situation rises to the level of an armed conflict under CA3:*

- *the party in revolt manifests a sufficient degree of organization and hierarchy;*
- *the legal government is obliged to have recourse to its military forces;*
- *the dissident group has popular support;*
- *the dispute has been placed on a U.N. agenda as constituting a threat to international peace, a breach of the peace, or an act of aggression; and*
- *the insurgents exercise some level of control over territory.*

*Building on the criteria of “protracted” armed violence it established in Tadić, the ICTY and other international tribunals have focused primarily on two factors: the scale or intensity of the violence and the degree of organization of the parties, as discussed in the excerpted case. Through their jurisprudence, they have identified a number of considerations relevant to evaluating whether the intensity of the violence is sufficient to pass through the IHL gateway. These include:*

- *the number and duration of individual confrontations;*
- *the types of weaponry and equipment employed;*
- *the degree of physical destruction;*
- *the number of embattled individuals and casualties;*
- *the geographical and temporal breadth of clashes;*
- *the number of civilians displaced or otherwise impacted by fighting; and*
- *the involvement of the United Nations (particularly the Security Council).*

*This same case law employs indicators for identifying what constitutes an “organized armed group.” These factors mirror the characteristics of a formal national army and include:*

- *a hierarchical structure and rules of engagement;*
- *infrastructure to enlist and train recruits;*
- *the ability to launch military operations;*
- *a central authority empowered to negotiate with governmental representatives; and*
- *a leadership corps capable of being held responsible for the group’s acts.*

*Although many argue that CA3 was designed to cover classic civil wars (those occurring between a government and internal rebel forces), language limiting its scope to such conflicts in early treaty drafts was deleted in favor of a more expansive formulation. This question was particularly relevant in the debates over the applicability of the Geneva Conventions to the U.S. conflict with al Qaeda and other terrorist groups. For example, Justice Scalia in Hamdan argued that in light of CA3’s reference to the “territory” of a High Contracting Party, this provision is meant to govern classic civil wars and does not apply to situations in which a state is engaged in an armed conflict with a non-state actor outside its own borders and on the territory of another High Contracting Party. Hamdan v. Rumsfeld, 548 U.S. 557, 718-20 (2006) (Scalia, J., dissenting). The Supreme Court held, however, that the term “not of an international character”*

*in CA3 refers to all conflicts that do not meet the definition of “international”, meaning between two states, and ruled that CA3 governs the U.S. conflict with al Qaeda. Therefore, it is now generally accepted that CA3 provides a floor of protection for all conflicts not of an international character, including today’s transnational conflicts pitting states against non-state actors and terrorist groups.*

*Additional Protocol II to the Geneva Conventions, which provides more detailed rules governing NIACs, applies to a subset of NIACs that:*

*take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*

*This threshold excludes “internal disturbances and tensions such as riots and isolated and sporadic acts of violence” as stated in Article 1(2) of Protocol II. NIACs that do not meet APII’s standards of organization or territorial control continue to be governed by CA3. Because many of today’s organized armed groups do not satisfy the high bar set forth in APII—often by design—CA3 provides important protections for a broader range of armed conflicts.*

#### *Suggested readings*

- ICRC, “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, *Opinion Paper*, March 2008
- Sylvain Vite, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT’L REV. RED CROSS 69-94 (March 2009)

The definitions of many war crimes raise complex IHL questions. These include: what constitutes a proper military objective? What level of force may lawfully be employed against such a target? Was the victim of an act of violence a protected person (such as a civilian or prisoner of war who are generally immune from attack) or a combatant (who is targetable at any time by virtue of his or her status)? Is a particular tactic a lawful ruse or an unlawful act of perfidy? All of these questions hinge, however, on an *a priori* question: Is IHL even applicable? This is the subject of the next case. As you review it, pay particular attention to the standard the tribunal employs to determine the existence of an armed conflict and whether this standard changes depending on the classification of the conflict.



The following excerpt is from a case before the International Criminal Tribunal for the Former Yugoslavia (ICTY) involving the war in Kosovo (see map above). The defendant, Fatmir Limaj, was a Kosovo Liberation Army (KLA) commander alleged to be responsible for directing military operations and the administration of a prison camp in a region of Kosovo. Limaj was indicted for war crimes and crimes against humanity in early 2003 and was arrested soon thereafter by Slovenian authorities. The charges stemmed from allegations that KLA forces under Limaj's command and control unlawfully detained Kosovo Serbs and Albanians in cruel conditions. In addition, the Prosecution alleged that when Serb forces retook the area around the camp in 1998, Limaj's co-accused and subordinate, Haradin Bala, marched detainees from the camp into the mountains west of Priština and then executed half of them.

***Prosecutor v. Fatmir Limaj, et al.,***  
**Case No. IT-03-66-T, Judgment (Nov. 30, 2005)**

**1. The Existence Of An Armed Conflict And Nexus**

**(a) Law**

83. In order for the Tribunal to have jurisdiction over crimes punishable under Article 3 of the Statute [prescribing war crimes], two preliminary requirements must be satisfied. There must be an armed conflict, whether international or internal, at the time material to the Indictment, and the acts of the accused must be closely related to this armed conflict.

84. The test for determining the existence of an armed conflict was set out in the *Tadić* Jurisdiction Decision and has been applied consistently by the Tribunal since:

An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.<sup>294</sup>

Under this test, in establishing the existence of an armed conflict of an internal character the Chamber must assess two criteria: (i) the intensity of the conflict and (ii) the organisation of the parties. These criteria are used “solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.” The geographic and temporal framework of this test is also settled jurisprudence: crimes committed anywhere in the territory under the control of a party to a conflict, until a peaceful settlement of the conflict is achieved, fall within the jurisdiction of the Tribunal.

85. The Defence submit that in determining the existence of an armed conflict for the purposes of the Tribunal’s jurisdiction the Chamber may consider the insurgents’ control over a determinate territory, the government’s use of the army against the insurgents, the insurgents’ status as belligerents, and whether the insurgents have a State-like organisation and authority to observe the rules of war. This submission draws on the International Committee of the Red Cross (“ICRC”) Commentary to Common Article 3 of the Geneva Conventions, which is the basis for the charges brought under Article 3 of the Statute. In the relevant part, the Commentary lists different conditions for the application of Common Article 3 which were discussed at the Diplomatic Conference for the Geneva Conventions. The Commentary explicitly clarifies, however, that this list is “in no way obligatory” and is suggested merely as “convenient criteria” to distinguish a genuine armed conflict from an act of banditry or an unauthorised or short-lived insurrection. It further states:

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<sup>294</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995). \* \* \*

Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfil any of the above conditions (which are not obligatory and are only mentioned as an indication)? We do not subscribe to this view. We think, on the contrary, that the Article should be applied as widely as possible.<sup>300</sup>

86. The drafting history of Common Article 3 provides further guidance. Several proposed drafts of what later became known as Common Article 3 sought to make its application dependent, *inter alia*, on conditions such as an explicit recognition of the insurgents by the *de jure* government, the admission of the dispute to the agenda of the Security Council or the General Assembly of the United Nations, the existence of the insurgents' State-like organisation, and civil authority exercising *de facto* authority over persons in determinate territory. However, none of these conditions was included in the final version of Common Article 3, which was actually agreed by the States Parties at the Diplomatic Conference. This provides a clear indication that no such explicit requirements for the application of Common Article 3 were intended by the drafters of the Geneva Conventions. \* \* \*

88. The Defence submit even further that the extent of organisation of the parties required for establishing an armed conflict, as well as, generally, the level of its intensity, have not yet been defined by the jurisprudence of the Tribunal. They submit that the law does not require the impossible and that, in order to be bound by international humanitarian law, a party to a conflict must be able to implement international humanitarian law and, at the bare minimum, must possess: a basic understanding of the principles laid down in Common Article 3, a capacity to disseminate rules, and a method of sanctioning breaches. They also refer to Additional Protocol II to the Geneva Conventions, which requires a higher standard for establishment of an armed conflict, and submit that in order for Additional Protocol II to apply it must be established that the insurgent party (in the present case, the KLA) was sufficiently organised to carry out continuous and persistent military operations and to impose discipline on its troops, that it exercised some degree of stability in the territories it was able to control and had the minimum infrastructure to implement the provisions of Additional Protocol II.

89. The Chamber does not share this view. The two determinative elements of an armed conflict, intensity of the conflict and level of organisation of the parties, are used "*solely for the purpose*, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law." Therefore, some degree of organisation by the parties will suffice to establish the existence of an armed conflict. This degree need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organisation, as no determination of individual criminal responsibility is intended under this provision of the Statute. This position is consistent with other persuasive commentaries on the matter. A study by the ICRC submitted as a reference document to the Preparatory Commission for the establishment of the elements of crimes for the ICC noted that:

The ascertainment whether there is a non-international armed conflict does not depend on the subjective judgment of the parties to the conflict; it must be

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<sup>300</sup> ICRC Commentary to Geneva Convention I, p 50.

determined on the basis of objective criteria; the term ‘armed conflict’ presupposes the existence of hostilities between armed forces *organised to a greater or lesser extent*; there must be the opposition of armed forces and a *certain intensity* of the fighting.

90. For these reasons the Chamber will apply the test enumerated in the *Tadić* Jurisdiction Decision to determine whether the existence of an armed conflict has been established. Consistently with decisions of other Chambers of this Tribunal and of the ICTR, the determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis. By way of example, in assessing the intensity of a conflict, other Chambers have considered factors such as the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed. With respect to the organisation of the parties to the conflict Chambers of the Tribunal have taken into account factors including the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms.<sup>314</sup> \* \* \*

## **(b) Findings**

93. The Indictment alleges that an armed conflict between Serbian forces and the KLA existed in Kosovo not later than early 1998. The Chamber heard evidence and is satisfied that the Serbian forces involved in Kosovo in 1998 included substantial forces of the Army of Yugoslavia (“VJ”) and the Serbian Ministry of Internal Affairs (“MUP”), *i.e.* the police, and, therefore, constitute “governmental authorities” within the meaning of the *Tadić* test. The Chamber will discuss below whether the Prosecution has established that the KLA possessed the characteristics of an organised armed group, within the meaning of the *Tadić* test, and whether the acts of violence that occurred in Kosovo in the material time reached the level of intensity required by the jurisprudence of the Tribunal to establish the existence an armed conflict.

### **(i) Organisation of the KLA \* \* \***

95. Progressively from late May to late August 1998 the territory of Kosovo was divided by the KLA into seven zones: Drenica, Dukagjin, Pastrok, Shala, Llap, Nerodime, and Karadak. Each zone had a commander and covered the territory of several municipalities. The level of organisation and development in each zone was fluid and developing and not all zones had the same level of organisation and development; this was significantly influenced by the existence and extent of the KLA’s presence in each zone before April 1998. \* \* \*

98. While, not necessarily without fail, the Chamber accepts that, generally, zone commanders acted in accordance with directions from the General Staff. The “Provisional Regulations for the Organisation of the Army’s Internal Life” of the KLA (“Regulations”) were distributed to the various units by the General Staff. \* \* \*

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<sup>314</sup> *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, paras. 23-24 (June 16, 2004).

100. \* \* \* The General Staff was also active in organising issues of overall importance for the functioning of the KLA, such as the supply of weapons. \* \* \*

101. Further, it was the General Staff that issued political statements and communiqués which informed the general public in Kosovo and the international community of its objectives and its activities. Political Statement No. 2 of the KLA, issued by the General Staff on 27 April 1998 and published in the Kosovo newspaper “Bujku” two days later, described the KLA and its political goals as follows:

The KLA constitutes the integrity of the armed forces of Kosovo and its occupied territories, and its aim is the liberation and unification of the occupied territories of Albania. \* \* \*

110. The KLA Regulations further support the existence of such an organisational structure and hierarchy. Although the Regulations are dated “1998” and the precise date of their promulgation is not identified, the Chamber accepts from the evidence, and finds, that at least by the end of June 1998 these Regulations were available and were being distributed among KLA soldiers at various positions. \* \* \*

111. The Regulations, *inter alia*, established several ranks of KLA servicemen, defined the duties of the unit commanders and deputy unit commanders, as well as the duties of the company, platoon, and squad commanders, and created a chain of military hierarchy between the various levels of commanders. It was declared in the Regulations that “obedience, respect and orders strictly follow the chain of military hierarchy.” The Regulations authorised an officer at a higher level “to demand from an officer beneath him the enforcement of the law, of regulations, of orders, instructions, etc.” and provide that “a junior officer is obliged to carry out orders, decisions, instructions, etc.” Further, the Regulations contained explicit provisions directed to guaranteeing that orders would be executed down the hierarchy. \* \* \*

123. The evidence varies considerably as to the supply and use of uniforms in the KLA in the period before August 1998. Some evidence indicates that by February 1998 most of the KLA soldiers had uniforms with badges identifying their allegiance, although the evidence indicates that the military uniforms were of varying nature. Some KLA soldiers wore some self-made uniforms. Others had no uniforms at all. As with most things the position regarding uniforms improved as the end of 1998 neared. While the existence of a uniform may be indicative of the existence of a well-organised entity, in the view of the Chamber, this factor alone is not determinative in this case of the existence of an organised military structure, as it has little bearing on the functioning of the KLA, especially having regard to its rapid expansion after March 1998 which undoubtedly placed unanticipated strain on the provision of commodities such as uniforms, at a time when other needs were clearly more relevant to the military functioning of the KLA. \* \* \*

125. Indicative of the extent of the KLA’s organisation is its role in the negotiations with representatives of the European Community and foreign missions based in Belgrade. Jan Kickert, a diplomat with the Austrian Embassy in Belgrade, indicated that by the middle of 1998 it had become evident that a solution of the Kosovo crisis would not be achieved without the

involvement of the KLA.\* \* \* [Three meetings took place in July 1998 with representative of the European Union, the international community, and the KLA.]

129. As this evidence confirms, by July 1998 the KLA had become accepted by international representatives, and within Kosovo, as a key party involved in political negotiations to resolve the Kosovo crisis. This discloses and confirms that by that time the KLA had achieved a level of organisational stability and effectiveness. In particular this gave it the recognised ability to speak with one voice and with a level of persuasive authority on behalf of its members.  
\* \* \*

134. In the Chamber's finding, before the end of May 1998 the KLA sufficiently possessed the characteristics of an organised armed group, able to engage in an internal armed conflict.

## **(ii) Intensity of the Conflict**

135. Sporadic acts of violence between Serbian forces and the KLA occurred in Kosovo in 1997 and early 1998. Some of these acts of violence were discussed by the Chamber earlier in this decision. The most significant of them was the attack at the end of February 1998 and in early March 1998 on the villages Qirez/Cirez, Likoshan/Likosane, and Prekazi-i-Poshtem/Donjie Prekaze located in the Drenica area, in the course of which 83 Kosovo Albanians were killed. International observers present in Kosovo at the time testified that these events marked a turning point in the development of the conflict in Kosovo.

136. Around 5 March 1998 a police action was carried out in the area of Kline/Klina-Laushe/Lausa, located southwest of Prekazi/Prekaze. Reports indicated that buildings were attacked with heavy weapons and mortars. A group of diplomats who visited Prekazi/Prekaze on 8 March 1998 reported great devastation to a limited number of buildings, continuing heavy police presence and a complete absence of civilian activities. Houses were torched, burned, or fired at. Serbian forces from the Ministry of the Interior ("MUP") and forces associated with Serbian special units equipped with armoured personnel carriers and other heavy vehicles were involved in the operation. \* \* \*

159. On or about 23 June 1998 the KLA took control of a coal mine and the village of Bardhi-i-Madh/Veliki Belacevac, 10 km west of Prishtina/Pristina. Shooting could be heard in the area for the entire day and Kosovo Albanian residents were reported to have fled to Prishtina/Pristina. \*\*\*About a week later the Serbian forces attempted to retake the mine. Reports indicate that the Serbian forces used tear gas, that automatic gunfire and explosions were heard in the area, and that security forces, the VJ, and armed Serbian civilians were involved in this operation. This was the first action in which the participation of the VJ was officially confirmed by the Serbian side. \* \* \*

166. As discussed earlier, tanks and armoured vehicles, heavy artillery weapons, air defence systems, armored personnel carriers, machine guns, and explosives, among other weapons, were used in the conflict. \* \* \*

168. The Defence submit that a series of regionally disparate and temporally sporadic attacks carried out over a broad and contested geographic area should not be held to amount to

an armed conflict. In the Chamber's view, the acts of violence that took place in Kosovo from the end of May 1998 at least until 26 July 1998 are not accurately described as temporally sporadic or geographically disperse. As discussed in the preceding paragraphs, periodic armed clashes occurred virtually continuously at intervals averaging three to seven days over a widespread and expanding geographic area.

169. The Defence further submit that a purely one-sided use of force cannot constitute protracted armed violence which will found the beginning of an armed conflict. In the Chamber's view, this proposition is not supported by the facts established in this case. While the evidence indicates that the KLA forces were less numerous than the Serbian forces, less organised and less prepared, and were not as well trained or armed, the evidence does not suggest that the conflict was purely one-sided. KLA attacks were carried out against a variety of Serbian military, community and commercial targets over a widespread and expanding area of Kosovo. Further, KLA forces were able to offer strong and often effective resistance to Serbian forces undertaking military and police operations. While very large numbers of Serbian forces, well equipped, were deployed in the relevant areas of Kosovo during the period relevant to the Indictment, the KLA enjoyed a significant level of overall military success, tying up the Serbian forces by what were usually very effective guerrilla-type tactics. \* \* \*

### **(iii) Conclusion**

171. The Chamber is satisfied that before the end of May 1998 an armed conflict existed in Kosovo between the Serbian forces and the KLA. By that time the KLA had a General Staff, which appointed zone commanders, gave directions to the various units formed or in the process of being formed, and issued public statements on behalf of the organization. Unit commanders gave combat orders and subordinate units and soldiers generally acted in accordance with these orders. Steps have been established to introduce disciplinary rules and military police, as well as to recruit, train and equip new members. Although generally inferior to the VJ and MUP's equipment, the KLA soldiers had weapons, which included artillery mortars and rocket launchers. By July 1998 the KLA had gained acceptance as a necessary and valid participant in negotiations with international governments and bodies to determine a solution for the Kosovo's crisis, and to lay down conditions in these negotiations for refraining from military action.

172. Further, by the end of May 1998 KLA units were constantly engaged in armed clashes with substantial Serbian forces in areas from the Kosovo-Albanian border in the west, to near Prishtina/Pristina in the east, to Prizren/Prizren and the Kosovo-Macedonian border in the south and the municipality of Mitrovica/Kosovka Mitrovica in the north. The ability of the KLA to engage in such varied operations is a further indicator of its level of organisation. Heavily armed special forces of the Serbian MUP and VJ forces were committed to the conflict on the Serbian side and their efforts were directed to the control and quelling of the KLA forces. Civilians, both Serbian and Kosovo Albanian, had been forced by the military actions to leave their homes, villages and towns and the number of casualties was growing.

173. In view of the above the Chamber is persuaded and finds that an internal armed conflict existed in Kosovo before the end of May 1998. This continued until long after 26 July 1998.

174. Further, the Chamber is satisfied that the requisite nexus between the conduct alleged in the Indictment and the armed conflict has been established. In particular, the Chamber refers to its findings that the prison camp where the alleged crimes occurred was established after the KLA took control of the village, that it was run by KLA members, and that the camp effectively ceased to exist after the KLA lost control of the [region]. Those detained in it were principally, if not solely, those who were or who were suspected of being Serbians or Kosovo Albanians who collaborated with the Serbian authorities.

### ***Notes and Questions***

1. **Case History & Outcome.** Limaj was ultimately acquitted on the ground that although he was in a position of command over the KLA, there was insufficient evidence that he played any role at the prison camp or in the mountains where the prisoners were executed. His acquittal was affirmed on appeal. *Prosecutor v. Limaj, et al.* Case No. IT-03-66-A, Judgement (Sept. 27, 2007). One of his co-accused, Haradin Bala, was convicted of the murder, torture, and cruel treatment of prisoners and sentenced to 13 years' imprisonment. This sentence reflected the fact that Bala was following orders. *Prosecutor v. Limaj, et al.*, Case No. IT-03-66-T, Judgement, para. 726 (Nov. 30, 2005). The Trial Chamber dismissed all of the crimes against humanity counts in both cases on the ground that the conduct alleged was not part of a widespread or systematic attack against a civilian population. *Id.* at para. 228. Hence, the central importance of the war crimes charges, which depend entirely on the existence of an armed conflict.

2. **Tadić and the Definition of Armed Conflict.** In *Tadić*, the Trial Chamber determined that an armed conflict exists:

whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

*Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (October 2, 1995). Note that the *Tadić* Trial Chamber defines “armed conflict” and not “war.” This is in keeping with the lexicon of the International Committee of the Red Cross (ICRC) as well. Why might this be so? Is the definition of “armed conflict” formulated by the *Tadić* Appeals Chamber a useful one? What violent situations might it exclude?

3. **Armed Conflict in Kosovo.** What would be the implications if the defendants had succeeded in convincing the Trial Chamber that there was no armed conflict underway during the time in question? What is the test employed by the Trial Chamber in determining the existence of an armed conflict in the region within Kosovo? What evidence was most dispositive in your view?

Are there other factors beyond those mentioned by the tribunal that you would consider important? For example, are the political motivations of the parties at all relevant? What if the violence is entirely one sided? Can this be an armed conflict or is some measure of mutuality required?

**4. Nexus and Causation.** In para. 174 above, the Court mentions the necessity of showing a nexus between the alleged war crime and the state of armed conflict. How was the nexus satisfied in this case? Is it necessary to show a causal relationship between an armed conflict and an alleged war crime? In a decision involving the prosecution of three Serbian military officials for war crimes in the Foča area of the former Yugoslavia, the Appeals Chamber noted that such a causal relationship was not necessary:

58. What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment—the armed conflict—in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. The Trial Chamber’s finding on that point is unimpeachable.

