

THE PRINCIPLES OF DISTINCTION AND
PROPORTIONALITY UNDER THE FRAMEWORK OF
INTERNATIONAL CRIMINAL RESPONSIBILITY
–CONTENT AND ISSUES–*

LOS PRINCIPIOS DE DISTINCIÓN Y
PROPORCIONALIDAD EN EL MARCO
DE LA RESPONSABILIDAD PENAL
INTERNACIONAL INDIVIDUAL
–CONTENIDO Y PROBLEMÁTICA–

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ABSTRACT

This article seeks to illustrate how the Principles of Distinction and Proportionality, coming from a branch of primary rules (International Humanitarian Law) have a relevant influence on the modern system of international criminal responsibility, consecrated in the Statute of the International Criminal Court, ICC. It is found that even if the latter contains provisions –war crimes– reproaching conducts due to their indiscriminate character, there are gaps related with the meaning and extension of such criminal conducts; this problematic is explained on one hand, by the political reluctance of States to compromise their sovereignty, and the specificities of the punitive function on the other. Practical consequences can be seen on the way on which modern armed conflicts take place, as most of them take place in a non-international level. Despite of a pessimist diagnosis, it has to be firmly pointed that the sole fact that a permanent criminal court has come to be a reality is a tremendous gain, provided that it is through its activity i.e. the production of clarifying jurisprudence, that this problems will be confronted and solved.

Key words author: International Criminal Court, Criminal Responsibility, International Humanitarian Law, Distinction between Civilians and Combatants, Principle of Proportionality.

Key words plus: International Criminal Court, Criminal liability, International Humanitarian Law, Combatants and noncombatants.

RESUMEN

Este artículo busca ilustrar cómo los Principios de Distinción y Proporcionalidad, provenientes de un conglomerado de normas primarias (Derecho Internacional Humanitario, DIH), han influenciado el sistema de responsabilidad penal internacional, consagrado en el Estatuto de Roma. Se observa que aun cuando este último contiene provisiones legales que reprochan conductas de tipo indiscriminado, hay un vacío relacionado con el significado y la extensión de dichos comportamientos; dicha problemática se explica, de un lado, por la reticencia que tienen los Estados en comprometer su soberanía y, del otro, por las especificidades de la función punitiva de la Corte. Las consecuencias prácticas de esta situación se pueden apreciar en el escenario de los conflictos armados internos, ya que la mayoría de éstos se desarrolla en este ámbito. A pesar de un diagnóstico pesimista, debe señalarse que el mero hecho de que una corte penal permanente haya emergido como una realidad tangible constituye una ganancia, ya que es mediante su actividad—la producción de jurisprudencia que establezca el contenido y alcance de las normas—que los inconvenientes pueden ser confrontados y resueltos.

Palabras clave autor: *Corte Penal Internacional, responsabilidad penal, Derecho Internacional Humanitario, distinción entre civiles y combatientes, Principio de Proporcionalidad.*

Palabras clave descriptor: *Corte Penal Internacional, Responsabilidad penal, Derecho internacional humanitario, Combatientes y no combatientes (Derecho internacional).*

SUMMARY

INTRODUCTION.- I. PRELIMINARY MATTERS ON THE RELEVANT LEGAL BRANCHES. *A. The relation between International Humanitarian Law and International Criminal Law.- B. The Principles under the framework of International Humanitarian Law.-* II. GENERAL ISSUES ARISING FROM THE STRUCTURE OF ARTICLE 8 OF THE ICC STATUTE.- *A. Issues around the dichotomy civilian/combatant.- B. War crimes in the context of a non-international armed conflict.-* 1. Distinction and Proportionality.- 2. Location of the Principles on International Humanitarian Law.- *C. Issues on the customary nature of the primary rules vis à vis the Principle of Legality under the Statute.-* III. PRAGMATIC ISSUES ON DISTINCTION AND PROPORTIONALITY.- *A. Structure of war crimes and the place of the Principles on the International Criminal Court Statute.- B. Prohibition to intentionally direct attacks against civilians.- C. Concrete provisions related to the Principle of Proportionality.-* 1. Methods of warfare.- 2. Means of warfare. IV. FINAL REMARK ON CIVILIANS TAKING ACTIVE PART IN HOSTILITIES.- V. CONCLUSIONS.- BIBLIOGRAPHY.

INTRODUCTION

One of the greatest paradoxes of International Law is the one related with war; even if nowadays the use of force is forbidden as a breach to the international legal order¹ since it constitutes a massive violation to human dignity and contravene elemental considerations of humanity, there is a whole normative set which is to determine how hostilities have to be conducted.

For that reason, and looking to establish a balance between these two extremes, the distinction between combatants and civilians is the cornerstone of all humanitarian law,² and therefore, has a tremendous influence on the regime of international individual penal responsibility, as in practice by far the most numerous crimes are committed against civilians.³

The purpose of this article is to establish the content, scope and pragmatic problems of the Principles of Distinction and Proportionality, inspirational elements of the so-called category of war crimes under International Criminal Law.

In