59. In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.

60. The Appellants’ proposition that the laws of war only prohibit those acts which are specific to an actual wartime situation is not right. The laws of war may frequently encompass acts which, though they are not committed in the theatre of conflict, are substantially related to it. The laws of war can apply to both types of acts. The Appeals Chamber understands the Appellants’ argument to be that if an act can be prosecuted in peacetime, it cannot be prosecuted in wartime. This betrays a misconception about the relationship between the laws of war and the laws regulating a peacetime situation. The laws of war do not necessarily displace the laws regulating a peacetime situation; the former may add elements requisite to the protection which needs to be afforded to victims in a wartime situation.

*Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgement (June 12, 2002).

**5. Public Reception of the Case.** The acquittal of Limaj was greeted with jubilation in the streets of Kosovo. Just prior to the issuance of the judgment, upwards of 20,000 residents took to the streets in Kosovo’s capital city of Priština to proclaim the innocence of the defendants. The judgment was largely seen as a vindication of the KLA, whom Serbian authorities had branded as

a terrorist organization. Why might this be the case? In what way can IHL be used by parties to legitimize themselves or de-legitimize their opponents? A second set of indictments involving the KLA also resulted in acquittals of high ranking KLA members, including the former Prime Minister of Kosovo, Ramush Haradinaj. *Prosecutor v. Haradinaj, et al.*, Case No IT-04-84-T, Judgment (April 3, 2008). Both judgments drew criticism from Serbia and renewed accusations that the ICTY is biased against Serb defendants. The Appeals Chamber—for the first time ever—ordered a partial re-trial of the *Haradinaj et al.* case on the ground that the Trial Chamber erred in failing to take adequate measures to secure the testimony of key witnesses and failed to “appreciate the gravity of the threat witness intimidation posed to the trial’s integrity,” even though the prosecutor had exceeded the time limit for his case.” *Prosecutor v. Haradinaj, et al.*, Case No IT-04-84-A, Judgment, para. 40 (July 21, 2010). The re-trial commenced in August 2011.

*The questions following the excerpt from Limaj offer an opportunity to discuss why there is a separate body of law applicable to armed conflicts and to highlight key reasons for the basic framework of the law. It is useful to discuss with the students why the Geneva Conventions use the term “armed conflict” rather than the term “war”, which was the standard term used in IHL treaties until 1949. Before the 1949 Geneva Conventions, existing treaty and customary law applied to situations of declared war. For example, Article 2 of the Hague Convention of 1899 stated that the annexed Regulations on the Laws and Customs of War on Land applied “in case of war.”\* Subsequent conventions, such as the 1907 Hague Convention and the 1929 Geneva Prisoner of War Convention, did not address a threshold of applicability but rather relied on the plain meaning found in their titles. Although the defining of war seemed obvious, this scenario left open multiple possibilities for states to argue that the laws of war – and their concomitant obligations – were not applicable because there was indeed no declared war. As just one example, during World War II, the Japanese consistently argued that their military operations in Manchuria and China were “police operations” and therefore did not trigger the law of war (an argument that did not succeed at the International Military Tribunal for the Far East). Notably, the Geneva Conventions adopted the term “armed conflict” specifically to avoid the technical legal and political pitfalls of the term “war.” As such, determination of the existence of an armed conflict does not turn on a formal declaration of war—or even on how the participants characterize the hostilities—but rather is based on the facts of a given situation.*

*Note that the Tadić formulation of the definition of armed conflict tracks the CA2 and CA3 framework by differentiating between the trigger for applicability in IACs and NIACs. Encourage the students to think about different situations around the world and how they fit into this conception of armed conflict: Somalia, Yemen (both the internal violence and the U.S. engagement there are relevant), Pakistan, Syria, and Mexico, to name a few, all offer useful opportunities to discuss how different types of violence fit within the framework (or not) and what that means for the application of the law and the protection of persons. Here it is also important to consider the nature of the test the ICTY has now developed through the Tadić-Limaj line of cases. Are intensity and organization the only relevant factors? The most important factors?*

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\* Convention with Respect to the Laws and Customs of War on Land, art. 2, July 29, 1899, 32 Stat. 1803.

*An interesting case to add to the discussion here is Abella v. Argentina,<sup>\*\*</sup> a case before the Inter-American Commission on Human Rights (IACHR) in 1997. In that case, a group of Argentine citizens launched an attack on a military barracks, to which the commander of the barracks responded with full military force. After a 30-hour firefight, the attackers were defeated, taken into custody and prosecuted. They later brought their case before the Inter-American Commission on Human Rights to protest denial of free trial rights during their trial in Argentina. The IACHR first assessed what body of law to apply to the situation – human rights law or international humanitarian law. The Commission determined that the situation met the threshold of an armed conflict within CA3 and therefore applied IHL. Discuss with the students what the reasoning might have been – surely thirty hours does not fit within the notion of “protracted” as set forth in the Tadić case. One significant factor for the IACHR was the government’s response to the attack on the military barracks, using military force rather than seeking to subdue and arrest the attackers with police measures. The case thus raises interesting questions for discussion with regard to what armed conflict means, what it should include, and what the consequences of different approaches to applicability could be.*

*The latter questions can open a discussion on the classification of situations of violence resulting from organized crime. In this context, the situation in Mexico offers a fascinating example of the practical limits of the Tadić definition – and an example that students are usually very interested in. A comparison can be drawn here between existing NIACs where the non-state armed group is resorting to criminal activities to finance its rebellion (e.g., the involvement of the Taliban in Afghanistan or the FARC in Colombia in drug-related activities) and situations where the criminal activities are the primary purpose of the group. This may have a major impact on the law applicable to the situation: when organized crime is concerned, should IHL only apply to situations where the criminal activities are a consequence of the armed group’s struggle against the government, or should it also apply to situations where the struggle against the government is the direct consequence of the criminal activities? The question has not been resolved yet among scholars – although State practice would tend to exclude the second set of situations – but it is interesting to raise in discussion with students.*

*At some point in this unit, you might also emphasize the requirement that there be a nexus between an armed conflict and a charged act of violence in order to invoke the war crimes prohibition. This requirement reflects the fact that not all wrongful acts that occur during an armed conflict are war crimes, per se. Thus, a purely private dispute—between two neighbors over the boundary between their two homes or between two members of a family—that results in violence will rarely be covered by IHL, even if committed simultaneous to an armed conflict. The question then is how to distinguish between those acts committed during an armed conflict that fall under IHL and those that do not. This is the nexus question. You might note in lecture that the nexus requirement has proven contentious with respect to crimes of sexual violence, because defendants argue, or tribunals assume, that such acts are simply opportunistic or private conduct reflecting personal motives and desires that are unconnected to, or simply capitalizing upon, the prevailing state of war. In such cases, it should be kept in mind that acts of violence committed outside of an armed conflict, or which are unconnected to the existing armed conflict, may still be criminally prosecuted: within the ad hoc tribunals, such acts may be charged as crimes against humanity so long as they are part of a widespread or systematic attack on a civilian population.*

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<sup>\*</sup> Abella v. Argentina (La Tablada), Case 11.137, Inter-Am. C.H.R., Report No. 55/97 (1997).

<sup>\*\*</sup> Abella v. Argentina (La Tablada), Case 11.137, Inter-Am. C.H.R., Report No. 55/97 (1997).

### III. Conflict Classification

*The point here is to emphasize that the treaties, and the jurisprudence thereunder, actually give rise to a non-binary taxonomy of situations of violence and conflict, including:*

1. *Situations that do not trigger IHL at all (e.g., riots, sporadic acts of violence);*
2. *Non-international armed conflicts that trigger Article 3 protections;*
3. *Non-international armed conflicts that meet the heightened requirements of Protocol II (and thus are subject to the more detailed regulations provided in that Protocol);*
4. *Non-international armed conflicts that involve multiple states working in coalition with the host state against an insurgent force.*
5. *International armed conflicts within the meaning of Protocol I (e.g., situations in which an indigenous population is resisting colonial domination);*
6. *Sufficiently internationalized internal armed conflicts that trigger the greater part of the protections of the 1949 Geneva Conventions because one state exercises overall control over a non-state party embattled against another state;*
7. *Situations of belligerent occupation, including those that do not meet with armed resistance; and*
8. *Traditional international armed conflicts pitting two High Contracting Parties Against each other, thus triggering the 1949 Geneva Conventions.*

*The ICRC has recently highlighted a “typology” of non-international armed conflicts, which includes:*

- *Traditional or classical Common Article 3 conflicts in which government forces fight against one or more organized armed groups within the territory of a single state;*
- *Conflicts between two or more organized armed groups in the territory of a single state, such as when there is no state authority (these are, in effect, a subset of the traditional non-international armed conflict;*
- *Spill-over conflicts in which a non-international armed conflict between government forces and one or more organized armed groups within the territory of a state “spill over” into the territory of neighboring states;*
- *Multi-national non-international armed conflicts, where multi-national armed forces fight alongside the forces of a “host” state, in its territory, against one or more organized armed groups;*
- *A subset of multi-national non-international armed conflicts where United Nations or regional forces support a “host” government involved in hostilities against one or more organized armed groups in its territory;*
- *Cross-border conflicts where the forces of a state are involved in hostilities with a non-state party operating from the territory of a neighboring “host” state without that state’s control or support; and*

- *In addition, some believe that a seventh category should be added, to reflect the transnational conflict taking place across multiple states between al Qaeda and its affiliates and the United States. The ICRC, however, does not share the view that a global conflict is or has been taking place, and instead favors a case-by-case analysis of the various situations in question (intelligence gathering, counter-terrorism measures governed by a law enforcement paradigm, use of force rising to the level of an armed conflict).<sup>†</sup>*

*These frameworks offer an excellent opportunity to explore and highlight the consequences of classifying a situation as international or non-international. To that end, it is important to stress the fact that the dearth of treaty provisions governing NIACs is today counterbalanced by the fact that many of the basic principles of IHL now apply to such conflicts by virtue of customary international law. One area where the law governing all types of conflicts is largely co-extensive relates to war crimes—where IHL and ICL intersect. Most of the conduct that constitutes a war crime in an IAC is also a war crime when committed within a NIAC. Students can be encouraged to deconstruct Article 8 of the ICC Statute to see this for themselves and to discuss the reasons for any differences.*

*In contrast, it may be interesting to spend some time on two specific aspects of IHL, namely targeting and detention, in which the differences between the two classes of conflict are salient. First, although targeting in NIAC follows the same principles as in IAC (distinction, proportionality, precautions), a major difference remains regarding the concept of combatancy and its attendant privileges and immunities. The law governing NIACs does not recognize non-state fighters as “combatants” who enjoy combatant immunity for lawful acts of war or POW status upon capture, but who are also targetable on the basis of their status rather than their actions. You can explore this further if you cover the direct participation in hostilities doctrine in any depth. In any case, it is important to stress that this difference in IHL can affect the determination of the existence of a war crime under ICL.*

*Second, the dearth of treaty provisions stands out in particular with regard to the protection of persons deprived of liberty. IHL is silent on the conditions of detention, procedural guarantees and fair trial rights applicable in NIACs, making it difficult to determine when detaining a person amounts to a violation of IHL (and hence potentially a war crime).*

*As the excerpt below makes clear, the determination of whether a conflict is internal or international can be complicated in proxy wars, conflicts involving paramilitaries with cross-border allegiances, and identity-based conflicts. To further complicate matters, parallel conflicts can occur simultaneously on the same territory, the nature of the parties to each conflict determining its classification. Moreover, the nature of a conflict itself can also evolve over time, in the sense that an IAC may become a NIAC, and vice versa. Conflicts that are primarily internal can have enormous internal and international consequences—in the number of those affected, as well as in the regional instability that they encourage.*

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<sup>†</sup> ICRC, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT, Report, Geneva, October 2011.

*You might also note that there is a distinction made in the law between the test employed to internationalize a conflict, as when a state exercises overall control over an organized armed group, and the test that has emerged to attribute the acts of non-state actors to a state. The latter question was the subject of the case brought by Nicaragua against the United States before the International Court of Justice (ICJ). The ICJ ruled that state responsibility for the acts of non-state actors is only allowed where the state exercises effective control over the non-state actors. Later, when determining the legal criteria for establishing when the involvement of a foreign power may turn an internal armed conflict into an international one, the ICTY in Tadić looked at the effective control test enounced by the ICJ, and decided that it was setting too high a threshold for purposes of classifying a conflict. The ICTY then used a test of overall control, considered less stringent than the “effective control” test because it does not require the presence of specific orders and directives from the foreign state to the internal armed forces. The ICJ nevertheless reiterated the relevance of the effective control test in the Bosnia v. Serbia Judgment. Both of these tests and considerations play a role in the ICC’s deliberations and decisions in the case excerpted below.*

If a situation meets the definition of an armed conflict, thus triggering the application of international humanitarian law, the next question is whether the armed conflict is an “international” or “non-international” one. The law of war has historically made a distinction between international and non-international armed conflicts, with the former having a more comprehensive prescriptive framework and more rigorous enforcement regime. During the negotiations around the four Geneva Conventions, the ICRC and a handful of state delegates sought to include rules governing internal armed conflicts within the treaties. In the face of stiff resistance from other members of the international community, however, these advocates were only able to obtain a cryptic reference to armed conflicts “not of an international character” in Article 3, common to the four Geneva Conventions.

Before reading the next case excerpt, which comes from the Pre-Trial Chamber of the International Criminal Court, compare how the four Geneva Conventions and their Protocols define their respective material fields of application:

- Geneva Conventions, Common Article 2:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

- Geneva Conventions, Common Article 3:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions...

- Protocol I, Article 1:
  3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.
  4. The situations referred to in the preceding paragraph include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.
  
- Protocol II, Article 1:
  1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
  2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

From these provisions, can you construct a conflict classification typology? How many different types of conflict are contemplated? What contribution does Protocol I make to the definition of an “international armed conflict”? Is it still relevant today? How does the field of application differ between Common Article 3 and Protocol II? Are all types of conflicts and situations of violence addressed in these treaties? Do you think there are situations that are not covered that should be? How might world events have influenced the drafting of the two Protocols? Revisit this typology at the end of the next Section. In so doing, consider why we have different treaty regimes for IACs and NIACs.

The next excerpt comes from the Pre-Trial Chamber of the ICC and involves the situation in the Democratic Republic of Congo (DRC). The DRC has been wracked by conflict for many years. The events in question occurred in the Ituri district, which borders Uganda and South Sudan, is home to 20 different ethnic groups (including the Lendu and the Hema), and is rich in natural resources. The case involves Thomas Lubanga Dyilo, alleged founder of the Union of Congolese Patriots (UPC) and its military wing, the Patriotic Forces for the Liberation of Congo (FPLC). Both organizations are affiliated with the Hema ethnic group. Lubanga, also the commander-in-chief of the FPLC, was the first defendant to go to trial before the ICC.

The opinion below mentions Bosco Ntaganda, Lubanga’s former Deputy Chief of General Staff for Military Operations in the FPLC. A warrant for Ntaganda’s arrest was originally filed under seal so that Ntaganda would not abscond or threaten potential witnesses. It was later unsealed when the Office of the Prosecution and the Registry, which houses the Court’s Witness Protection Program, determined that witnesses would not be endangered. Like Lubanga, Ntaganda is alleged to have committed the war crime of enlisting, conscripting, and using children in armed conflict. Although Ntaganda remains at large, the trial of two other DRC defendants—Germain Katanga and Mathieu Ndgudjolo Chui—is underway before the ICC. The cases are before the Court as a result of the DRC’s self-referral of ICC crimes committed within its territory.

Lubanga had originally been charged under Article 8(2)(e)(vii) of the ICC Statute with the war crimes of conscripting and enlisting children under the age of fifteen years into “armed forces or groups” and using them to participate actively in hostilities. In so charging, the Prosecutor implicitly characterized the relevant conflict as a NIAC. (Virtually the same crime involving recruitment into “the national armed forces” could be charged in connection with an international armed conflict pursuant to Article 8(2)(b)(xxvi)). As you’ll see, the Pre-Trial Chamber disagrees with this assessment. In the final judgment, however, the Trial Chamber ultimately reversed the Pre-Trial Chamber on this point. As you’re reading the excerpt below, consider the grounds on which the Trial Chamber might reverse.

**Situation in the Democratic Republic of The Congo**  
***Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06,**  
**Decision on the Confirmation of Charges (Public Redacted Version)<sup>‡</sup>**  
**(Jan. 29, 2007)**

**2. The Characterization Of The Armed Conflict**

200. In his Document Containing the Charges, the Prosecutor considers that the alleged crimes were committed in the context of a conflict not of an international character. The Defence contends however that consideration should be given to the fact that during the relevant period, the Ituri region was under the control of Uganda, Rwanda, or the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC). In the view of the Defence, the involvement of foreign elements, such as the Ugandan People's Defense Force (UPDF), could internationalize the armed conflict in Ituri. Furthermore, in her closing statement at the confirmation hearing, the Representative of Victim a/0105/06 asserted that the involvement of Uganda and Rwanda in the Congolese conflict, including in Ituri, was a matter of common knowledge. She added, however, that the characterization of the armed conflict had to be done on a case-by-case basis. In her opinion, regardless of the type of armed conflict, the Statute offers exactly the same protection, adding that the *Union des Patriotes Congolais* (UPC) had set up a quasi-state structure which could be described as a "national armed force."

201. According to articles 8(2)(b)(xxvi)[governing IACs] and 8(2)(e)(vii) [governing NIACs] of the Statute and the Elements of the Crimes in question, conscripting or enlisting children under the age of fifteen years and using them to participate actively in hostilities entails criminal responsibility, if

[t]he conduct took place in the context of and was associated with an international armed conflict; or the conduct took place in the context of and was associated with an armed conflict not of an international character. \* \* \*

204. In this case, the Chamber concurs with the Representative of Victim a/105/06, that the protection afforded by the Statute against enlisting, conscripting and active participation in hostilities of children under the age of fifteen years is similar in scope, regardless of the characterization of the armed conflict. Thus, as will be discussed below, articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute criminalize the same conduct, whether it is committed in the context of a conflict of an international character or in the context of a conflict not of an international character. Consequently, the Chamber considers that it is not necessary to adjourn the hearing and request the Prosecutor to amend the charges.

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<sup>‡</sup> Ed.: Portions of this opinion have been issued under seal. In particular, the names of certain witnesses and other pieces of evidence have been redacted.

**a. From July 2002 To June 2003: Existence Of An Armed Conflict Of An International Character**

205. The Chamber observes that neither the Statute nor the Elements of Crimes provide a definition of an international armed conflict for the purposes of article 8(2)(b). Only footnote 34 of the Elements of Crimes states that the term “international armed conflict” includes military occupation. Accordingly, the Chamber finds that, pursuant to article 21(1)(b) of the Statute, and with due regard to article 21(3) of the Statute,<sup>\*</sup> it is useful to rely on the applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.

206. Common Article 2 of the Geneva Conventions, which is applicable to international armed conflicts, provides that:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

207. The Commentary on the Geneva Conventions states that any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims.<sup>276 \* \* \*</sup>

209. The Chamber considers an armed conflict to be international in character if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance. In addition, an internal armed conflict that breaks out on the territory of a State may become international—or, depending upon the circumstances, be international in character alongside an internal armed conflict—if (i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).

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<sup>\*</sup> Ed.: Article 21 (Applicable Law) states that:

(1) The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;  
(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;  
(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world. \* \* \*

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

<sup>276</sup> International Committee of the Red Cross, Commentary to the IV Geneva Convention relative to the Treatment of Prisoners of war, p. 26.

210. Regarding the second alternative, the ICTY Appeals Chamber has specified the circumstances under which armed forces can be considered to be acting on behalf of a foreign State, thus lending the armed conflict an international character. In *Tadić*, the Appeals Chamber set out the constituent elements of the “overall control” exercised by a foreign State on such armed forces:

[C]ontrol by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). ... The control required by international law may be deemed to exist when a State ... has a role in organizing, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.<sup>279</sup>

211. The Chamber holds the view that where a State does not intervene directly on the territory of another State through its own troops, the overall control test will be used to determine whether armed forces are acting on behalf of the first State. The test will be met where the first State has a role in organizing, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping the group or providing operational support to it.

212. The Chamber notes that in the judgement rendered on 19 December 2005 in the case of the *Democratic Republic of the Congo v. Uganda*, the International Court of Justice (ICJ) observed that, under customary international law, as reflected in Article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.<sup>280</sup>

213. In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an occupying Power, the ICJ held that it would need to “satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government.”

214. In the opinion of the ICJ, the fact that General Kazini, commander of the Ugandan forces in the DRC, appointed Adèle Lotsove as Governor of the new province of Kibali-Ituri in June 1999 is clear evidence of the fact that Uganda established and exercised authority in Ituri as an occupying Power.

215. The ICJ considered “that there is also persuasive evidence that the UPDF incited ethnic conflicts and took no action to prevent such conflicts in Ituri district.” In this regard, the ICJ relied, amongst other documents, on a report by MONUC on events in Ituri between January 2002 and December 2003 which states that “Ugandan army commanders already

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<sup>279</sup> *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, para. 137.

<sup>280</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement, 19 December 2005, I.C.J. Reports 2005, p. 59, para. 172. \*\*\*

present in Ituri, instead of trying to calm the situation, preferred to benefit from the situation and support alternately one side or the other according to their political and financial interests.”

216. The ICJ considered that the conduct of the UPDF as a whole is clearly attributable to Uganda, being the conduct of a State organ, and that “the conduct of any organ of a State must be regarded as an act of that State.”

217. The ICJ finds in its disposition “that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter’s territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention” and that it can be considered as an occupying power.

218. The Chamber further notes that in his statement, [REDACTED] refers to the [REDACTED] military training [REDACTED]. [REDACTED] also refers to the taking hostage of Thomas Lubanga by Chief Kahwa and to the fact that the Ugandan authorities immediately initiated steps to secure his release. Similarly, in his statement, [REDACTED] refers to discussions with the Ugandan authorities regarding security matters and the “organis[ation of] UPDF/UPC patrols.” He states that [REDACTED] “UPC forces were taking up position behind the UPDF’s positions.”

219. In addition, the Chamber recalls that [REDACTED] states that from August 2002 to March 2003, [REDACTED] the Congolese, but that the area was under total Ugandan control. Indeed, he adds that the Ugandans supplied them with arms after training them and [REDACTED] with the Ugandans when [REDACTED]. According to him, it was [REDACTED] restructure the army of the Congolese that problems arose with Uganda which led to the U PDF attack on Bunia on 6 March 2003.

220. On the evidence admitted for the purpose of the confirmation hearing, the Chamber considers that there is sufficient evidence to establish substantial grounds to believe that, as a result of the presence of the Republic of Uganda as an occupying Power, the armed conflict which occurred in Ituri can be characterized as an armed conflict of an international character from July 2002 to 2 June 2003, the date of the effective withdrawal of the Ugandan army.

221. Similarly, some of the evidence admitted for the purpose of the confirmation hearing bears on the role of Rwanda in the conflict in Ituri after 1 July 2002, and indicates that Rwanda backed the UPC and was particularly involved within the UPC. It would seem that Rwanda was supplying not only ammunition and arms to the UPC, but also soldiers. The evidence admitted for the purpose of the confirmation hearing also includes indications that Rwanda was advising the UPC. There is also substantial evidence before the Chamber to the effect that Uganda stopped backing the UPC as a result of the UPC’s alliance with Rwanda.

222. In this regard, [REDACTED] presents a diagram summarizing the “chain of command, or at least ... the power games played out in the relations that the UPC’s main players had with the Hema community and the UPC’s main ally, Rwanda.” The diagram indicates that orders were issued directly from Rwanda through its President and the Hema

community. The witness states that [REDACTED] understanding of the UPC chain of command is based exclusively on the explanations [REDACTED].

223. In addition, the Chamber observes that according to the same [REDACTED], “Bosco [Ntaganda] had more of a hold over the UPC’s Rwandan-speaking militia men. [REDACTED] confirmed to [REDACTED] that Bosco [Ntaganda] received his orders as much from Kigali as from Lubanga.” From his statement, it would also seem that during the fighting in Bunia in March 2003, Floribert Kisembo himself “received contradictory orders from his two masters: on the one hand he had gotten orders from Thomas LUBANGA, and on the other hand he had gotten orders from Kigali.”

224. [REDACTED] also refers to military assistance from Rwanda, which supplied ammunition and arms and sent instructors to Mandro Camp.

225. In addition, the Chamber recalls that [REDACTED] points out in [REDACTED] testimony that relations between the UPC and Rwanda would come to the fore again starting in late 2002.

226. However, in light of the paucity of evidence before it, the Chamber is not in a position to find that there is sufficient evidence to establish substantial grounds to believe that Rwanda played a role that can be described as direct or indirect intervention in the armed conflict in Ituri.

**b. From 2 June 2003 To December 2003: Existence Of An Armed Conflict Not Of An International Character Involving The Ugandan People’s Conference**

227. The Document Containing the Charges, filed by the Prosecution on 28 August 2006, states that Thomas Lubanga Dyilo committed war crimes under article 8(2)(e)(vii) of the Statute between July 2002 and December 2003. It is therefore necessary to review the events that occurred between 2 June 2003 and late December 2003.

228. Article 8(2)(e)(vii) of the Statute deals with “other serious violations of the laws and customs applicable in armed conflicts not of an international character.”

229. Article 8(2)(f) of the Statute defines “conflicts not of an international character” for the purposes of article 8(2)(e) of the Statute, and provides that:

Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

230. In addition, the introduction to the chapter of the Elements of Crimes dealing with this provision states that “[t]he Elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict.”

231. In this connection, the Chamber notes that Protocol Additional II to the Geneva Conventions of 8 June 1977, which applies to non-international armed conflicts only, sets out criteria for distinguishing between non-international armed conflicts and situations of internal disturbances and tensions. According to its Article 1.1, Protocol Additional II applies to armed conflicts “which take place in the territory of a High Contracting Party and between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

232. Thus, in addition to the requirement that the violence must be sustained and have reached a certain degree of intensity, Article 1.1 of Protocol Additional II provides that the armed groups must: (i) be under responsible command implying some degree of organization of the armed groups, capable of planning and carrying out sustained and concerted military operations and imposing discipline in the name of a *de facto* authority, including the implementation of the Protocol; and (ii) exercise such control over territory as to enable them to carry out sustained and concerted military operations.<sup>301</sup>

233. The ICTY Appeals Chamber has held that an armed conflict not of an international character exists whenever there is a resort to “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>302</sup> This definition echoes the two criteria of Protocol Additional II, except that the ability to carry out sustained and concerted military operations is no longer linked to territorial control. It follows that the involvement of armed groups with some degree of organization and the ability to plan and carry out sustained military operations would allow for the conflict to be characterized as an armed conflict not of an international character.

234. The Chamber notes that article 8(2)(f) of the Statute makes reference to “protracted armed conflict between ... [organized armed groups].” In the opinion of the Chamber, this focuses on the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time.

235. In the instant case, the Chamber finds that an armed conflict of a certain degree of intensity and extending from at least June 2003 to December 2003 existed on the territory of Ituri. In fact, many armed attacks were carried out during that period, causing many victims.<sup>304</sup>

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<sup>301</sup> International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Geneva, Sandoz, Swinarski and Zimmermann (eds.), 1986, paras. 4463-4470.

<sup>302</sup> *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR75, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

<sup>304</sup> According to MONUC’s Special Report on the Events in Ituri, January 2002-December 2003, the above-mentioned attacks caused approximately 400 deaths. Furthermore, for the whole of the period in question, the hostilities in Ituri caused the displacement of tens of thousands of people. See, for example, paragraph 82 of the Special Report: “[t]he total of the new internally displaced persons as a result of the May events in Bunia was reportedly 180,000 persons.” (DRC-OTP-0129-0358).

In addition, at the time, the Security Council also adopted a resolution under Chapter VII of the Charter of the United Nations and was actively seized of this matter during the entire period in question.<sup>305</sup>

236. The Chamber also finds that there are substantial grounds to believe that between 2 June and late December 2003, the armed conflict in Ituri involved, *inter alia*, the UPC, the Party for Unity and Safeguarding of the Integrity of Congo (PUSIC), and the Nationalist and Integrationist Front (FNI); that the UPC and the FNI fought over control of the gold-mining town of Mongbwalu; that various attacks were carried out by the FNI in Ituri during this period; that a political statement was signed in mid-August 2003 in Kinshasa by the main armed groups operating in Ituri calling on the transitional government to organize “a meeting with us, current political and military actors on the ground, so as to nominate by consensus, new administrative officials for appointment;” that at the very beginning of November 2003, the UPC carried out a military operation against the town of Tchomia, which was then under PUSIC control; and, finally, that the UPC/*Forces Patriotiques pour la Libération du Congo* (FPLC) armed forces controlled the towns of Iga Barriere and Nizi at the very least in December 2003.

237. The Chamber finds that there are substantial grounds to believe that these three armed groups were in fact organized armed groups within the meaning of article 8(2)(f) of the Statute. Thus, it seems clear that the FNI was capable of carrying out large-scale military operations for a prolonged period of time. In addition, none of the participants at the confirmation hearing appear to dispute the fact that these were indeed organized groups. The Defence itself stated that very soon after their creation, PUSIC and the FNI succeeded in gaining lasting control over territories previously controlled by the UPC/FPLC.

### ***Notes and Questions***

1. **Case Outcome.** In March 2012, in a 600-page opinion, Lubanga was found guilty of conscripting and enlisting children in armed conflict and using them in military hostilities during the conflict in Ituri. This marks the first judgment of the ICC. The trial consumed six years since the time of his arrest and transfer to the Court in 2006. Sentencing and an innovative reparations procedure are forthcoming.

2. **The War in Ituri (1999-2003).** The war in Ituri was devastating. It resulted in the deaths of over 60,000 people and the displacement of many more. As was the case in Rwanda, ethnic tensions in the Ituri region span decades but were exacerbated by colonial rule and the Belgian practice of favoring one group over others. The immediate trigger for the recent war, however, concerned land disputes. These soon evolved into proxy conflicts waged by neighboring states competing for access to the region’s natural resources. Ituri Province today plays host to a large contingent from the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO), the United Nation’s largest military deployment to date. The conflict in Ituri is part of a series of conflicts plaguing the DRC, collectively called the Second Congo War, involving government troops, multiple armed groups, and the intervention of other

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<sup>305</sup> See Security Council resolution S/RES/1493 of 28 July 2003: “Deeply concerned by the continuation of hostilities in the eastern part of the Democratic Republic of the Congo, particularly in North and South Kivu and in Ituri, and by the grave violations of human rights and of international humanitarian law that accompany them,” the Security Council “[a]uthorizes MONUC to use all necessary means to fulfill its mandate in the Ituri district ... requests the Secretary-General to deploy in the Ituri district, as soon as possible, the tactical brigade-size force by mid-August 2003.”

regional powers, including Uganda, Sudan, Chad, Zimbabwe, and Rwanda. Over 5 million people died in this larger conflict, mostly from disease, malnutrition, and starvation. How did the classification of the conflict in Ituri change over time according to the ICC?

3. **Conflict Classification.** The applicability of IHL treaties depends on the characterization of a conflict as international or non-international. How have modern geopolitical realities, especially during and since the Cold War, challenged this distinction between the two types of conflict? Did the conflict in central Africa fit cleanly in this binary distinction? When does a conflict that began as an internal armed conflict become an international one? In the *Lubanga* decision above, what were the facts and types of evidence relied upon by the tribunal to determine that the conflict in the region in question was an international one? On what authority did the Trial Chamber rely in formulating the test it employed? Why is the occupation by Uganda of parts of Ituri relevant to the classification of the conflict, especially given that Lubanga's militia was not necessarily linked to Uganda?

4. **Armed Activities on the Territory of the Congo.** The ICC cites the case of *DRC v. Uganda* before the ICJ. Upon assuming power over the DRC (formerly Zaire) in May 1997, President Laurent-Désiré Kabila allowed Ugandan troops into the eastern regions of the country to help maintain security. A year later, however, when Kabila called for the withdrawal of these troops, Uganda refused and in fact began providing support to various Congolese militias opposed to the regime in Kinshasa. Uganda claimed it was exercising its right of self-defense against cross-border attacks emanating from anti-Ugandan insurgent, Congolese, and Sudanese forces. In the case in question, the ICJ determined that Ugandan troops acted unlawfully by remaining on DRC territory and substituting their own authority in Ituri for that of the Congolese government. How is this case relevant to the *Lubanga* case? Does the question of whether Uganda's presence in the DRC was lawful have a bearing on the qualification of the acts committed as war crimes? Should it? What standard of proof is applied by the ICJ in determining state responsibility? This finding laid the foundation for further findings that the government of Uganda was responsible for violations of human rights and international humanitarian law, not only by its own troops but also by various other non-state actors present in the occupied territory. What level of involvement by a foreign state is enough to internationalize what would otherwise be a NIAC? Should the level of involvement necessary to internationalize a NIAC be the same as the level of involvement necessary to ascribe state responsibility?

5. **Conflict Classification at Trial.** In the final judgment, the Trial Chamber reversed the Pre-Trial Chamber on the issue of conflict classification. The Trial Chamber reasoned as follows:

563. [A]lthough there is evidence of direct intervention on the part of Uganda, this intervention would only have internationalised the conflict between the two states concerned (viz. the DRC and Uganda). Since the conflict to which the UPC/FPLC [Lubanga's militia] was a party was not "a difference arising between two states" but rather protracted violence carried out by multiple non-state armed groups, it remained a non-international conflict notwithstanding any concurrent international armed conflict between Uganda and the DRC.

564. As discussed above, there is evidence that during the relevant timeframe the UPDF [Ugandan armed forces] occupied certain areas of Bunia, such as the airport. However, it is unnecessary to analyse whether territory came under the authority of the Ugandan forces, thereby amounting to a military occupation, because the relevant conflict or conflicts concern the UPC and other armed groups

565. Focusing solely on the parties and the conflict relevant to the charges in this case, the Ugandan military occupation of Bunia airport does not change the legal nature of the conflict between the UPC/FPLC and \* \* \* FRPI rebel groups since this conflict, as analysed above, did not result in two states opposing each other, whether directly or indirectly, during the time period relevant to the charges. In any event, the existence of a possible conflict that was “international in character” between the DRC and Uganda does not affect the legal characterisation of the UPC/FPLC’s concurrent noninternational armed conflict with the APC and FRPI militias, which formed part of the internal armed conflict between the rebel groups.

Do you agree? This ruling, however, was of no moment, as the ICC Statute penalizes the use of child soldiers in all conflict scenarios.

**6. Occupation.** The law governing belligerent occupation dates back as least as far as the 1899 and 1907 Hague Regulations Respecting the Laws and Customs of War on Land. These rules apply from the time a state establishes what amounts to effective control over another sovereign’s territory until it relinquishes control to the indigenous authorities. Thus, the mere presence of foreign troops on the territory of another state does not *ipso facto* constitute an occupation. Whether a situation of occupation exists is not dependent upon any declaratory act or subjective intent; rather, it is the objective facts on the ground that govern. An over-arching obligation of the occupying power is to restore and maintain public order on the occupied territory while respecting the laws in force. To this end, Article 43 of the 1907 Hague Regulations states:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

World War II—and the mistreatment of the civilian population it occasioned—made it clear that the Hague Convention’s provisions did not provide adequate protection to civilians in situations of occupation. Accordingly, the Fourth Geneva Convention imposes more detailed—and rigorous—obligations on the occupying power (*see, e.g.*, Part III of the treaty). Persons who find themselves in the territory that is under the control of an occupying power are considered protected persons within the meaning of the Fourth Geneva Convention. Article 4 of this treaty defines its “protected persons” as:

those who, at a given moment and in any manner whatsoever, 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.

For a discussion, see *Prosecutor v. Naletilić & Martinović*, Case No IT-88-34-T, Judgement (March 31, 2003). Consider the way in which a situation of occupation might impact international criminal law and its enforcement. For example, would a situation of occupation bear on who might be charged and for what crimes?

The law of belligerent occupation does not apply to non-international armed conflicts. Why not?

7. **Human Rights in Occupied Territory.** The question of whether or not a state's human rights obligations apply both during times of war and extraterritorially remains contentious. Some states—including the United States—have taken the position that IHL displaces human rights law in times of armed conflict (the so-called *lex specialis* rule). In addition, a few states argue that human rights obligations do not apply when a state acts extraterritorially. The European Court of Human Rights, however, has held that when a state exercises effective control over a territory outside its borders, even when IHL also applies, it is under a duty to respect and ensure the rights and freedoms set out in the European Convention on Human Rights. See *Loizidou v. Turkey*, Applic. No. 15318/89 (Dec. 18, 1996) (holding that Turkey was under a duty to respect the applicant's right to property by virtue of its occupation of northern Cyprus).

8. **The United States Position.** The United States recently revised its position on this question in connection with a filing before the Human Rights Committee, a body charged with supervising state compliance with the International Covenant on Civil & Political Rights (ICCPR). In an earlier submission, when addressing whether the ICCPR applied to detainees in the so called "Global War on Terror," the United States had argued that:

The United States also notes that the legal status and treatment of such persons is governed by the law of war.

See Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, para. 130 (Oct. 21, 2005), available at <http://www.state.gov/j/drl/rls/55504.htm>. In its most recent submission, however, the United States backtracked and noted:

With respect to the application of the Covenant and the international law of armed conflict (also referred to as international humanitarian law or "IHL"), the United States has not taken the position that the Covenant does not apply "in time of war." Indeed, a time of war does not suspend the operation of the Covenant to matters within its scope of application.

The United States stated that "typically" it is international humanitarian law that regulates the conduct of states in armed conflict situations, according to the doctrine of *lex specialis*. In the next breath, however, the U.S. submission stated that:

In this context, it is important to bear in mind that international human rights law and the law of armed conflict are in many respects complementary and mutually

reinforcing. These two bodies of law contain many similar protections [such as the prohibition against torture].

See Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, paras. 506-507 (Dec. 30, 2011), available at <http://www.state.gov/j/drl/rls/179781.htm>.

**9. Conflict Classification in the Age of Terrorism.** How have other geopolitical realities in the modern era, especially during and since the Cold War, challenged the distinction between international and internal armed conflicts? How would you characterize the war in Afghanistan since 2002? In Iraq since 2003? Against Al Qaeda? Are there multiple ways one might argue this point? As in *Lubanga*, did the classification evolve with time? What hinges on conflict classification? The U.S. Supreme Court, in a challenge to the military commission system established by President George W. Bush brought by Osama Bin Laden's driver, ruled that the conflict originating in Afghanistan is, at a minimum, a non-international armed conflict to which at least Common Article 3 applies. *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-30 (2006); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality). Because the phenomenon of transnational terrorism does not easily fit within the traditional IHL classification paradigm, some commentators have argued that such a binary distinction is no longer useful. See, e.g., Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295 (2007).

**10. The War with Al Qaeda.** If the Supreme Court is correct and the United States and its coalition partners are in fact engaged in a non-international armed conflict with al Qaeda, when did that conflict commence? Consider the following timeline, which is drawn from *The 9/11 Commission Report*, available at <http://www.9-11commission.gov/report/911Report.pdf>:

- 1989: Al Qaeda reportedly formed by Osama Bin Laden.
- 1992: Al Qaeda claimed responsibility for bombing a hotel in Yemen where U.N. and U.S. soldiers were billeted while providing humanitarian relief in Somalia.
- 1993: The First World Trade Center bombing; Al Qaeda did not claim responsibility. The U.S. prosecuted several individuals, including the so-called Blind Sheik, Omar Abdel-Rahman.
- 1996: Publication of Bin Laden's *fatwā* (religious edict) entitled "Declaration of War against the Americans Occupying the Land of the Two Holy Places" in a London-based newspaper.
- 1998: Issuance by Bin Laden of a second *fatwā* declaring the killing of Americans and their allies to be an individual duty for every Muslim. In August of this year, two bombs exploded within the U.S. embassies in Nairobi and Dar es Salaam. In response to the attacks, President Bill Clinton invoked the right of self-defense under Article 51 of the U.N. Charter and ordered an armed attack against suspected al Qaeda sites in Sudan and Afghanistan. The U.N. General Assembly condemned the U.S.'s actions, but a similar Security Council resolution failed. The U.S. indicted Bin Laden for conspiracy to attack defense utilities of the United States (18 U.S.C. § 2155(b)), and for his involvement in the bombing of the U.S. embassies.

- 1999: The indictment against Bin Laden is amended to include charges for conspiracy to kill Americans.
- 2000: Members of Al Qaeda attacked the U.S.S. *Cole* in Yemen.
- September 11, 2001: Members of Al Qaeda attacked the World Trade Center and the Pentagon.
- September 18, 2001: Congress passed the Authorization for Use of Military Force (Public Law 107-40) authorizing the U.S. to use “all necessary and appropriate” force against those “nations, organizations, or persons” responsible for the 9/11 attacks.
- October 7, 2001: Air and some ground operations began in Afghanistan pursuant to Operation Enduring Freedom.

The U.S. did not attribute other attacks against U.S. targets that occurred prior to Sept. 11<sup>th</sup> (such as the 1996 attack on the Khobar Towers in Saudi Arabia) to Al Qaeda. Does this question of when the armed conflict commenced have any impact on international criminal law and the ability to prosecute these acts under domestic or international law? Are any of the acts of violence discussed above war crimes? If not, how else might they be charged under international criminal law?

**11. Children Associated with Armed Groups or Forces (the so-called Child-Soldiers).** Many conflicts, notably but not exclusively in Africa, involve the recruitment, enlistment, and deployment of child soldiers. Some such children have been forcibly abducted by rebel groups, civil defense groups, and even government forces. Others have joined voluntarily for ideological, political, or economic reasons or to seek retaliation for harms committed against their communities. Many child soldiers are used in combat; others play support roles, such as porters, spotters, couriers, spies, looters, and cooks. Girl children are particularly, but not exclusively, vulnerable to gender-based and sexual violence. In 2000, the U.N. General Assembly adopted an Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. *See* G.A. Res. A/RES/54/263 (May 25, 2000). The Protocol, which entered into force in 2002 and governs only national armed forces, sets 18 as the minimum age for recruitment and direct participation in hostilities, although youth may enlist at age 16 or above so long as certain safeguards (such as parental and informed consent) are in place. In this regard, the Protocol seeks to raise the age of recruitment and participation; Additional Protocols I and II to the Geneva Conventions and the Convention on the Rights of the Child all set 15 as the minimum age, although states are to give priority to older youth. Similarly, the ICC Statute only criminalizes the recruitment and use of children under 15. The Child Soldiers Protocol also obliges states parties to approach child soldiers with an ethos of rehabilitation. In particular, Article 6(3) states parties agree to

take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.

The Special Court for Sierra Leone (SCSL) was the first tribunal to litigate the crime of recruiting and using child soldiers. In its decision in the case against Sam Hinga Norman, the Court concluded for the first time that the crime entailed individual criminal responsibility under customary international law, and indicted Norman for recruiting children under 15. *Prosecutor v. Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction, 31 May 2004, SCSL-2003-14-AR72(E). The Court subsequently prosecuted several individuals for the same crime, including, most recently, Charles Taylor, Liberia's former president. See *Prosecutor v. Charles Ghankay Taylor*, Judgment, 18 May 2012, SCSL-03-01-T.

Child soldiers were also the subject of the International Criminal Court's first judgment: Thomas Lubanga Dyilo was convicted on 14 March 2012 of "enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities", and sentenced to 14 years of imprisonment. See *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment, 14 March 2012, ICC-01/04-01/06.

For more information on child soldiers, see *Child Soldiers International*, <http://www.child-soldiers.org/home>. For a nuanced discussion of the phenomenon of child soldiers, and the way in which they tend to be essentialized as either hapless victims or violent sociopaths, see Mark Drumbl, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY (2012). The CRC and its Child Soldiers Protocol are directed at states; what rules govern, or should govern, the participation of young people in non-state armed groups?

**12. Girl Soldiers.** The role of women and girl soldiers in conflict is often overlooked. Non-combat functions undertaken by many girl (and boy) soldiers—cooking, cleaning, transport, entertainment—may not trigger treaties that proscribe the "direct participation" of children in activities whose purpose is to "cause harm to the personnel or equipment of the enemy forces." As such, they are often left out of Demobilization, Disarmament, and Reintegration (DDR) programs aimed at child soldiers in the post-conflict period. For a discussion, see Noëlle Quénivet, *Girl Soldiers and Participation in Hostilities*, 16 AFRICAN J. OF INT'L & COMP. LAW 219 (2008).

**13. Child Soldiers & The United States.** There are 144 parties to the Optional Protocol on Child Soldiers, including the United States, which ratified the treaty in 2002. The United States—along with Somalia—is not a party to the parent Convention on the Rights of the Child. In 2008, President George W. Bush signed into U.S. law the Child Soldier Accountability Act, which penalizes the recruitment and use in combat of children under the age of 15. See 18 U.S.C. § 2442. At the same time, the United States has held child soldiers at the Guantánamo Bay Naval Base. Omar Khadr, for example, was seized at age 15 and has been in custody for upwards of 10 years. He is accused of throwing a grenade that killed U.S. Special Forces during a firefight. He was subjected to harsh interrogation practices while still a minor. His Department of Defense case file is available here: <http://www.defense.gov/news/commissionsKhadr.html>. After entering a plea, he is slated to be released to Canada, where he was born. The United States also released Mohammed Jawad, another child soldier held in Guantánamo, to his native Afghanistan. Jawad was between 12 and 16 when he was seized. For a discussion of the *Khadr* case, tracing its treatment in multiple fora including U.S. federal courts asserting *habeas* jurisdiction, U.S. military commissions, Canadian courts, and U.N. human rights institutions, see Richard Wilson, *Omar Khadr: Domestic and International Litigation Strategies for a Child in Armed Conflict*, 11(1) SANTA CLARA J. INT'L L. \_\_\_\_ (forthcoming 2013).

*In discussing the conflict classification and the changes over time in the conflict in Ituri, it can also be useful to discuss other examples of how conflict classification can change over time. The war in Afghanistan is a good example. Talk with the students about the stages of the conflict and the relevant actors at various times from before September 11, 2001 through the present. Before 9/11, there was a NIAC in Afghanistan between the Northern Alliance and the Taliban. In October 2001, the United States began bombing Afghanistan, triggering an international armed conflict between the United States and Afghanistan. By December 2001, the Taliban was defeated (at least for the time) and the government of Hamid Karzai took over (some date this to June 2002, depending on the criteria one uses to determine when the Karzai government was fully in power). At that time, the U.S. and other coalition forces were no longer in conflict with the government of Afghanistan but were assisting the government of Afghanistan – under the latter's invitation – in its non-international conflict with the Taliban (now insurgents). For the ensuing decade, the conflict has remained a NIAC, between the government of Afghanistan and the international coalition on one side and the Taliban and any other insurgents on the other. At the same time, the U.S. continues to fight against al Qaeda and other terrorist groups. Several commentators (and the U.S. government) view that conflict as a separate NIAC between the U.S. and one or more transnational terrorist groups.*

*The conflict in the DRC highlights the “messiness” of many conflicts in ways that challenge the formal IAC-NIAC framework by making it difficult to identify the dividing lines between international and non-international. Beyond the specific application of frameworks to the conflict in the DRC, this case offers a useful opportunity to explore with the students broader questions about the purposes of IHL – ask students to think about whether IHL should apply to all situations of conflict, regardless of whether they fit neatly or well into the existing two-part framework. How should challenging questions of classification be resolved? Should courts err on the side of greater applicability and be over-inclusive of IACs or err in the opposite direction? What would be the consequences in each case? Issues involving occupation and state responsibility inject additional considerations here when thinking about the range of factors and issues that courts should take into account in analyzing and classifying conflict, including the linkage between state responsibility and individual criminal responsibility of high-ranking leaders. Students should think about which factors are the most important and why, and how different factors and characteristics of conflict situations interrelate. In doing so, it is equally important to think about why IHL exists and what its key goals are – and to think about how those foundational issues should drive more specific determinations about legal application and conflict classifications.*

*With regard to occupation and human rights, several recent cases have tackled issues in this area and may prove useful in fleshing out the classroom discussion. One underlying issue is the extent of the extraterritorial application of human rights law, outside of any situations of occupation. This issue arose with regard to targeting in the *Bankovic v. Belgium* case before the European Court of Human Rights (ECHR), in which Serb victims of the NATO bombing campaign in 1999 sought to hold NATO countries responsible for violations of human rights in the course of the operation. Application No. 52207/99, *Decision on Admissibility* (December 12, 2001) The ECHR ruled that the NATO countries did not have effective control over the area of the bombing and therefore did not have any extraterritorial human rights obligations. Adding the layer of occupation changes the calculus, however, given the control administered by occupying forces. How much so remains a point of contention. The ECHR has recently taken a broad view*

*of the application of human rights law to occupying powers in a series of cases stemming from British operations and occupation in Iraq. In Al Skeini, the families of five Iraqis killed in the course of military operations and one Iraqi killed in British detention sued in UK courts for wrongful death. Application no. 55721/07, Judgment (July 7, 2011) The UK House of Lords held that British human rights obligations under the European Convention on Human Rights did apply to the death of the individual in detention, because he was in British custody at the time, but did not apply to the deaths of the individuals during military operations because the UK did not have sufficient control to apply human rights law extraterritorially. The ECHR reversed that decision and held that human rights obligations applied to all six situations and mandated that human rights law govern even in the event of firefights and other hostilities in occupied areas. Finally, in Al Jedda, the UK House of Lords ruled that the indefinite detention of British/Iraqi detainee in Basra was lawful because the United Nations Security Council Resolution specifically authorized such detention and therefore trumped any human rights obligations to prevent arbitrary detention under the European Convention on Human Rights. Application no. 27021/08, Judgment (July 7, 2011). The ECHR reversed, holding that the UN Security Council Resolution did not displace human rights obligations under the European Convention.*

*The question of whether IHL applies to acts of terrorism (the subject of Notes 9 & 10) is a difficult one. The issues stemming from the US conflict with al Qaeda and other terrorist groups raise questions with regard to both the existence of an armed conflict (Section II above) and the characterization or classification of that conflict if it indeed exists (Section III here). For purposes of clarity, we have kept these two aspects together; they may also be partly covered during Section II, as it is to be expected that students will raise questions then, but it is nevertheless generally preferable to tackle the subject after having covered conflict classification.*

*In addition, the ICTY in particular has grappled with the question of when acts of terrorism can be “counted” toward the existence of an armed conflict (see, e.g., Prosecutor v. Bošković). This issue is more acute with respect to the effort by the United States to prosecute detainees in what used to be called the Global War on Terror before military commissions, which by definition have jurisdiction only over violations of the law of war. Defendants here have begun arguing that the commissions lack jurisdiction over them because the law of war does not apply to their actions or because their acts of violence were not directed against so-called “protected persons” (civilians or combatants who are hors de combat). With regard to the first argument, consider, for example, Attorney General Eric Holder’s original decision to prosecute the so-called 9/11 defendants in federal court in New York for acts of terrorism in violation of Title 18. This may have been due in part to the recognition that the defendants may have had a credible jurisdictional argument that the 9/11 attacks did not constitute a war crime because they were not committed within the context of an extant armed conflict. (In the aftermath of the announcement that charges had been filed against them in military commissions, it can be useful to discuss the arguments that may be used by both the defendants and the military commission prosecutor regarding the commission’s jurisdiction). Indeed, this argument has even greater force with respect to other Guantánamo detainees, such as Abd al-Rahim al-Nashiri. Nashiri is being tried by military commission for pre-9/11 acts of violence including the bombing of the U.S.S. Cole in Yemen, which injured only U.S. service members and no civilians. It is useful here to raise with the students questions regarding the temporal parameters of the conflict with al Qaeda, as noted in question #10 of this section. After discussing the timeline of attacks referenced from The 9/11 Commission Report, consider also looking at Justice Thomas’ dissent in the Hamdan case, in*

*which he argues that the conflict with al Qaeda dates back to at least 1996. Urge the students to think about the types of factors you discussed with regard to the threshold for application of the law of NIAC – intensity, organization, nature of the government response and others – and how they might be applied to the facts of the timeline and those Justice Thomas presents.*

#### *Suggested readings*

- Andrew J. Carswell, *Classifying the Conflict: a Soldier's Dilemma*, 91 INT'L REV. RED CROSS 143 (March 2009)
- Marco Sassoli and Laura M. Olson, *The Decision of the ICTY Appeals Chamber in the Tadić Case: New Horizons for International Humanitarian and Criminal Law?*, INT'L REV. RED CROSS No. 839, 733 (September 2000)
- Geoffrey S. Corn and Eric Talbot Jensen, *Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISR. L. REV. 46 (2009)
- Mary Ellen O'Connell, *INTERNATIONAL LAW AND THE "GLOBAL WAR ON TERROR"*, (Pedone 2007)
- Richard J. Goldstone, *Symposium: from Nuremberg to Abu Ghraib: the Relevance of International Criminal Law to the Global War on Terror*, 14 MICH. ST. J. INT'L L., 1 (2006)

#### **IV. Means and Methods of Combat**

*Most texts in ICL cover the war crimes associated with the so-called Geneva Law, as opposed to the so-called Hague Law addressed to the means and methods of war. While cases involving the direct targeting of civilians in the absence of military objectives are often relatively straightforward, it is much more difficult for tribunals to adjudicate situations implicating the principle of proportionality. These arise when a warring party targets a proper military objective but there is collateral damage nonetheless. Prosecutors are reluctant to bring such charges, in part because applying the facts to the law tends to be quite technical and reasonable minds can differ quite sharply over whether a particular military advantage was sufficiently weighty to justify the risk to civilians. As such, there is a dearth of criminal cases addressing the principle of proportionality and operational targeting. Most importantly, students must come away from this unit understanding that not all civilian deaths are war crimes. They should also have an appreciation of the difficulty of adjudicating ICL in a complex operational environment.*

International humanitarian law places limits on the use of force in pursuit of a military objective. These principles first found expression in the 1899 and 1907 Hague Conventions and their annexed regulations. Subsequent treaties in this tradition regulate or prohibit particular weapons systems, such as the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; the 1993 Chemical Weapons Convention; and the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction. Additional Protocol I to the 1949 Geneva Conventions expanded upon many of the Hague Convention's basic principles, signaling the convergence of Hague and Geneva Law. Although

not all states (including the United States and Israel) have ratified Protocol I, many of its means and methods provisions are considered to be customary international law.

The Hague treaties and their progeny regulate the use of force within armed conflicts with reference to the principles of humanity, military necessity, distinction, and proportionality. While these four principles obviously overlap, they each provide distinct guidance for the regulation of armed conflict. The principle of humanity, for example, prohibits the use of means and methods of warfare that produce unnecessary suffering. The principle of military necessity requires that armed attacks be designed and intended to defeat the opponent militarily. This principle can be traced at least as far back as the 1868 St. Petersburg Declaration, which declared in its preamble that “the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.”

In this vein, the principle of distinction requires that parties to an armed conflict distinguish between legitimate military targets, such as combatants and their installations, and illegitimate targets, such as civilians or cultural property. Article 48 of Protocol I provides that “Parties to the conflict shall at all times distinguish between the civilian population and combatants.” To this end, Article 52(2) of Protocol I states:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

The definition of military objective has two elements: (a) the target must make an effective contribution to military action, and (b) its destruction must offer a definite military advantage in the circumstances at the time. The concept of military advantage is evaluated with reference to the conflict as a whole and not just within the context of a specific attack.

Civilians and civilian objects are immune from direct attack. However, civilian objects lose their protected status if they are used to make an effective contribution to military action.

Relatedly, Article 51(4) of Protocol I prohibits indiscriminate attacks, which are defined as:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

In other words, an attack is considered indiscriminate if it is of a nature to strike military objectives and civilians or civilian objects without distinction.

Article 57 requires that those who plan or decide upon attacks must “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects.” Moreover, according to Article 58, warring parties may not co-locate military objectives and civilian objects. The principle of distinction has also been interpreted to prohibit certain types of weapons that, by their very nature, do not discriminate among lawful and unlawful targets.

The principle of proportionality under IHL states that even when military force is used against a proper military objective in the vicinity of civilians or civilian objects, parties must refrain from any attacks in which the expected civilian casualties will be excessive in relation to the anticipated military advantage gained.\* If a choice of weaponry, tactics, or force levels is available, the commander or combatant must choose the approach that will cause the least incidental harm. Civilian casualties—euphemistically referred to as “collateral damage”—in and of themselves are thus not necessarily unlawful. Rather, it is only deliberate attacks and attacks that cause damage to civilians and civilian objects that is excessive in relation to the anticipated military advantage of the attack that are prohibited. This analysis mandates a sliding scale: more “collateral damage” is tolerated as the anticipated military advantage increases. If there is no risk to protected persons or objects by an attack, no proportionality analysis is required. Moreover, the assessment of legality is based on the information available at the time of attack.

Individuals who plan and implement attacks are to take additional precautions in the conduct of military operations to protect the civilian population per Article 57. To this end, they must: “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.” They must also cancel or suspend an attack

if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Finally, “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”

Certain violations of these principles are designated war crimes in Article 3 of the ICTY Statute concerning “Violations of the Laws or Customs of War,” which include, but are not limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

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\* Note that the *jus ad bellum* contains a principle of proportionality as well. With regard to the exercise of self-defense, proportionality requires that any response to an armed attack be calibrated to repel the original attack and prevent future attacks, and is not concerned with civilian casualties. In the *jus in bello*, the principle of proportionality applies to particular attacks, a smaller unit of analysis, and focuses on minimizing harm to innocent civilians. As explained in the text above, it aims to ensure that excessive force is not employed in relation to the military advantage sought and the risk to civilian casualties (so-called collateral damage).

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

Similar crimes are set out in Article 8(2)(b) (governing IACs) and 8(2)(e) (governing NIACs) of the ICC Statute.

Many of the war crimes cases litigated or pending in international and hybrid courts concern violations of so-called Geneva Law—deliberate harm to protected persons. These include cases alleging the mistreatment of civilians and prisoners of war in captivity. *See, e.g., Prosecutor v. Delalić, et al.*, Case No. IT-96-21-A, Judgement (Feb. 20, 2001) (concerning the mistreatment of Bosnian Serbs detained in the Čelebići Camp). There are a number of additional cases concerned with the direct targeting of civilians. *See, e.g., Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement (July 29, 2004) (reversing the Trial Chamber’s findings that the defendant ordered his troops to attack a village devoid of military objectives). Abuses against civilians are often – unfortunately – highly prevalent in armed conflict situations. By contrast, there are very few cases addressed to the challenge inherent in adjudicating the principle of proportionality following an attack against a military objective that has also resulted in harm to civilians or civilian objects. Such cases require a prosecutor to meet a heavy burden; he or she must prove, beyond a reasonable doubt, that—under the circumstances at the time—the force used was excessive in relation to the military advantage anticipated and the potential risk to civilians.

A notable exception can be found in the opinion below concerning Operation Storm, an effort to retake parts of Croatia from Serbian forces. Before you read the excerpt, review Articles 48-52 and 57-58 of Protocol I. The defendant in question was charged under Articles 3 (war crimes) and 5 (crimes against humanity) of the ICTY Statute (*see supra*) with, *inter alia*:

1. Deportation and forcible transfer as a crime against humanity as a result of “the threat and/or commission of violent and intimidating acts, the effect of which was to displace, transfer or deport the Krajina Serbs from the area (including causing them to flee or leave the area)”;
2. Wanton destruction of cities, towns or villages, or devastation not justified by military necessity as a war crime.



***Prosecutor v. Ante Gotovina, et al.,***  
**Case No. IT-06-90-T, Judgement (April 15, 2011)**

## 1. Introduction

1. The Accused, Ante Gotovina, Ivan Čermak, and Mladen Markač, are jointly charged in the Indictment with crimes against humanity and violations of the laws or customs of war allegedly committed from at least July 1995 to about 30 September 1995 against the Serb population in the southern Krajina region of Croatia (see map above).

2. According to the Indictment, by the time Croatia declared independence on 25 June 1991, an armed conflict had erupted in certain areas of Croatia between the Yugoslav National Army (JNA) and other Serb forces on the one hand and the Croat armed forces on the other. By the end of 1991, the JNA and various Serb forces controlled approximately one-third of the territory of Croatia. On 21 December 1990 the Croatian Serbs announced the creation of a Serbian Autonomous District of Krajina, which on 19 December 1991 proclaimed itself the Republic of Serbian Krajina (RSK) and appointed its own president, Milan Martić.

3. According to the Indictment, by at least July and early August 1995 Croatian leaders, officials and forces conceived, planned, established, and implemented a military operation called “Operation Storm” to re-take territory in the Krajina, a part of the area in Croatia that had been self-proclaimed as the RSK and that was largely inhabited by Serbs. The major part of the military operation began in full on 4 August 1995, and on 7 August 1995 the Croatian government announced that the operation had been successfully completed. Follow-up actions allegedly continued until 15 November 1995. The Prosecution alleges that before, during, and after the major military operation of Operation Storm there was an orchestrated campaign to drive the Serbs from the Krajina region. The Prosecution further alleges that from at least July 1995 to about 30 September 1995, Croatian government, military, police, security and/or intelligence forces persecuted the Krajina Serbs through deportations and forcible transfers; destruction of Serb homes and businesses; plunder and looting of Serb property; murder; the

shelling of civilians and cruel treatment; unlawful attacks on civilians and civilian objects; the imposition of restrictive and discriminatory measures; discriminatory expropriation of property; unlawful detentions and disappearances.

4. The Prosecution alleges that from at least 4 August 1995 to 15 November 1995, Ante Gotovina was the Commander of the Split Military District (MD) of the Croatian Army (HV) and the overall operational commander of Operation Storm in the southern portion of the Krajina region. It further alleges that from at least July 1995 to about 30 September 1995, he participated in the planning and preparation of the operational use of Croatian forces in Operation Storm and continuing related operations and actions. The Prosecution also alleges that he possessed effective control over all units, elements and members of the HV that comprised or were attached to the Split MD, and other forces that were subordinated to his command and operated and/or were present in the southern portion of the Krajina region during Operation Storm. As Commander of the Split MD, he was responsible for maintaining order among, and disciplining and supervising the conduct of, his subordinate personnel. \* \* \*

79. In orders dated 2 August 1995, Gotovina and Marko Rajčić [chief of artillery of the Split MD] ordered the formation of artillery groups [including TS-3 within Operation Group North and TS-4 within Operation Group Šibenik]. To provide artillery support, Gotovina further ordered the formation of artillery groups within the units carrying out the combat operations, using the units' own artillery resources. These artillery groups were to engage in the focal tasks of their respective units. Gotovina ordered that ammunition be provided to artillery at their initial positions and further supplies to be provided based on consumption, within the amounts authorized. Rajčić provided further details on the organization of the Split MD, in particular with regard to its artillery units. \* \* \* The artillery groups were tasked with providing artillery support for infantry brigades and regiments by firing at targets within the composition of enemy brigades and combat groups, as well as with firing at military objectives, such as targets in Knin and in the operative depth of the enemy's defence. \* \* \* When firing at strategic targets and targets in the operational depth, such as those in Knin, the artillery groups were under the command of the Split MD Commander Gotovina, who operated through Rajčić. When firing at targets at the closer tactical level, or within positions of the enemy brigades, the commanders of units for which the artillery group was providing support decided the targets. These commanders could request and direct the fire, based on their plans and lists of targets. If new targets were discovered at the tactical level, this would be communicated to the unit that was capable of engaging the new target and neutralizing it. If a lower level commander sought artillery support, he would contact his superior command, along his axis of attack. When a request for support reached Rajčić, he would call the commander of an artillery group and assign it to provide support to the requesting unit. According to Rajčić, this resource sharing ensured that the Split MD was always in full control and maintained constant oversight of firing upon in-depth targets, so that it could react promptly and stop irrational action or fire if necessary. The HV planned for around 75 per cent of the HV artillery to focus its fire on the forward defence line of the enemy, at a tactical depth. The HV planned for the remaining 25 per cent to open fire into the operational depth, at strategic targets. The commander of each artillery group was bound to prepare a written report \* \* \* of the targets they fired on at the tactical level. In Zadar, where Gotovina had set up a group of officers who coordinated and oversaw the execution of orders, the information would be analyzed, and if there were any disturbances, then the information would be forwarded to Rajčić and Gotovina at the main command in Sajkovići.

#### 4.4 Unlawful Attacks On Civilians And Civilian Objects

1161. The Indictment charges the Accused with unlawful attacks on civilians and civilian objects as underlying acts of the crime against humanity of persecution, from at least July 1995 to about 30 September 1995, in the Indictment municipalities. The evidence received by the Trial Chamber has been focused on a number of towns, with the overwhelming majority of evidence dealing with Knin during the first days of Operation Storm.

1162. The Trial Chamber has received evidence with regard to artillery projectiles impacting on or nearby Kistanje, Kaštel Žegarski in Nadvoda municipality, and Polača and hamlets in the Plavno Valley, both in Knin municipality, on 4 and 5 August 1995. The evidence is insufficient for the Trial Chamber to determine the number of projectiles fired at these towns or, with only a few exceptions, to determine the times and locations of impacts of the projectiles. Moreover, the evidence insufficiently establishes whether there was an Serbian Army of Krajina (SVK) presence in these towns or whether there were other objects offering a definite military advantage if fired at. The towns are not mentioned in the HV's artillery orders by Gotovina, Rajčić, Firšt, or Fuzul. The artillery reports which the Trial Chamber has received in evidence do not provide further details as to what the HV fired at in or nearby these towns. Under these circumstances, the Trial Chamber cannot determine what the forces firing artillery projectiles which impacted on or nearby the aforementioned towns targeted. The Trial Chamber does not consider an unlawful attack on civilians or civilian objects in these towns to be the only reasonable interpretation of the evidence. Instead, the Trial Chamber considers that the evidence allows for the reasonable interpretation that the forces who fired artillery projectiles which impacted on or nearby these towns were deliberately targeting military targets. Under these circumstances, the Trial Chamber will not further consider these incidents in relation to Count 1 of the Indictment. \* \* \*

1164. [The Prosecution's expert witness Harry Konings, a Lieutenant Colonel in the Royal Netherlands Army,] testified about the properties of the different types of artillery weapons, including with regard to their ranges and rates of fire. Specifically, Konings testified that Howitzers are high angle indirect fire weapon systems, whose projectiles follow a ballistic trajectory after being fired from the barrel at an angle. 155-millimetre Howitzers can fire shells with a rate of fire of two to three rounds per minute with a well-trained crew, although sustained fire is generally one round per minute. 130-millimetre Howitzers are comparable to 155-millimetre Howitzers and have ranges of up to 28 kilometres. Mortars are characterised by the delivery of high-angle fire and a high rate of fire of up to 10 or more rounds per minute, over a relatively short range. The 120-millimetre mortar has a rate of fire of four to six rounds per minute with a range of up to eight kilometres. Rockets have their own propulsion systems and are fired from rocket launchers, which tend to have high rates of fire. 128-millimetre rocket systems have maximum ranges of between 12 and 22 kilometres.

1165. With regard to the accuracy of artillery weapons, Konings testified that artillery, mortar and rocket systems are designed to combat area targets, such as concentrations of forces, supply areas, larger command posts or other areas of 100 to 150 metres, with fired rounds landing apart from each other over a certain area, providing area coverage. These systems are too inaccurate to engage smaller, point targets, such as a single vehicle or a command post of less than 50 by 50 metres, and a high number of projectiles would have to be fired at a point target to destroy or neutralize it. For example, Konings noted that a single

command post may be less than 50 by 50 metres, while the probable error of a 155-millimetre projectile at long range was also 50 metres. In general, the rocket systems used in 1995 were less accurate than the artillery systems, such as Howitzers or mortar systems. The accuracy of conventional fire support systems with unguided ammunitions, such as Howitzers and mortars, is affected by internal characteristics, such as the differences between individual guns, known as gun-to-gun variations, which lead to probable errors in range and deflection. For example, Konings testified that these internal characteristics can lead to differences in the location of impact of an unguided 155-millimetre shell fired at 14,5 kilometres with a certain charge of up to 55 metres in range and five metres in deflection. Their accuracy is further affected by external factors, such as air temperature and density, wind speed and direction, flight time, muzzle velocity, propelling charges temperature, and the weight and height of the projectile. By measuring the applicable data on external factors, the variations can be corrected. The probable errors increase the further the target is from the fire unit. For example, Konings testified with regard to the location of impact of an unguided 155-millimetre shell fired at 14,5 kilometres with a certain charge, that an increase of muzzle velocity by one metre per second would cause the shell to impact 26 metres further; a tail wind of one knot would cause the shell to impact 18 metres further; a lower or higher air temperature causes changes of 20 metres per degree; air density can lead to a difference of 60 metres and the spinning movement of the shell can cause a difference of 20 metres, if not corrected. Accuracy is also affected by the precise locations of fire unit and target coordinates. Depending on whether it uses ten, eight or six digits, a grid system of coordinates gives an accuracy of up to one, ten or 100 metres. In case one of the coordinates is inaccurate, the commander of an artillery unit can adjust the fire, by firing single shells in order to close in on the target, until the 50-metre mark has been reached, and then firing for effect. \* \* \*

1175. [Defense expert Geoffrey Corn, a professor and IHL expert] testified that Knin was a critical command, control, and communication centre serving enemy forces, as well as a logistical centre. Corn considered the use of Multi-Barrel Rocket Launchers (MBRLs) against the SVK Main Staff headquarters and the Northern barracks to be understandable, as they presented critical command, control, communications, and intelligence targets. Multiple barrel rocket launchers could degrade these targets by destroying communications antennas, cables, and equipment, while enemy forces required to move in and around the area would be disrupted. As commander in chief and President of the RSK, Martić was a lawful military objective, and although the probability of killing or disabling Martić by artillery attack was limited, if Gotovina believed Martić to be an important component in SVK decision-making, the potential operational advantage in disrupting the SVK command and control structure would be substantial. Further, indirect, harassing fire at the TVIK factory, an apparent logistics supply facility and ammunition components production facility, would degrade the enemy's ability to use the resources stored there to re-supply forces engaged in combat. The Knin police station was also a valuable military objective, because police forces had been mobilized to participate in hostilities and harassing fire could demoralize police forces unaccustomed to combat operations, as well as disrupt the communication capability in the station, which could have been used to augment military communications disrupted by other attacks. \* \* \*

1181. On 1 August 1995, Rajčić attended a planning meeting in Split for Operation Storm with Gotovina and [others]. At the meeting, the commanders were informed of the upcoming operation and the intended implementation of the Chief of the HV Main Staff's

directive. At the meeting, Gotovina emphasized that the operation was aimed only at enemy soldiers and that the U.N. Protection Force (UNPROFOR) facilities near SVK positions should not be endangered. He also warned those present to instruct their subordinates that enemy prisoners of war and civilians should receive proper treatment and protection. He further stressed that there was a shortage of ammunition, so the artillery needed to be as precise as possible and could only target the military objectives that provided the highest military advantages. According to Rajčić the HV had less ammunition at its disposal than had been anticipated during the planning stage.

1182. Following the 1 August 1995 meeting, Rajčić prepared the artillery engagement plan, by reviewing the source lists of potential military objectives and taking into account the available ammunition. The basis for the development of target lists was a database from which the targets were chosen. The HV updated and reviewed its source lists on a daily basis, based on information from the intelligence departments. \* \* \* Certain military objectives did not appear on these source lists, as it had been determined beforehand that the collateral damage would be too high. For instance, the fuel station near the Atlagic Bridge over the Krka River in Knin was a military objective that did not appear on the source list, as engaging it with artillery could result in contaminating the river, which was a source of drinking water. Further, the source lists included items that served as visual reference points, such as churches, and were not military objectives to be fired upon. The lists also included structures for which the HV estimated that there was a high chance that enemy military forces may use them during the battle. Smaller facilities that were not visible from the altitude the HV's unmanned drones flew at were named after the visible dominant facilities in their vicinity.

1183. According to Rajčić, the HV discussed the protection of the civilian population and the instructions were as they had always been in operations he had participated in with Gotovina, that civilians were not to be targeted and civilian casualties and damage to civilian property should be minimized. Gotovina told Rajčić that with regard to using artillery in the civilian-populated areas of Knin, Benkovac, Obrovac and Gračac, maximum precision and proportionality should be respected. According to Rajčić, Gotovina was aware of the relative inaccuracy of artillery and knew that the HV had trained, experienced artillery troops who were able to exceed standards of precision in artillery fire. Gotovina also informed Rajčić of his concerns about the probable range of errors of the artillery weapons should the deviation of a missile or shell exceed the size of the target, specifically with regard to strategic level targets such as the SVK Main Staff and communications centre. Rajčić told Gotovina that 130-millimetre guns and 122-millimetre launchers were not capable of being fired at the SVK Main Staff and the communications centre and hitting only those targets, without causing damage to the surrounding area. Gotovina told Rajčić to analyse the possible collateral damage of projectiles missing these targets, as the SVK Main staff was a highly interesting target in combat.

1184. Rajčić analyzed the possible collateral damage of firing at targets in Knin and concluded that the harm to citizens and material damage to surrounding buildings would be "to a lesser extent." In coming to this conclusion, Rajčić considered the use of contact-fuse shells, which cannot pierce concrete buildings, as well as the characteristics of the targets, their area, their surface area, the surrounding buildings, and the quality of construction. He also considered the intelligence information that there had been substantial emigration of civilians from Knin and that there was a curfew in place in Knin, which affected the expected number of

civilians on the streets and in buildings at 5 a.m. According to Rajčić, when using artillery against military objectives in urban areas, the choice of the time of day was an important consideration in minimizing collateral damage to civilians, when deciding the weapon, type of fire and amount of ammunition. According to Rajčić, the selection and targeting within the tactical and operational deployment of the enemy was preceded by a thorough intelligence assessment of the terrain, deployment and enemy strength, and weather conditions. Rajčić made the final selection of military objectives by considering both military necessity and possible collateral damage and civilian casualties. The choice of weapon to be fired at a certain target was determined by range and by which weapon would cause the least collateral damage while still achieving the military advantage. It was decided that the MBRLs were going to fire early in the morning. Rajčić submitted the artillery plan to Gotovina on 1 August 1995. \* \* \*

1188. According to Rajčić, the formulation “putting the towns under fire” meant that the targets in those towns were to be under constant fire, which referred to a combat activity known as harassing fire and disruptive fire on enemy combat elements. Rajčić testified that it was clear to all commanders of subordinate units that this meant that these towns contained important military units, facilities and commands, and referred to firing at previously selected targets with specific coordinates, according to the existing plans and source lists. The artillery units received a textual tabular segment of the attachment for artillery and the groups also had a list of targets with the coordinates for the military objectives, based on which the commanders of the artillery groups drew their operations maps. The lists of military objectives were re-checked prior to the operation to ensure the accuracy of the x-y-z coordinates. On 3 August 1995, Rajčić visited the Chiefs of Artillery at the various OGs, as well as the Command of each artillery group, to coordinate planned artillery targets and check that everyone understood their tasks. According to Rajčić, the HV did not intend to use artillery to force civilians to flee the Krajina. Instead, the HV’s plan was to shock, disorient and disrupt the leadership and communications of the SVK. The plan relied heavily on artillery, as well as the synchronization of fire and the element of surprise. In order to generate the strongest effect, the first strike had to be powerful, simultaneous, and coordinated, firing on targets on the enemy front line of defence and in depth on commands and communication centres.

1189. The Trial Chamber has received evidence on the targets identified by the HV, including in Knin, prior to Operation Storm primarily from Rajčić, who testified that on the tactical level, the targets for Operation Storm were command posts of brigades; firing positions of the artillery; communication centres and relay nodes; depots for military equipment, combat reserves and troops; roads and bridges; fortified combat features and enemy defence trenches; and any targets that would emerge during combat. The targets at the tactical level were in the enemy disposition, whereas the targets established for the Corps Artillery at the operational level were in the settlements of Knin, Benkovac, and Gračac. On the operational level, the firing targets were the SVK Main Staff, the Ministry of Defence headquarters, the SVK communications centre, the bridges and the railway station, all in Knin; the police stations in Knin and Gračac; the military barracks facilities in Knin and other towns; and cross-roads in the towns of Knin, Drvar, Benkovac, and Gračac.

1191. According to Rajčić, the Main SVK headquarters, the adjacent communications centre, and the SVK 7th Krajina Corps headquarters in the Northern barracks were the main and highest pay-off targets in Knin. These targets needed to be hit with all available assets, as they were critical to the success of the entire operation. The HV also selected Milan Martić as a

target in Knin and information regarding his location and residence was constantly updated, based on surveillance and intelligence efforts. Although there was no clear line of sight from the HV's positions to the settlement of Knin before Operation Storm, HV intelligence officers determined the coordinates of Martić's apartment (designated KV-610) based on sources which Rajčić believed may have included aerial photography by pilotless drones, cadastral [land ownership] plans, and information spread by word of mouth. Martić's apartment was located in an otherwise civilian apartment building. According to Rajčić, the HV took the rules of distinction and of proportionality into account when deciding whether to target the apartment block, where other civilians may have been present. In this context, Rajčić considered the information that the SVK had an evacuation plan and a plan on how to take care of civilians, that the buildings in the area were of good quality, and that the residents would try to take care of the population in the area. Rajčić opined that it would have been unacceptable to fire at the residential complex with 122-millimetre MBRLs, because they would damage the buildings around the target, due to their higher density of projectiles covering a broader area. \* \* \*

1228. On 30 July 1995, HV Rear admiral Davor Domazet reported that the HV's taking of Grahovo, in Bosnia-Herzegovina, on 28 July 1995 had created conditions for it to threaten Knin directly, which had caused local Serbs to fear an HV attack on the entire RSK. Domazet further stated that more and more people were leaving the Krajina area and moving to the Republika Srpska and the FRY [former Yugoslavia], although the latter had issued a decree closing its borders with Bosnia-Herzegovina and Croatia out of fear of a mass influx of people from the Republika Srpska and RSK. Those who could not leave were preparing shelters in houses, and evacuation routes had been designated. \* \* \*

1229. Alain Gilbert [posted in Knin as United Nations Confidence Restoration Operation (UNCRO) General Alain Forand's aide-de-camp] testified that on or around 29 July 1995 up until the eve of Operation Storm, the population of the town of Knin began to leave and there was a state of panic there. Witness 6 testified that by 4 August 1995, between five and ten per cent of the population of Knin had already left the city. Some had left by private vehicles and some on a bus four or five days before Operation Storm. Robert Williams [an intelligence officer for the Canadian contingent of UNPROFOR] testified that he could not clearly assess the amount of civilians present in Knin at the time of his visit on 3 August 1995, but he recalled that he did not see many civilians on the streets.

1230. Murray Dawes [a former civilian UN accommodation officer] testified that the majority of Knin's inhabitants were elderly Serbs and Serb women and children, since most of the Serb men were out at the front lines. \* \* \* Dawes further testified that based on information relayed to him by Serbian municipal employees working in the property recorder's office, he knew that, just prior to the end of July 1995, Knin's population expanded from 15-17,000 to 30,000 people. According to the witness, as the HV took over Grahovo on 28 July 1995 and proceeded along the eastern side of Knin, Knin's population swelled noticeably with people leaving their local villages. The population in Knin rose to a level which seemed to the witness greater than what the town was able to accommodate in such a short amount of time. The individuals coming into Knin, immediately preceding Operation Storm, were also mostly elderly Serbs, Serb women and children, not fighting age males. Dawes recalled seeing individuals living in makeshift camps along some of the roads in town. Andrew Leslie [Chief of Staff of UNCRO Sector South in Knin] testified that Knin had a population of about 35,000 people immediately prior to 4 August 1995 although it was around 20,000 or 25,000 in March 1995. The

reason for this increase was the rise of tensions and the expectation of imminent hostilities that had made people from villages and towns closer to the zone of separation move into Knin. According to Leslie, a part of the local population from Knin had left during roughly the week prior to 4 and 5 August 1995 but this did not constitute a sizeable reduction in the population. In his report of 12 August 1995, Leslie noted that 1,000 persons had fled Knin by the time of the attack.

1231. Petar Pašić [mayor of Knin] testified that he prepared a letter to the citizens of Serb ethnicity in Knin, which he sent to the Croatian news agency and which was broadcast on Croatian television and radio and on a Serbian news agency on 2 August 1995, telling the Serbs to renounce their dissident authorities and to acknowledge the Republic of Croatia as their sole homeland. Pašić's letter stated that Knin had been flooded with 35,000 people and that in the preceding days, barriers had been erected around the town preventing the population from leaving in light of the Krajina's likely collapse.

1232. Witness 54 testified that in the days before Operation Storm, he saw refugees in Knin coming from the villages of Strmica and Golubić in Knin municipality and other villages just below Mount Dinara, who told the witness they were escaping the shelling of these villages. Hussein Al-Alfi, the UN Civil Affairs Coordinator, later renamed Political and Human Affairs Coordinator, for Sector South in Knin from June 1995 to January 1996, testified that in early August 1995, the RSK declared a curfew by radio, forbidding residents from being outside before 6 a.m. On 4 August 1995, around 4:05 a.m., Al-Alfi was taken to the UN compound in Knin. He saw no civilians on the streets of Knin at that time. \* \* \*

1244. According to Rajčić, during Operation Storm, the HV fired 122-millimetre rockets at the SVK Main Staff in Knin, the headquarters of the RSK Ministry of Defence, which was in the same building, and a roundabout intersection in the centre of Knin. The HV also fired at the communications centre, which was housed in the main post office, the TVIK factory, known as KV-750 on target lists, and a target referred to as Hospital, or KV-710, which Rajčić described as a cross-roads north of the Slavko Rodić barracks. The HV also fired at the Slavko Rodić barracks, known as target KV-250, as well as at the cross-roads of the roads leading to Strmica and Vrlika on the periphery of Knin in Kninsko Polje. \* \* \* The HV also fired 13 to 16 shells of 130 millimetres at Milan Martić's residence, known as KV-610, which was in one of the housing blocks near the police station. The chance of hitting or injuring Martić by firing artillery at his building was very slight, but the HV aimed to pressure him into signing a capitulation. According to Rajčić, the repeated fire achieved the desired harassment and pressure effect, instilling a sense of insecurity in Martić. \* \* \*

1315. According to an interview of Milan Martić that was published in *Vreme International* on 24 August 1996, with regard to the attack on Knin on 4 August 1995, Martić stated that he was with his family in his apartment in Knin at the time of the first attack, which he claimed he survived only by chance, as two projectiles passed nearby his apartment. \* \* \*

1517. Novaković testified that in the first hours of the attack of 4 August 1995, people were panic-stricken and started leaving Knin. \* \* \* Novaković testified that these people had left Drniš spontaneously, out of fear of shelling, before the RSK evacuation order was issued and before evacuation plans were worked out.

1518. \* \* \* According to Mile Mrkšić [commander of the SVK Main Staff], people left Knin prior to the HV troops advancing into Knin because they feared encirclement, but also because they could not stand the firing from the mortars and rocket launchers any more. People were also afraid because of the excessive force used by the Croatian government previously in Western Slavonia. The Supreme Council, including supreme commander Martić and the President of the Assembly, met and Mrkšić explained that if the civilian population were to withdraw, defending the area would be a big problem. After 4 p.m. on 4 August 1995, Martić told Mrkšić that he had consulted Milan Babić, as a member of the Supreme Command, who was in Belgrade, by telephone and that they had agreed that the civilian population should be moved from the Krajina. The Supreme Council decided that civilians should leave the territory “into the depth” so that they would be out of harm’s way. \* \* \*

1520 The order by Milan Martić, with the time and date 4:45 p.m. on 4 August 1995, called for the evacuation of all inhabitants not fit for combat from the municipalities of Knin, Benkovac, Obrovac, Drniš, and Gračac. The order further stated that the evacuation was to be carried out in a planned manner according to prepared plans. \* \* \* The order also stated that help for the evacuation should be sought from the UNPROFOR Sector South headquarters. \* \* \*

1910. The evidence shows that the HV reported firing a total of twelve shells of 130 millimetres at Milan Martić’s apartment on two occasions between 7:30 and 8 a.m. on 4 August 1995. Further, on the evening of 4 August 1995, the HV fired an unknown number of 130-millimetre shells at a location marked R, in a predominantly civilian residential area, on Prosecution Exhibit 2337 [a map of Knin with Rajčić’s markings] where they believed Martić to be present. The Trial Chamber has found above that firing at Martić’s apartment could disrupt his ability to move, communicate, and command and so offered a definite military advantage. Rajčić recognized that the chance of hitting or injuring Martić by firing artillery at his building was very slight. Rajčić testified that the HV sought to harass and put pressure on Martić and that the HV took the rules of distinction and of proportionality into account when deciding whether to target the apartment block. The Trial Chamber considers that Martić’s apartment was located in an otherwise civilian apartment building and that both the apartment and the area marked R on P2337 were in otherwise predominantly civilian residential areas. The Trial Chamber has considered this use of artillery in light of the evidence on the accuracy of artillery weapons reviewed above and the testimony of expert Konings on the blast and fragmentation effects of artillery shells. At the times of firing, namely between 7:30 and 8 a.m. and in the evening on 4 August 1995, civilians could have reasonably been expected to be present on the streets of Knin near Martić’s apartment and in the area marked R on P2337. Firing twelve shells of 130 millimetres at Martić’s apartment and an unknown number of shells of the same calibre at the area marked R on P2337, from a distance of approximately 25 kilometres, created a significant risk of a high number of civilian casualties and injuries, as well as of damage to civilian objects. The Trial Chamber considers that this risk was excessive in relation to the anticipated military advantage of firing at the two locations where the HV believed Martić to have been present. This disproportionate attack shows that the HV paid little or no regard to the risk of civilian casualties and injuries and damage to civilian objects when firing artillery at a military target on at least three occasions on 4 August 1995.

1911. The Trial Chamber considers that the deliberate firing at areas in Knin which were devoid of military targets is inconsistent with Rajčić’s explanation of the HV artillery orders. Instead, it is consistent with the plain text of those orders to put towns under artillery fire,

meaning to treat whole towns, including Knin, as targets when firing artillery projectiles during Operation Storm. The interpretation of the HV's artillery orders as being orders to treat whole towns as targets is also supported by the TS-4's reporting of firing at Knin or at the general area of Knin on two occasions on 4 and 5 August 1995 \* \* \*. This interpretation is further supported by the general impression gained by several witnesses present in Knin during the attack, that the shelling impacted all over Knin and was indiscriminate. Moreover, the interpretation is consistent with the insufficient regard paid to the risk of civilian casualties and injuries and damage to civilian objects in the disproportionate firing at two locations where the HV believed Martić to have been present. Consequently, the Trial Chamber finds that on 4 and 5 August 1995, at the orders of Gotovina and Rajčić, the HV fired artillery projectiles deliberately targeting previously identified military targets and also targeting areas devoid of such military targets. In light of the language of the artillery orders and considering that the HV did not limit itself to shelling areas containing military targets, but also deliberately targeted civilian areas, the Trial Chamber finds that the HV treated the town of Knin itself as a target for artillery fire. The Trial Chamber finds beyond a reasonable doubt that as a result the HV's shelling of Knin on 4 and 5 August 1995 constituted an indiscriminate attack on the town and thus an unlawful attack on civilians and civilian objects in Knin.

1912. Considering the evidence on the ethnic composition of Knin,<sup>\*</sup> the Trial Chamber finds that the unlawful attack on civilians and civilian objects in Knin discriminated in fact against Krajina Serbs. In establishing the intention with which this unlawful attack was committed, the Trial Chamber has considered the language of the HV's artillery orders and the deliberate shelling of areas devoid of military targets. \*\*\* The Trial Chamber further considers that the unlawful attack against civilians and civilian objects was committed in the context of a wider discriminatory attack against Krajina Serbs. The Trial Chamber finds that the unlawful attack on civilians and civilian objects in Knin was carried out with the intention to discriminate on political, racial, or religious grounds.

1913. Considering circumstances such as the ethnicity of the victims and the time and place where the acts took place, the Trial Chamber finds that the unlawful attack against civilians and civilian objects was part of a widespread and systematic attack against a civilian population. In conclusion, the Trial Chamber finds that the unlawful attack on civilians and civilian objects in Knin on 4 and 5 August 1995 constituted persecution as a crime against humanity.

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\* Eds. The Chamber found that Knin was Serbian by a large majority. *See id.* at para. 856.

### Supplemental Faculty Materials

*The outcome and reasoning of the Gotovina case has been controversial, especially among military lawyers. The Emory International Humanitarian Law Clinic convened a meeting of IHL and military law experts to analyze the reasoning of the Gotovina judgment and the broader legal issues it implicates. The following is an excerpt from the report, which is available in full here: [http://www.law.emory.edu/fileadmin/NEWWEBSITE/Centers\\_Clinics/IHLC/Gotovina\\_Meeting\\_Report.pdf](http://www.law.emory.edu/fileadmin/NEWWEBSITE/Centers_Clinics/IHLC/Gotovina_Meeting_Report.pdf).*

#### **Operational Law Experts Roundtable On the *Gotovina* Judgment: Military Operations, Battlefield Reality And The Judgment's Impact On Effective Implementation And Enforcement Of International Humanitarian Law**

During the experts' meeting, there was general consensus that the legal analysis in the *Gotovina* judgment risks undoing [the IHL] legal framework for the role of intent in the crime of unlawful attacks against civilians. The judgment, as noted above, finds that all of the HV's targets were lawful military objectives. It then concludes, however, that because a very small percentage (approximately 4.5%) of the artillery effects could not be attributed to a pre-established lawful object of attack, the overall operation constituted an unlawful attack on civilians. In essence, the finding reflects a double failure. First, it rests primarily on an effects-based analysis that either ignores or disregards any investigation or evidence of the commander's knowledge or intent at the time of the attack—information that is central to any valid IHL analysis. Second, the inference derived from these effects seems operationally irrational: instead of focusing on the 95.5% of valid effects to infer a legally compliant state of mind, the Chamber relied on the 4.5% (an attribution ratio that itself is questionable) of invalid effects to reach the opposite conclusion. The experts recognize that the Trial Chamber ostensibly relied on the order to place Knin under artillery fire as direct evidence of the defendant's state of mind. In doing so, however, the judgment places an overwhelming emphasis on post-attack effects, and draws an objectively irrational inference from those effects (the conclusion that a very small percentage of artillery effects resulting from over 900 rounds fired from maximum range cannot be directly linked to a pre-determined military objective indicates an unlawful intent). The experts were concerned that this methodology—judging targeting decisions based on unreasonable and incorrect standards—could become the accepted approach for assessing targeting decisions and operations. Ultimately, it is impossible to ignore the import of this judgment: it encourages a determination of criminality based almost exclusively on effects, without any grasp of what the alleged perpetrator knew or intended at the time of the attack.

Throughout the course of the expert group discussion, the participants emphasized the essential role of accountability in the effective implementation and enforcement of IHL. But the experts also stressed that accountability that rests on relaxed standards of *mens rea*—or *de facto* elimination of *mens rea* altogether—comes at too high a price. The *Gotovina* judgment essentially forces commanders to operate with a standard that accommodates no errors. The legal standard in Additional Protocol I, the ICTY Statute, the ICC Statute and customary international law is that commanders are obligated to make reasonable decisions based on the information available at the time of the attack. The law does not judge commanders based on the outcome alone, nor does it require commanders to be right in all circumstances. Rather, the

participants at the November 4, 2011 experts meeting agreed that any assessment of targeting must be based on the commander's intent and whether the decision to launch the attack in question was objectively reasonable based on the information available at the time of decision, including the full range of operational execution variables that influence the actual effects of an attack. More important, beyond the incorrect application of the law, the participants voiced a number of concerns regarding the imposition of a *de facto* strict liability standard for targeting determinations.

First, the judgment's approach appears to lower the legal standard of culpability from the ICTY's established standard of willful or reckless to a standard of reasonable but wrong after the fact, rendering reasonable action by a commander culpable based solely on hindsight and outcome-based interpretations. This approach transforms a reasonable judgment (which by definition is not reckless) into an unlawful judgment solely based on the fact that what was prospectively reasonable was not retrospectively perfect: a strict liability standard. In effect, the judgment conflates the criminal standard with the operational standard in IHL, leaving no room at all for commander discretion and the complexity of the modern battlefield and targeting decision-making. The correct standard in IHL is amorphous and subjective in many instances, but it also fairly represents operational realities. The judgment thus fails to recognize that a commander's judgment may be reasonable but ultimately wrong—and not culpable.

Second, no commander will be able to meet the standard set forth in the *Gotovina* judgment, resulting in an oxymoronic result from the broader perspective of the fundamental goals of IHL. Forcing a commander to a "no error" standard is simply ineffective and even dangerous for future operations. Commanders will either refrain from engaging in military operations altogether out of an overabundance of caution in the face of an impossible standard, or will simply disregard the law entirely as no longer relevant to their purposes and mission. Under either scenario, innocent civilians are the ultimate victims—a result directly at cross-purposes with a central goal of IHL and of the ICTY. Finally, the experts were equally concerned about the long-term disillusionment with international law that will be the likely result as the legal standards for international criminal accountability no longer have a rational relationship to the implementation of IHL in military operations. \* \* \*

In view of both the complexity and the importance of proportionality as a key component of targeting decision-making and execution, the experts carefully examined the sole proportionality assessment in the *Gotovina* judgment (with regard to the attack on President Martić's residence) and found it deficient, both with regard to the application of the law in that case and to the ability of commanders to apply the law effectively in future operations. The Trial Chamber appears to assess the proportionality of the attack on President Martić's residence in a retrospective manner using the post-attack effects as the primary factor. The experts firmly agreed that it is axiomatic that any tribunal or court assess the elements of the proportionality analysis—both the military advantage and the civilian casualties—from the perspective of the commander before the attack.

The careful choice of words in [Article 51 of] Additional Protocol I—"anticipated" and "expected"—manifests the IHL requirement that the analysis must be taken in a prospective manner from the perspective of the commander at the time of the attack; that is, did the commander expect, or should he have expected, excessive civilian casualties relative to the military advantage he anticipated gaining, based on what he knew at the time of the decision to

attack the target. After the fact, the urge to condemn a decision to attack based on actual casualties may be powerful, as can be seen in the frequent tendency to link civilian deaths automatically with IHL violations (which, the experts noted, renders the judgment even more perplexing because it did not identify any civilian casualties caused by the attack). However, such a methodology utterly undermines the logic of the proportionality rule, which emphasizes the *anticipated* effects of an attack. A retrospective approach falls prey to the challenge of comparing the impact of civilian deaths to military advantage gained or lost. The former are dramatic and emotional and “lend themselves to powerful pictures and strong reactions.” Military advantage, in contrast, is abstract, has little or no emotional impact and is difficult to convey in pictures. It will often prove difficult to fairly assess whether collateral damage is excessive in practice because the military advantage from an attack may not be immediately apparent to an observer. The retrospective approach can therefore lead to departures from the accepted application of the principle of proportionality.

In the specific instance of Operation Storm, the participants at the expert roundtable discussed extensively how a proportionality analysis would be conducted in such a situation. The first step is, naturally, to assess the lawfulness of the target—as the Trial Chamber did in finding that President Martić’s residence was a lawful target. But the analysis does not end there. It is essential then to examine the value of the target in the context of the entire operation (and not merely as an individual object of attack). In this case, Martić was the supreme military commander of the SVK during a deliberate attack against improved enemy defensive positions protecting their most vital strategic asset: their capital city. The experts agreed that almost any military commander would consider disrupting the ability of such a commander to influence the command, control, and communication of his forces during the decisive phase of an attack to be one of the highest priority targets. In the context of Operation Storm, Martić was perhaps the most valuable target in the city of Knin.

The experts also emphasized that a legitimate application of the proportionality rule requires an understanding of why a target is valuable—for example, does it make the attacking party stronger, the defending party weaker, and so on. Targets are not attacked merely because they are susceptible; they are attacked to produce defined effects related to the overall tactical and operational end state. Disrupting Martić’s ability to influence the battle, whether by targeting him directly, severing his command and control capabilities, or fixing him in place and isolated from his operational command post, for example, therefore offered a tremendously significant military advantage, particularly from the perspective of the commander at the time of the attack. Intelligence showing that Martić was in the building at the designated time would be relevant as well to the determination of the value of the building as a military objective. The Trial Chamber does not address these considerations at all, offering only the cursory statement that Martić’s residence was a lawful objective with no examination of the value or the military advantage at the time of the attack.

On the alternate side of the proportionality assessment, the experts emphasized the need for equally careful consideration of the risk to civilians and the likely numbers of civilian casualties. Just as military advantage requires a thorough understanding and analysis of the nature and value of the target at the time of the attack, so the analysis of likely civilian casualties demands that a commander gather information regarding civilians who live and work in the area, and those who are likely to be present at the time of the attack. Again, this assessment is heavily dependent on intelligence to enable the commander to get a picture of the situation on

the ground around the target at the time of the attack so as to make the best decision possible. Simply noting that the designated lawful target is located in a civilian area is generally insufficient, but that appears to be the extent of the Trial Chamber's analysis. Such a cursory approach ignores questions of whether civilians were actually still present in the city of Knin, whether they were likely to be present in the area around the target at the time of the attack, where they were at the time of attack, whether they were susceptible to the methods and means of attack, and how many civilians might be present and within the blast radius of the artillery attack, just to note a few critical aspects of information necessary for a comprehensive proportionality analysis.

The experts raised concerns about the nature of the Trial Chamber's application of the principle of proportionality in the instant case of the attack on Martić's residence. In particular, although the Trial Chamber correctly referenced proportionality in analyzing the lawfulness of the attack on Martić's residence, it cited no relevant information from the Prosecution on which to base its conclusion of illegality. As a result, the judgment seems to apply a wholly retrospective approach to proportionality and failed to accord proper weight to the information about the commander's intent or analysis at the time of the attack. A second shortcoming, linking directly back to the importance of the target's value, is that the judgment does not appear to consider the operational impact of attacking a target as significantly valuable as Martić. Many of the experts in fact expressed incredulity that such a low number of artillery rounds fired for harassing and/or disrupting effect at a time when civilians were unlikely to be out in public could be considered unlawful. The methodology—to the extent there is one—in the judgment does not represent the requisite marriage of intelligence and battle operating effects that is at the heart of the proportionality assessment at the time of the attack. Beyond these immediate shortcomings, however, the experts shared a number of broader concerns about the impact of this case if the existing proportionality approach were to stand going forward.

First, some suggested that the failure to delineate and assign value to the military advantage to be gained from the target in question will undermine IHL's goal of reducing death and suffering in war generally. Commanders who have no guidance or unhelpful guidance regarding how to assess lawfulness and proportionality in targeted leadership strikes may well simply adopt the tactic of large-scale attacks on enlisted personnel on the assumption that such attacks engage no complicated and amorphous proportionality judgments. Whereas carefully targeted strikes can have substantial efficacy in reducing the enemy's ability and will to fight while causing only minimal casualties, the alternative would lead to extensive casualties and prolonged conflicts, a result neither international tribunals nor military leaders find palatable.

Second, to highlight two of the central themes of the expert discussion, the Trial Chamber's approach does not provide either clarity or predictability for commanders planning and executing future military operations. A commander who is to be judged based on post-attack effects has no way to know, at the time of the attack, how to determine the parameters of lawful conduct. Here, it is important to emphasize that proportionality is more than just a principle; it is a methodology for assessing lawfulness in advance through careful consideration of both the value of the military advantage and the likelihood of civilian casualties. By failing to either enunciate or apply any methodology in its proportionality analysis—by disregarding the numerous factors and variables that bear on a commander's decision-making process—the Trial Chamber provides no guidance to future commanders on the lawful implementation of IHL in targeting. For many of the experts at the Nov. 4, 2011 meeting, this failure of methodology

does a great disservice both to commanders of future military operations who seek to adhere to IHL and also to the law itself by undermining efforts to fulfill its goals and obligations.

### ***Notes and Questions***

1. **Case Outcome.** The ICTY sentenced General Gotovina to 24 years for war crimes and crimes against humanity on a joint criminal enterprise theory of responsibility. The Prosecutor also charged Gotovina under a superior responsibility theory, but the Trial Chamber made no findings in this regard and limited itself to the joint criminal enterprise ruling, even though Gotovina's alleged omissions were central to the case. Make a list of the "good" and "bad" facts in evidence from the defendant's perspective. Based on your assessment, is the case rightly decided? Do you think it was lawful for the Croatian forces to target Milan Martić, the "president" of the self-proclaimed Republic of Serbian Krajina (RSK)? If so, was he targetable while asleep in his residence in a civilian neighborhood? Did Martić himself violate IHL by embedding himself within a civilian neighborhood?

2. **Competing Narratives.** With respect to the two-day Operation Storm, two narratives emerged in the evidence presented at trial. It is clear that the lightning-fast operation coincided with a massive exodus of the Serbian population from the area four years after many of its Croatian inhabitants had themselves been pushed from the area by Serbian forces. Was this a case of retaliatory ethnic cleansing and persecution, as alleged in the indictment and believed by some observers, or a natural response to armed conflict conditions and an evacuation order by the Serb leadership, as others have argued? The Operation also occasioned looting and plunder. But by whom: Soldiers under Gotovina's command and control, civilians, or retreating Serbian forces? In its Judgment, the Trial Chamber squarely adopted the ethnic-cleansing narrative. In so doing, it relied heavily on Gotovina's operations order, which directed his forces to "place [Knin] under attack," and the fact that approximately 5% of the projectiles employed struck farther than 200 meters from any lawful military objective. The entire opinion is ultimately premised on a finding that Gotovina ordered a direct attack on civilians in the Krajina. The rest of the Judgment balances on this finding like an inverted pyramid. This finding thus serves as the basis for the wanton-destruction war crimes charge. The crimes against humanity convictions rely on the indiscriminate attack as the predicate widespread/systematic attack against a civilian population. The attack also serves as a key *actus reus* for the persecution count and the other inhumane acts count. The attack is conceived of as one of the means by which the Croatian forces effectuated the deportation of the Serbian population (the other being the subsequent acts of plunder). Finally, the attack serves as one of two "substantial contributions" made by the defendant to the apparent joint criminal enterprise. (The other was an omission; that is, the failure to take the necessary and reasonable measures to prevent and punish foreseeable crimes committed in connection with effectuating the joint criminal enterprise).

3. **Proportionality.** The principle of proportionality requires those who plan and implement attacks to balance the anticipated military advantage with the anticipated harm to civilians and to civilian objects. How would you formulate the proportionality calculus likely employed by Gotovina, particularly as it relates to the attack on President Martić's residence? How does your application of proportionality change given the testimony that Gotovina knew he was unlikely to actually kill Martić? Does the potential to disorient Martić, and potentially sever or at least impede his command over the RSK forces, offer a weighty enough military advantage

to the Croatian forces to justify the potential harm to civilians? The record was unclear as to how many civilians were in fact present in Knin at the time of the attack; how was Gotovina to do a proper proportionality analysis under the circumstance without this knowledge? Who bears the burden of proving the number of civilians in the area at the time of the attack? Gotovina's chief of artillery testified that the Croatian troops were highly trained and skilled at engaging in precision targeting; should they be subjected to a more rigorous proportionality calculus as a result? There were no civilian casualties in Knin. What, then, is the crime for which the tribunal convicted Gotovina? Are judges from varied legal and cultural backgrounds likely to have different intuitions about how to balance the strategic value of a target and the moral cost of harm to civilians? Will they necessarily undertake the same assessment *ex post* that the defendant undertook *ex ante*?

4. **Appeal.** The defendant has appealed the Judgment against him. Not surprisingly, his 120-page brief challenges the Trial Chamber's characterization of the attack as unlawfully directed against civilians. The defense points out that the Trial Chamber concluded that almost 95% of the Croatian Army's artillery rounds were aimed at military objectives. For the 5% that fell further from any military objective contained on the Croatian Army's target list, Gotovina's lawyers argued that the Trial Chamber failed to consider other reasonable explanations, such as

- the existence of opportunistic and mobile targets in the form of Serbian forces or tanks;
- equipment malfunction;
- the existence of additional military objectives not previously identified on target lists;
- destruction by mortar fire by Serbian forces (there was evidence in the record of some Serb assets in town); or even
- a larger acceptable range of error for the weapons systems employed.

The defense also argues that Gotovina did no more than engage military objectives on the front lines and within the Serb army's operational depth. It concedes the mass departure of the Serbian population, but contends that based on the evidence presented at trial, a reasonable finder of fact could reach alternative explanations. For example, it argues that Knin's residents may have been:

- adhering to evacuation orders issued by the Serbian army;
- following their family or neighbors;
- in fear of making contact with Croatian forces or other authorities;
- understandably motivated by a desire to avoid the armed conflict, even one lawfully fought; or
- long gone in advance of the Operation given rumors of its imminence.

Indeed, it seems that no Serb civilian actually testified that he or she left the Krajina in response to unlawful shelling. Who bears the burden of proof in showing that any targets were unlawful civilian objects or that excessive force was used? How did the Trial Chamber assign the burden of proof?

5. **The "Rendulic Rule."** General Lothar Rendulic served in the German army during World War II. Following Germany's surrender in 1945, Rendulic was prosecuted in the so-called

Hostages Trial (*U.S. v. List, et al.*, VIII Law Reports of Trials of War Criminals 38 (1949)) by a military commission convened to try “lesser” war criminals than those prosecuted by the Nuremberg Tribunal. Rendulic was implicated, *inter alia*, in ordering a scorched earth campaign in northern Norway and Finland. As German troops retreated through the area in the winter of 1944, they destroyed foodstuffs and potential shelter in order to slow what they thought was an impending Russian advance. As it turned out, the Russians were not in pursuit, and this destruction proved unnecessary and excessive. Nonetheless, articulating what later became known as the Rendulic Rule, the commission held that Rendulic’s actions had to be judged on the basis of his knowledge at the time, not on what later emerged as the actual facts. Specifically, it held:

We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties. ... It is our considered opinion that the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act. We find the defendant not guilty on this portion of the charge.

*Id.* at 1297.

6. **Targeted Killing Under International Humanitarian Law.** When, if ever, is the killing (some would say “assassination”) of a political leader lawful under international law? In the wake of the revelation of potential assassination plots against foreign leaders emanating from the United States, U.S. President Gerald Ford issued an executive order (E.O. 11905 (1976)) banning assassination. Presidents Jimmy Carter and Ronald Reagan renewed this order (E.O. 12036 (1978), and E.O. 12333 (1981), respectively). E.O. 12333, for example, provides: “No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.” These Orders have been interpreted to recognize exceptions in conventional military, counterinsurgency, and counter-terrorism operations. *See* Col. W. Hays Parks, *Memorandum on Executive Order 12233 and Assassination* (Nov. 2, 1989), available at [http://www.hks.harvard.edu/cchrp/Use of Force/October 2002/Parks\\_final.pdf](http://www.hks.harvard.edu/cchrp/Use of Force/October 2002/Parks_final.pdf). In his memo, Parks concludes that

clandestine, low visibility or overt use of military force against legitimate targets in time of war, or against similar targets in time of peace where such individuals or groups pose an immediate threat to United States citizens or the national security of the United States, as determined by competent authority, does not constitute assassination or conspiracy to engage in assassination, and would not be prohibited by the proscription in EO 12333 or by international law.

In Afghanistan, Pakistan, Somalia, and Yemen, the U.S. has engaged in targeted killing of high-value Al Qaeda and Taliban operatives, at times using Predator and Reaper drone aircraft. Do such killings run afoul of these executive orders, which have never been publically repealed or repudiated? Is IHL implicated in these killings? What about international human rights? Assuming IHL applies, are such killings lawful under IHL or could they constitute willful or treacherous killings of a protected person, the denial of quarter, or summary executions? Would it be preferable if wars were waged as a series of targeted killings rather than through combat on more traditional battlefields or large-scale aerial bombardment? Which types of attack create the greater risk of collateral damage? Is there a duty to endeavor to capture opponents where possible rather than kill them?

7. **Direct Participation in Hostilities.** Civilians are entitled to immunity from attack “unless and for such time as they take a direct part in hostilities.” See Article 51(3), Additional Protocol I (applicable in international armed conflicts); Article 13(3), Protocol II (applicable in non-international armed conflicts). Thus, someone charged with willfully killing a civilian in the context of an armed conflict can as a defense put on proof that the victim was directly participating in hostilities. See *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgement, paras. 164-186 (July 17, 2008). How is a tribunal to determine when a civilian is directly participating in hostilities? The International Committee of the Red Cross recently completed a process of developing interpretive guidance concerning when individuals lose their civilian protection for the purposes of targeting. See International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT’L REV. OF THE RED CROSS 991 (2008). According to this guidance, in order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

- The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
- There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation);
- The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

The DPH doctrine is a conduct-based targeting doctrine. To respond to arguments by states that IHL should recognize a status-based targeting doctrine in NIACs as is the case in IACs, the ICRC also recognized a function-based targeting doctrine. Individuals who are members of organized armed groups and who undertake a “continuous combat function” are deemed targetable at any time so long as they maintain their combat function. What constitutes a “combat function”? What constitutes a “continuous combat function”?

8. **Cultural Property.** Cultural property is subject to special protections under IHL. Indeed, there is an entire treaty, the 1954 Hague Convention for the Protection of Cultural

Property in the Event of Armed Conflict, devoted to this. Article 1 of the treaty defines cultural property as:

movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above...

Article 4 indicates that states parties must respect

cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

Such obligations, however, may be disregarded “in cases where military necessity imperatively requires such a waiver.” Parties are also to protect against pillage, theft, and vandalism directed against cultural property. These protections also apply to non-international armed conflicts per Article 19(1):

In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.

*Questions related to the targeting of Milan Martić offer excellent opportunities to discuss who or what constitutes a legitimate target during armed conflict – and at what times and for how long. Martić was the commander of the RSK forces and therefore was a legitimate target at all times, including when he was sleeping. With regard to Martić’s decision to locate his headquarters in a civilian residential building and neighborhood, have the students look at Article 58 of Additional Protocol I, which mandates certain precautions defending parties must take during armed conflict and is considered to be customary international law. Most relevant to the instant discussion, Article 58(b) obligates all parties to “avoid locating military objectives within or near densely populated areas.” Although Additional Protocol I emphasizes the attacking party’s affirmative obligation to take precautions in planning and launching attacks, this obligation in no way diminishes the defending party’s obligations. Parties therefore have an obligation to protect their own civilians from the consequences of their own offensive actions as well as those of the enemy. Ask students to think about how these two components of precautions work in tandem, placing obligations on both parties. Who should be responsible for civilian deaths when one side uses the civilian population as a shield and the other side attacks, resulting in civilian deaths?*

*Direct participation in hostilities offers immensely fertile ground for classroom discussion. A few key points are essential to the discussion of direct participation in hostilities. First, the rule applies only to civilians. Combatants can be attacked at all times and enjoy no immunity from attack. Complexities arise in the case of organized armed groups and other non-state entities in which individuals are fighting as a regular course – in essence, as their job – but do not qualify as combatants. In both international and non-international armed conflicts, there is now a general recognition that these "fighting" members of organized belligerent groups (hence to the exclusion of members who hold a mere "supportive" function such as cooks, recruiters, etc.) are targetable on the basis of their status as the enemy (which is determined by their continuous combatant function within the group), or hostile force, meaning that such persons would not qualify as civilians enjoying immunity from attack, i.e., as relevant for a direct participation analysis.\* However, the question of who constitutes a civilian for the purposes of this discussion continues to be a challenging one in many situations, as noted below. Second, the question of "for such time" – the temporal aspect of direct participation – is only relevant if there is indeed an underlying act of direct participation. The main case addressing the concept and parameters of direct participation is the Israeli Supreme Court's Targeted Killings judgment. In analyzing the lawfulness of Israel's practice of targeted strikes on terrorists, the Court first held that terrorists do not fall within the category of lawful combatants because they do not meet the requirements of Article 4 of the Third Geneva Convention. As civilians, the persons being targeted could therefore only be targeted if and when they were directly participating in hostilities. The Court then analyzed the three key components of direct participation – what are hostilities, what is taking a direct part, and what does "for such time" mean. In particular, the Court raised extensive concerns about the "revolving door" problem – the civilian who repeatedly participates in hostilities but is not a member of an armed group. What are the consequences of treating such persons as protected civilians in between each engagement in hostilities? Alternatively, what are the consequences of treating such persons as continuously participating in hostilities? Which approach seems more consistent with the fundamental principles of IHL? Which approach seems more likely to foster effective application of the law and its basic goals and principles?*

*One useful example to use in class regarding when and for how long individuals are participating in hostilities is a suicide bombing. The suicide bomb attack involves a basic infrastructure of four people: the bomber, the driver or logistical person, the planner or commander (the quarterback, to use an analogy), and the financier. Think about what each of these individuals does and when and how that impacts a direct participation analysis. The bomber is chosen both for his (or her) willingness to die and for his (or her) dispensability. He or she straps on the bomb, is taken to the target area, and detonates at the designated time (and – obviously – there will not be a return from deployment in such situations). The driver takes the bomber to the designated area and deposits him or her before driving away. The planner or commander is involved from start to finish – identifying targets, procuring the explosives and other necessary materials, identifying, selecting and recruiting the bomber, coordinating all of the team members, and receiving and dispensing money as needed. The financier is the most attenuated from the process – he may simply wire money or receive money at his bank and*

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\* The ICRC differentiates more specifically between international armed conflict and non-international armed conflict with regard to the "targetability" and status of members of organized armed groups. In an international armed conflict, armed members not fighting alongside a party would be considered to be civilians, or could be viewed as forming an organized armed group party to a parallel non-international armed conflict provided that the violence meets a certain level of intensity. In non-international armed conflicts, members of organized armed groups are targetable on the basis of their function: compared to the members of regular armed forces of the State, membership in an organized armed group is not sufficient alone to be targeted; only a continuous combat function creates a position similar to that of combatant status.

*transfer it – and yet is also indispensable to the process. Which of these individuals is directly participating in hostilities? Which are participating only “for such time?” Are some of them directly participating in hostilities at all times? The ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities covered such practical examples, and provides elements of answer to these questions.*

*The May 1, 2011 operation to kill Osama bin Laden highlights the issue of surrender and capture in the course of targeted killing. Bin Laden was killed as a legitimate target during an armed conflict and as a result, the U.S. forces had no obligation to capture him rather than kill him. However, had he clearly sought to surrender, they would have been obligated to accept his surrender and then detain him and treat him humanely. The extensive discourse after the raid about whether he was armed and whether he should have been offered an opportunity to surrender showed an incomplete comprehension of the law and – in particular – the consequences of the blurred paradigm for targeted strikes (self-defense and/or armed conflict) that the U.S. often presents.*

#### *Suggested readings*

- NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* (Oxford 2008)
- Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 831 (2010)
- Hays W. Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769 (2010)
- Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697 (2010)

## ADDITIONAL CASE STUDIES

For each of the following scenarios, the title specifies the main legal issue that can be discussed in class. Consider the following key questions for each:

- Does IHL apply? If not, what is the applicable legal regime?
- If IHL applies, are the targets in question proper military objectives, subject to attack?
- Were the attacks and/or tactics in question consistent with the principles of proportionality, humanity, and necessity, and were adequate precautions undertaken?
- Would a war-time order to attack these targets or engage in this conduct constitute a war crime giving rise to individual criminal responsibility?
- Would you recommend the prosecution of individuals if you were a prosecutor with penal jurisdiction over these events?

### 1. **Does IHL Apply: the Banyan Buddhas**

Using explosives, tanks, and anti-aircraft weapons, the Afghan Taliban regime destroyed the famous Banyan Buddhas, colossal statues dating from the 5<sup>th</sup> century that were carved from the living rock. The destruction was accomplished in March 2001, prior to the 9/11 attacks and the U.S. invasion of Afghanistan. The Taliban justified their actions under Islamic law on the ground that the statues were “graven images” and “idolatrous.” The statues had not been designated as a UNESCO World Heritage Site.<sup>§</sup> At the time, the Taliban was engaged in a NIAC with the Northern Alliance, a coalition of rebel groups.

### 2. **Military Objectives: the Hirgigo Power Station**

During the Ethiopia/Eritrean war (1998-2000), Ethiopia bombed the Hirgigo Power Station. The Station is located 10 miles from the port city of Massawa, which is home to an Eritrean naval base. The station was not yet fully operational when it was hit, and the Eritrean military forces had their own electricity-generating facilities. At the arbitral commission set up to hear claims arising out of the conflict, Eritrea introduced evidence that the plant was not yet producing power and that its military forces had their own electric generating equipment and were not dependent on general power grids. Ethiopia introduced evidence that Eritrea had placed anti-aircraft weaponry in the immediate vicinity of the station. Based on the arguments raised by the two parties, what elements would you use to determine whether the station was a proper target or whether a war crime was committed?

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<sup>§</sup> UNESCO, as well as a number of individual countries, nevertheless sent negotiators to discuss with the Taliban and attempt to prevent the destruction.

### 3. Targeting: Cultural Objects

In the early days of the 2003 Iraq War, civilians pulled down a statue of Saddam Hussein in Firdos Square. Did the statue constitute protected cultural property? If so, was its destruction lawful under IHL? Does your evaluation of this event change if a U.S. marine psychological warfare team initiated the attack on the statue? What if this event had occurred during the later period of time when the United States occupied the country? The photo below depicts a U.S. service member putting a rope around the statue's neck. At one point, a U.S. flag was placed over the statue's face, but this was later removed before the statue was toppled.



### 4. Targeting: Direct Participation in Hostilities

In a non-international armed conflict, the armed forces of the territorial state using drone surveillance see mechanics in rebel-controlled territory servicing vehicles that are known to transport rebel troops. The vehicles are pickups that have been weaponized. Can the vehicles be targeted? Can the mechanics? What if the drone operators see mechanics in rebel-controlled territory servicing a fleet of standard, unmarked pickup trucks of a kind seen transporting rebel troops in the past?

### 5. Targeting, Proportionality and Necessity: The Bombing of the RTS (Serbian TV and Radio Station) in Belgrade in April 1999

During the humanitarian intervention in Kosovo in 1999, NATO intentionally bombed the state-owned Serbian Radio and TV Station (RTS) at approximately 2:00 a.m. Between 10 and 17 people were killed and many others were injured. The strike was part of a larger attack on Serbian Command, Control & Communication (C3) assets, including electricity

grids, transformer stations, command posts, transmission towers, and control buildings of the Yugoslav radio relay network. NATO also justified the bombing on the grounds that RTS was used by the Serbian leadership to disseminate pro-Serb propaganda and President Milošević had barred the broadcast of less-biased western media reports. In light of the high degree of redundancy in the Serbian system, broadcasting recommenced within hours of the strike—an eventuality that NATO had anticipated. The record is unclear as to whether NATO gave advance warning of the planned attack. There was some indication that foreign journalists had been warned and vacated the area. Tony Blair, then United Kingdom’s Prime Minister, blamed the Serbian authorities for failing to evacuate the building. Was the attack lawful under IHL? How would your answer change, if at all, if the RTS broadcasts were inciting violence against non-Serbs?

## 6. Precautions: Roof-Knocking

Hamas is a Palestinian political party and militant group that has governed the Gaza Strip, the area of the Palestinian Territories that borders Egypt and Israel, since the 2006 elections. It has also been classified as a terrorist organization by a number of states, including the United States. Hamas and Israel have exchanged fire for years; these clashes erupted into full-blown armed conflict in 2009. During this so-called Gaza War, Israel engaged in a practice of “roof-knocking.” This entailed firing a non-explosive or light (10-20 kg) munition at a building that was suspected of housing weapons or being used as a terrorist headquarters. The goal was to provide a warning that would enable civilians to leave the building and area before it was subject to a full-scale attack. The Hamas leadership, in response, developed the practice of encouraging civilians climb up onto their roofs to deter attack. Israel’s reaction to this counter-tactic was mixed. At times, it would: call off the strike, direct its “roof knocking” to the empty areas of the roof in order to scare civilians off, or—when the target was a high value one—carry on with the attack even where civilians did not leave the premises after being subjected to a warning shot. In 2009, for example, Israel proceeded with the planned strike, killing a high-ranking Hamas official, Nizar Ghayan, and his family. Ghayan was accused of mentoring suicide bombers and allowing his home to be used as an ammunition silo. This practice of “roof knocking” was criticized in the highly controversial Goldstone Report, commissioned by the U.N. Human Rights Council to investigate violations of human rights law and IHL in connection with the Gaza War, as “reckless in the extreme” if meant to serve as a warning to civilians. *See Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, U.N. Doc. No. A/HRC/12/48 (Sept. 25, 2009), at para. 523. At the same time, the Report acknowledged the “significant efforts by Israel to issue warnings” so that civilians could get out of harm’s way. *See id.* at para. 37. Is roof-knocking lawful under IHL?

## 7. Targeted Killings in Yemen.

*The situation in Yemen, and the killing of Anwar Al Aulaqi in Northern Yemen on 30 September 2011 is a good case study to use with students, as it covers most questions posed above: applicable law, military objectives, precautionary measures, and so forth.*

Yemen is located on the tip of the Arabian Peninsula (see map below). After achieving independence from the Ottoman Empire in 1918, the country split into two (North and South Yemen) and spent decades wracked by conflict. In 1978, Ali Abdullah Saleh assumed power of Northern Yemen. In 1990, the country re-unified under Saleh's leadership with the drafting of a unity constitution. Peace was short-lived, however. A civil war broke out again in 1994, and the south re-declared its independence. This declaration was never internationally recognized or fully effectuated, and the secessionists eventually went into exile. The Yemeni population elected President Saleh twice to the presidency, in 1999 and 2006. This relative calm was punctuated by Al Qaeda attacks against western targets within Yemen. In 2000, Al Qaeda militants attempted to attack the U.S.S. *The Sullivans* and successfully attacked the U.S.S. *Cole* in the Gulf of Aden while it was refueling, killing 17 U.S. sailors and injuring many others. A French oil tanker, MV *Limberg*, was also attacked in the area in 2002.



In 2009, a group calling itself Al Qaeda in the Arabian Peninsula (AQAP) emerged. The group is believed to be populated by former *mujahedeen* from Afghanistan as well as Saudi and Yemeni Al Qaeda members. Although its name suggests a link to Al Qaeda proper, it is unclear whether this is truly an Al Qaeda franchise. It is also unclear how hierarchical the group is or if different cells enjoy operational autonomy. Part of AQAP's activities are focused on Yemeni government targets, including the security and military forces, which are attacked using perfidious means as well as classic guerilla and military tactics. Thousands of civilians have been displaced by hostilities. In January 2010, the government "declared war" on AQAP. In addition to these

in-country activities, AQAP has also been associated with attacks within the United States, such as the rampage by Nidal Malik Hasan in Fort Hood in November 2009; the failed efforts in 2009 of the so-called Christmas Day bomber, Umar Farouk Abdulmutallab; and the 2010 Times Square bomber, Faisal Shahzad. All three attackers had links to Anwar Al Aulaqi, a dual U.S.-Yemeni citizen and al Qaeda cleric, ideologue, and propagandist. Originally the editor of *Inspire*, Al Qaeda's *jihadist* magazine, it has been alleged that Al Aulaqi had increasingly assumed an operational role in AQAP by, for example, recruiting members, facilitating training camps, fundraising, and planning attacks on the United States.

President Saleh authorized U.S. maneuvers in the country against AQAP and other al Qaeda operatives in 2009 and has since collaborated on at least some of these missions. U.S. activities are undertaken by the Joint Special Operations Command (JSOC), a sub-unified command dedicated to joint special operations that is tasked with tracking suspected terrorists, and the Central Intelligence Agency. One of those killed was Al Aulaqi, who had been in U.S. sights for some time.\* It was reported that he had been placed on a list of individuals whom the JSOC was specifically authorized to kill. This list is colloquially called the "kill or capture list." Since at least April 2010, Al Aulaqi was on a separate list of suspected terrorists whom the CIA was authorized to kill. The Treasury Department also included him on a list of Specially Designated Global Terrorists (SDGT) suspected of "supporting acts of terrorism and for acting for or on behalf of AQAP." See Designation of Anwar Al-Aulaqi Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Fed. Reg. 43233, 43234 (July 23, 2010). Pursuant to U.N. Security Council Resolution 1267, he was next identified as an individual associated with Al-Qaeda and thus subjected to a global asset freeze and travel ban. See Security Council Al-Qaida and Taliban Sanctions Committee Adds Names of Four Individuals to Consolidated List, U.N. Doc. SC/9989 (July 20, 2010). The revelation that the National Security Council had authorized Al Aulaqi's killing provoked a lawsuit by Al Aulaqi's father and the American Civil Liberties Union (ACLU) seeking injunctive relief. The lawsuit failed on standing and political question grounds. *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010).

Al Aulaqi had apparently twice evaded death by drone attacks in December 2009 and May 2011. He was finally killed in a remote area of Northern Yemen near the town of Khashef on September 30, 2011, by a Hellfire missile fired from an Unmanned Aerial Vehicle (UAV or drone) deployed from a base somewhere in the Arabian Peninsula. Killed along with him was another U.S. citizen, Samir Khan, who also edited *Inspire*. There is no indication that the United States was aware of Khan's presence in the car, but his death has not been treated solely as collateral damage.

As the Arab Spring flourished in 2011, protests in Yemen began calling for the ouster of President Saleh. As the violence in Yemen escalated, the President was seriously injured in an assassination attempt in June 2011. Unlike other leaders in the region, Saleh—working with the Gulf Cooperation Council—agreed to transfer power to a new government. Fighting appears to be taking place on multiple fronts at the moment. In the capital of Sana'a, various tribal factions—ostensibly under the leadership of Sheikh Sadiq al-Amar, a dissident former General—have targeted governmental installations and the country's Republican Guard, which is under the

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\* Although the complete details of how Anwar Al Aulaqi met his demise may never be fully known, it is possible to piece together a composite account by drawing on press coverage, government legal briefs, and statements from the Obama Administration. The following narrative assumes the accuracy of such public records, bearing in mind that much relevant information remains classified.

command of the President's son. Meanwhile, Islamist militants affiliated with AQAP control parts of Southern Yemen and continue to launch attacks against government targets. Government forces are attacking protesters around the country. And, a secessionist movement remains active in the south, although it does not appear to be formally linked to AQAP.

Meanwhile, using remotely piloted vehicles and fighter jets, the United States continues to engage in targeted killing in Yemen. According to *The Long War Journal*—a web journal that tracks military actions against terrorist targets—all told, the United States has launched approximately seventeen separate strikes inside Yemen since December 2009 against AQAP operatives and other targets, such as suspected training camps. Of these, eleven were launched since May 2011. See Bill Roggio, *US Drone Strike Kills 11 AQAP Leaders, Fighters*, THE LONG WAR JOURNAL (Jan. 31, 2012), available at [http://www.longwarjournal.org/archives/2012/01/us\\_drone\\_strike\\_kill.php](http://www.longwarjournal.org/archives/2012/01/us_drone_strike_kill.php). The targets of this campaign are ostensibly AQAP militants and installations rather than rebels, although there is apparently some comingling of these various anti-government forces.

Does IHL govern the United States' conduct in Yemen? If so, what is the predicate armed conflict? Is there an armed conflict between AQAP and the government of Yemen? Between the United States and AQAP? Or, has the United States intervened in what is essentially a civil war in Yemen between the government and anti-government forces? Is the conflict in Yemen linked to the conflict in Afghanistan—or to the larger, global conflict with Al Qaeda—or is this a new conflict? What degree of nexus would be required to assert such a linkage and how far could a conflict with a transnational terrorist group like Al Qaeda extend geographically? Does it matter that while the United States has provided assistance to the government of Yemen it has also attacked targets in Yemen of its own choosing? How would you characterize any conflict(s) taking place in Yemen? Is IHL the correct framework for evaluating the legality of killing U.S. citizen Anwar Al Aulaqi? What other legal regime(s) might also apply?

*These problems do not necessarily have “right” answers. Here are some thoughts and excerpts that might be useful for you to guide the discussion. During class, have the students focus on the key targeting law framework of distinction, proportionality and precautions.*

### 1. ***Does IHL Apply: the Banyan Buddhas***

*The challenge here is to articulate a nexus between the attack on cultural property and the NIAC underway in Afghanistan at the time between the Taliban and the Northern Alliance, which was billeted far from the statues. That the Buddhas were not listed in UNESCO is of no moment. Is the fact that the Taliban was endeavoring to galvanize support by proving its Islamist bona fides enough to link these acts to the conflict underway? If IHL did not regulate this conduct, what body of law did?*

### 2. ***Military Objectives: the Hirgigo Power Station***

*Eritrea gained independence from Ethiopia in 1993 after 30 long years of conflict. The United Nations brokered the establishment of a transitional government in Eritrea, which staged a referendum on independence in 1991. The border between the two countries remained contested, however, especially around the town of Badme. Several efforts to resolve this issue failed, and the*

region again descended into war in 1998—this time, a full-fledged IAC. In December 2000, the two countries signed a peace agreement. Included within it was Article 5, which read:

*Consistent with the Framework Agreement, in which the parties commit themselves to addressing the negative socio-economic impact of the crisis on the civilian population, including the impact on those persons who have been deported, a neutral Claims Commission shall be established. The mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are*

- (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and*
- (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.*

*The Commission shall not hear claims arising from the cost of military operations, preparing for military operations, or the use of force, except to the extent that such claims involve violations of international humanitarian law.*

*Its ruling on the power station is set forth below.*

**Eritrea Ethiopia Claims Commission  
Partial Award  
Western Front, Aerial Bombardment and Related Claims  
The Hague, December 19, 2005**

111. On May 28, 2000, two Ethiopian jet aircraft dropped seven bombs that hit and seriously damaged the Hirgigo Power Station, which is located about ten kilometers from the port city of Massawa. At that time, construction was complete, and the power station was in the testing and commissioning phase. While not yet fully operational, the power station had successfully supplied some power briefly to Asmara and Mendefera. Eritrea asserted that the bombing of the plant was unlawful because the plant was not a legitimate military objective. \* \* \*

117. As a first step, the Commission must decide whether the power plant was an object that by its nature, location, purpose or use made an effective contribution to military action at the time it was attacked. The Commission agrees with Ethiopia that electric power stations are generally recognized to be of sufficient importance to a State's capacity to meet its wartime needs of communication, transport and industry so as usually to qualify as military objectives during armed conflicts. The Commission also recognizes that not all such power stations would qualify as military objectives, for example, power stations that are known, or should be known, to be segregated from a general power grid and are limited to supplying power for humanitarian purposes, such as medical facilities, or other uses that could have no effect on the State's ability to wage war. Eritrea asserted that, in May 2000, the Hirgigo plant was not yet producing power for use in Eritrea and that Eritrea's military forces had their own

electric generating equipment and are not dependent on general power grids in Eritrea. Eritrea also submitted evidence supporting its assertion that its Defense Ministry used no more than four percent of Eritrea's nonmilitary power supply and that Eritrean manufacturing companies did not produce significant military equipment. \* \* \*

119. While the fact that Eritrea placed anti-aircraft guns in the vicinity of the power station does not, by itself, make the power station a military objective, it indicated that Eritrean military authorities themselves viewed the station as having military significance.

120. The Commission, by a majority, has no doubt that the port and naval base at Massawa were military objectives. It follows that the generating facilities providing the electric power needed to operate them were objects that made an effective contribution to military action. The question then is whether the intended replacement for that power generation capacity also made an effective contribution to military action. Ethiopia asserted that a State at war should not be obligated to wait until an object is, in fact, put into use when the purpose of that object is such that it will make an effective contribution to military action once it has been tested, commissioned and put to use. Certainly, as the British Defense Ministry's Manual of the Law of Armed Conflict makes clear, the word "purpose" in Article 52's definition of military objectives "means the future intended use of an object." The Commission agrees.

121. The remaining question is whether the Hircigo power plant's "total or partial destruction . . . in the circumstances ruling" in late May 2000 "offer[ed] a definite military advantage." In general, a large power plant being constructed to provide power for an area including a major port and naval facility certainly would seem to be an object the destruction of which would offer a distinct military advantage. Moreover, the fact that the power station was of economic importance to Eritrea is evidence that damage to it, in the circumstances prevailing in late May 2000 when Ethiopia was trying to force Eritrea to agree to end the war, offered a definite advantage. "The purpose of any military action must always be to influence the political will of the adversary." The evidence does not—and need not—establish whether the damage to the power station was a factor in Eritrea's decision to accept the Cease-Fire Agreement of June 18, 2000. The infliction of economic losses from attacks against military objectives is a lawful means of achieving a definite military advantage, and there can be few military advantages more evident than effective pressure to end an armed conflict that, each day, added to the number of both civilian and military casualties on both sides of the war. For these reasons, the Commission, by a majority, finds that, in the circumstances prevailing on May 28, 2000, the Hircigo power station was a military objective, as defined in Article 52, paragraph 2, of Geneva Protocol I and that Ethiopia's aerial bombardment of it was not unlawful.

### 3. *Targeting: Cultural Objects*

*This mini-problem encourages students to think about the relativity of cultural property. In the United States, for example, would a 1950's diner constitute cultural property deserving of special protection under IHL? The problem also engages the responsibility of the occupying power to maintain order and security, even against acts by private actors. The involvement of U.S. service members in the bringing down of the statue can also be explored; was this event an exercise in American triumphalism orchestrated for CNN, or a truly spontaneous celebration of Iraqi citizens newly liberated from the yoke of a dictator?*

#### 4. *Targeting: Direct Participation in Hostilities*

*This doctrine is primarily a targeting doctrine, more relevant to IHL than ICL, but it arises as a defense in ICL to the charge that a combatant directly targeted a civilian. With this hypothetical, it is important to have the students work through the elements of the DPH doctrine as articulated by the ICRC. Students tend to have immediate gut reactions about whether an individual is directly targetable or not. These instincts are often dislodged when students are forced to rigorously apply the doctrine, which involves a relatively high threshold. Students can be reminded of this exercise when they work through the Anwar Al Aulaqi problem. None of the accounts of the attack on al Aulaqi has him directly participating in hostilities at the time of his death, hence the importance of the “continuous combat function” construct. (Although you can problematize what constitutes a “combat” function with this hypothetical and the al Aulaqi facts.)*

#### 5. *The Bombing of the RTS (Serbian TV and Radio Station) in Belgrade in April 1999*

*Following the 1999 intervention by NATO in Kosovo, the ICTY Prosecutor received numerous requests to investigate allegations that senior political and military figures from NATO countries committed serious violations of international humanitarian law during the air campaign. If the Prosecutor’s investigation found evidence of serious violations, she had the power to indict pursuant to the ICTY Statute, because the tribunal’s jurisdiction extended to the entire territory of the former Yugoslavia. Criticism of the NATO bombing campaign included allegations that: a) because the resort to force was illegal, all NATO actions were illegal (a melding of the jus ad bellum and the jus in bello), and b) the NATO forces deliberately attacked civilian infrastructure targets (and that such attacks were unlawful), deliberately or recklessly attacked the civilian population, and deliberately or recklessly caused excessive civilian casualties in disregard of the rule of proportionality by trying to fight a “zero casualty” war for their own side. Allegations concerning the zero casualty war involved suggestions that, for example, NATO aircraft operated at heights which enabled them to avoid attack by Yugoslav defenses and, consequently, made it impossible for them to properly distinguish between military or civilian objects on the ground.*

*On May 14, 1999, the Prosecutor established an internal committee to assess the allegations and material accompanying them, and to advise the Prosecutor and Deputy Prosecutor whether there was a sufficient basis to proceed with an investigation into some or all the allegations related to the NATO bombing. The Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (Committee) made the following factual findings with respect to the RTS attack.*

#### **Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia**

75. NATO intentionally bombed the Radio and TV station and the persons killed or injured were civilians. The questions are: was the station a legitimate military objective and; if it was, were the civilian casualties disproportionate to the military advantage gained by the attack? For the station to be a military objective within the definition in Article 52 of Protocol I: a) its nature, purpose or use must make an effective contribution to military action and b) its total or partial destruction must offer a definite military advantage in the circumstances ruling at the time. The 1956 ICRC list of military objectives, drafted before the Additional Protocols, included the installations of broadcasting and television stations of fundamental military importance as

military objectives. \* \* \* [T]he attack appears to have been justified by NATO as part of a more general attack aimed at disrupting the FRY Command, Control and Communications network, the nerve centre and apparatus that keeps Milošević in power, and also as an attempt to dismantle the FRY propaganda machinery. Insofar as the attack actually was aimed at disrupting the communications network, it was legally acceptable.

76. If, however, the attack was made because equal time was not provided for Western news broadcasts, that is, because the station was part of the propaganda machinery, the legal basis was more debatable. Disrupting government propaganda may help to undermine the morale of the population and the armed forces, but justifying an attack on a civilian facility on such grounds alone may not meet the “effective contribution to military action” and “definite military advantage” criteria required by the Additional Protocols. The ICRC Commentary on the Additional Protocols interprets the expression “definite military advantage anticipated” to exclude “an attack which only offers potential or indeterminate advantages” and interprets the expression “concrete and direct” as intended to show that the advantage concerned should be substantial and relatively close rather than hardly perceptible and likely to appear only in the long term (ICRC Commentary on the Additional Protocols of 8 June 1977, para. 2209). While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government’s political support, it is unlikely that either of these purposes would offer the “concrete and direct” military advantage necessary to make them a legitimate military objective. NATO believed that Yugoslav broadcast facilities were “used entirely to incite hatred and propaganda” and alleged that the Yugoslav government had put all private TV and radio stations in Serbia under military control (NATO press conferences of 28 and 30 April 1999). However, it was not claimed that they were being used to incite violence akin to *Radio Mille Collines* during the Rwandan genocide, which might have justified their destruction. At worst, the Yugoslav government was using the broadcasting networks to issue propaganda supportive of its war effort: a circumstance which does not, in and of itself, amount to a war crime. (See in this regard the judgment of the International Military Tribunal in Nuremberg in 1946 in the case of Hans Fritzsche, who served as a senior official in the Propaganda ministry alleged to have incited and encouraged the commission of crimes. The IMT held that although Fritzsche clearly made strong statements of a propagandistic nature, it was nevertheless not prepared to find that they were intended to incite the commission of atrocities, but rather, were aimed at arousing popular sentiment in support of Hitler and the German war effort (*American Journal of International Law*, vol. 41 (1947) 328)). The committee finds that if the attack on the RTS was justified by reference to its propaganda purpose alone, its legality might well be questioned by some experts in the field of international humanitarian law. It appears, however, that NATO’s targeting of the RTS building for propaganda purposes was an incidental (albeit complementary) aim of its primary goal of disabling the Serbian military command and control system and to destroy the nerve system and apparatus that keeps Milošević in power. In a press conference of 9 April 1999, NATO declared that TV transmitters were not targeted directly but that “in Yugoslavia military radio relay stations are often combined with TV transmitters [so] we attack the military target. If there is damage to the TV transmitters, it is a secondary effect but it is not [our] primary intention to do that.” A NATO spokesperson, Jamie Shea, also wrote to the Brussels-based International Federation of Journalists on 12 April claiming that Operation Allied Force “target[ed] military targets only and television and radio towers are only struck if they [were] integrated into military facilities...There is no policy to strike television and radio transmitters as such” (cited in Amnesty International Report, *ibid*, June 2000).

77. Assuming the station was a legitimate objective, the civilian casualties were unfortunately high but do not appear to be clearly disproportionate. Although NATO alleged that it made “every possible effort to avoid civilian casualties and collateral damage” (Amnesty International Report, *ibid*, June 2000, p. 42), some doubts have been expressed as to the specificity of the warning given to civilians by NATO of its intended strike, and whether the notice would have constituted “effective warning ... of attacks which may affect the civilian population, unless circumstances do not permit” as required by Article 57(2) of Additional Protocol I. Evidence on this point is somewhat contradictory. On the one hand, NATO officials in Brussels are alleged to have told Amnesty International that they did not give a specific warning as it would have endangered the pilots (Amnesty International Report, *ibid*, June 2000, at p. 47.) \* \* \* [In addition, we must consider] proportionality and the extent to which a military commander is obligated to expose his own forces to danger in order to limit civilian casualties or damage. On this view, it is possible that casualties among civilians working at the RTS may have been heightened because of NATO’s apparent failure to provide clear advance warning of the attack, as required by Article 57(2). On the other hand, foreign media representatives were apparently forewarned of the attack (Amnesty International Report, *ibid*). As Western journalists were reportedly warned by their employers to stay away from the television station before the attack, it would also appear that some Yugoslav officials may have expected that the building was about to be struck. Consequently, UK Prime Minister Tony Blair blamed Yugoslav officials for not evacuating the building, claiming that “[t]hey could have moved those people out of the building. They knew it was a target and they didn’t ... [I]t was probably for ... very clear propaganda reasons.” (*ibid*, citing *Moral combat – NATO at war*, broadcast on BBC2 on 12 March 2000). Although knowledge on the part of Yugoslav officials of the impending attack would not divest NATO of its obligation to forewarn civilians under Article 57(2), it may nevertheless imply that the Yugoslav authorities may be partially responsible for the civilian casualties resulting from the attack and may suggest that the advance notice given by NATO may have in fact been sufficient under the circumstances.

78. Assuming the RTS building to be a legitimate military target, it appeared that NATO realised that attacking the RTS building would only interrupt broadcasting for a brief period. Indeed, broadcasting allegedly recommenced within hours of the strike, thus raising the issue of the importance of the military advantage gained by the attack *vis-à-vis* the civilian casualties incurred. The FRY command and control network was alleged by NATO to comprise a complex web and that could thus not be disabled in one strike. As noted by General Wesley Clark, NATO “knew when we struck that there would be alternate means of getting the Serb Television. There’s no single switch to turn off everything but we thought it was a good move to strike it and the political leadership agreed with us.” (*ibid*, citing “Moral combat, NATO at War,” broadcast on BBC2 on 12 March 2000). At a press conference on 27 April 1999, another NATO spokesperson similarly described the dual-use Yugoslav command and control network as “incapable of being dealt with in a single knock-out blow (*ibid*).” The proportionality or otherwise of an attack should not necessarily focus exclusively on a specific incident. ([Note] the need for an overall assessment of the totality of civilian victims as against the goals of the military campaign). With regard to these goals, the strategic target of these attacks was the Yugoslav command and control network. The attack on the RTS building must therefore be seen as forming part of an integrated attack against numerous objects, including transmission towers and control buildings of the Yugoslav radio relay network which were “essential to Milosevic’s ability to direct and control the repressive activities of his army and special police forces in

Kosovo” (NATO press release, 1 May 1999) and which comprised “a key element in the Yugoslav air-defence network” (*ibid*, 1 May 1999). Attacks were also aimed at electricity grids that fed the command and control structures of the Yugoslav Army (*ibid*, 3 May 1999). Other strategic targets included additional command and control assets such as the radio and TV relay sites at Novi Pazar, Kosovaka and Krusevac (*ibid*) and command posts (*ibid*, 30 April 1999). Of the electrical power transformer stations targeted, one transformer station supplied power to the air-defence coordination network while the other supplied power to the northern sector operations centre. Both these facilities were key control elements in the FRY integrated air-defence system (*ibid*, 23 April 1999). The radio relay and TV transmitting station near Novi Sad was also an important link in the air defence command and control communications network. Not only were these targets central to the Federal Republic of Yugoslavia’s governing apparatus, but formed, from a military point of view, an integral part of the strategic communications network which enabled both the military and national command authorities to direct the repression and atrocities taking place in Kosovo (*ibid*, 21 April 1999).

79. On the basis of the above analysis and on the information currently available to it, the committee recommends that the OTP not commence an investigation related to the bombing of the Serbian TV and Radio Station.

## 6. *Precautions: Roof Knocking*

*The question of roof-knocking addresses the obligation to provide advance warning of attacks, part of an attacking party’s obligation to take precautions under Article 57 of Additional Protocol I. The obligation to warn civilians of impending attacks appears in the law of war dating back to the Lieber Code, which required military commanders to inform the enemy “of their intention to bombard a place, so that non-combatants, and especially the women and children, may be removed before the bombardment commences.” The main purpose of warnings is to give civilians an opportunity to leave and find a place of greater safety. Article 26 of the Regulations annexed to the 1907 Hague Convention is the most oft-cited statement of the obligation to warn: “[t]he officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.” Like Article 57(2)(c) of Additional Protocol I, this requirement provides a practical limitation taking into account the circumstances and the feasibility of issuing such a warning. In essence, the obligation to warn is not absolute and can be avoided if issuing a warning would seriously compromise the chances of success, such as in the case of a surprise attack. Examples of warnings from past conflicts include giving notice by radio of attacks on certain types of facilities, dropping pamphlets, providing a list of objectives to be attacked or flying low over targets to give civilians time to seek safety.*

*During Operation Cast Lead, the Israeli military operation in Gaza in 2008-2009, the Israelis issued extensive warnings: according to Israeli records, 165,000 phone calls, 2,500,000 leaflets, and radio broadcasts. They also used a new technology called “roof knocking,” in which the military fires a non-explosive missile at the roof of a building as an additional warning to the civilians before launching an attack.*

*The text of the U.N. Goldstone Commission's report on roof-knocking appears below.*

**Report of the United Nations Fact-Finding Mission on the Gaza Conflict,  
U.N. Doc. No. A/HRC/12/48 (Sept. 25, 2009)**

37. The Mission examined how Israeli forces discharged their obligation to take feasible precautions to protect the civilian population of Gaza, including particularly the obligation to give effective advance warning of attacks. The Mission acknowledges the significant efforts made by Israel to issue warnings through telephone calls, leaflets and radio broadcasts and accepts that in some cases, particularly when the warnings were sufficiently specific, they encouraged residents to leave an area and get out of harm's way. However, the Mission also notes factors that significantly undermined the effectiveness of the warnings issued. These include the lack of specificity and thus credibility of many pre-recorded phone messages and leaflets. The credibility of instructions to move to city centres for safety was also diminished by the fact that the city centres themselves had been the subject of intense attacks during the air phase of the military operations. The Mission also examined the practice of dropping lighter explosives on roofs (so-called "roof knocking"). It concludes that this technique is not effective as a warning and constitutes a form of attack against the civilians inhabiting the building. Finally, the Mission stresses that the fact that a warning was issued does not relieve a commander and his subordinates of taking all other feasible measures to distinguish between civilians and combatants. \* \* \*

475. The Mission is also aware of the public statement by Mr. Fathi Hammad, a Hamas member of the Palestinian Legislative Council, on 29 February 2009, which is adduced as evidence of Hamas' use of human shields. Mr. Hammad reportedly stated that

the Palestinian people has developed its [methods] of death seeking. For the Palestinian people, death became an industry, at which women excel and so do all people on this land: the elderly excel, the mujahideen excel and the children excel. Accordingly, [Hamas] created a human shield of women, children, the elderly and the mujahideen, against the Zionist bombing machine.

476. Although the Mission finds this statement morally repugnant, it does not consider it to constitute evidence that Hamas forced Palestinian civilians to shield military objectives against attack. The Government of Israel has not identified any such cases. \* \* \*

498. The Israeli Government has stated that it took the following steps to warn the civilian population of Gaza:

- The Israeli armed forces made 20,000 calls on 27 December and 10,000 on 29 December 2008;
- 300,000 warning notes were dropped over the whole of the Gaza Strip on 28 December;
- 80,000 leaflets were dropped in Rafah on 29 December;
- In the context of the beginning of ground operations on 3 January, 300,000 leaflets were dropped in the entire Gaza Strip, especially in the northern and eastern parts;

- On 5 January, 300,000 leaflets were dropped in Gaza City, Khan Yunis and Rafah;
- In total some 165,000 telephone calls were made throughout the military operations;
- In total some 2,500,000 leaflets were dropped.

499. In addition to these measures, the Israeli Ministry of Foreign Affairs explains that the telephone calls were both direct calls and pre-recorded messages, that it made radio broadcasts, and that it developed a practice of dropping apparently light explosives on rooftops (referred to by some as “roof-knocking”). \* \* \*

504. The Israeli Government describes that in certain circumstances its armed forces fired “warning shots from light weapons that hit the roofs of the designated targets”—a practice referred to as roof-knocking. The Israeli Government indicates that this practice was used when it appeared that people had remained in their houses despite being given some previous warning. It is not clear whether this was the only circumstance in which this method was employed. The Mission heard that in the al-Daya incident, the Israeli Government claims to have made such a warning shot, albeit to the wrong house. The Mission also saw in the Sawafeary house that a missile had penetrated the rear of the house on the wall near the ceiling, gone through an internal wall and exited through the wall at the front of the house near the windows. At the time (around 10 p.m. on 3 January 2009) there were several family members in the house, who happened to be lying down. The Mission cannot say what size of weapon was used on this occasion, although it was sufficiently powerful to penetrate three walls, or whether it was intended as a warning. \* \* \*

530. The Mission is doubtful whether roof-knocking should be understood as a warning as such. In the context of a large-scale military operation including aerial attacks, civilians cannot be expected to know whether a small explosion is a warning of an impending attack or part of an actual attack. In relation to the incident at the Sawafeary house recounted above, the Mission cannot say for certain if this missile was meant to warn or to kill. It notes that, if this was meant as a warning shot, it has to be deemed reckless in the extreme.

531. The legal requirement is for an effective warning to be given. This means that it should not require civilians to guess the meaning of the warning. The technique of using small explosives to frighten civilians into evacuation, even if the intent is to warn, may cause terror and confuse the affected civilians.

532. The Mission does not have sufficient information to assess the accuracy of the Israeli Government’s claim that the warning shot method was used only when previous warnings (leaflets, broadcasts or telephone calls) had not been acted upon. However, in many circumstances it is not clear why another call could not be made if it had already been possible to call the inhabitants of a house. The Mission notes that these warnings all took place in situations where the view appears to have been reached that those in the house are civilians or predominantly civilians. If the choice is between making another call or firing a light missile that carries with it a significant risk of killing those civilians, the Mission is not convinced that it would not have been feasible to make another call to confirm that a strike was about to be made.

533. Finally, apart from the issue of fear and ambiguity, there is the question of danger. The idea that an attack, however limited in itself, can be understood as an effective warning in the meaning of article 57(2)(c) [of Protocol I] is rejected by the Mission.

*The Israeli report on Operation Cast Lead provides this analysis of the practice of roof-knocking:*

*Specific Warnings Before Attacks:* In addition to the above, the IDF made specific telephone calls just before an attack was about to take place, informing residents at risk about the upcoming strike and urging them to leave the place. In certain instances, although such warnings were made, the civilians chose to stay. In such cases, the IDF made even greater efforts to avoid civilian casualties and minimise collateral damage by firing *warning shots from light weapons that hit the roofs* of the designated targets, before proceeding with the strike. These warnings were accompanied by real-time surveillance in order to assess the presence of civilians in the designated military target, despite the advance warnings. Accordingly, the commander in charge assessed whether the collateral damage anticipated, including to those who chose to stay at the premises, was not excessive in relation to the military advantage anticipated. The specific warnings were generally effective.

*It can be useful in class to discuss which argument fits better within the general scope of IHL and whether it is reasonable to use a warning shot that will not explode or cause injuries if other warnings have not had the desired effect. At what point can or should the attacking party progress on the belief that it has given all feasible warnings under the circumstances?*

#### 7. **Targeted Killings in Yemen: Anwar Al Aulaqi**

*The situation in Yemen, and the killing of Anwar Al Aulaqi in Northern Yemen on 30 September 2011 is a good case study to use with students, as it covers most questions posed above: applicable law, military objectives, precautionary measures, etc. With respect to targeted killings in particular, the law is very much in flux here. To prepare yourself for this exercise, you might review the following articles that address the Anwar Aulaqi killing from an IHL perspective:*

- Laurie Blank, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, 37 WILLIAM MITCHELL L. REV. \_\_\_\_ (2011)
- Benjamin R. Farley, *Targeting Anwar Al-Aulaqi: A Case Study In U.S. Drone Strikes And Targeted Killing*, II(1) AM. UNIV. NAT'L SECURITY L. BRIEF 57 (2011)
- Beth Van Schaack, *The Killing Of Osama Bin Laden & Anwar Al-Aulaqi: Uncharted Legal Territory*, 14 YEARBOOK OF HUMANITARIAN LAW \_\_\_\_ (Forthcoming 2012)



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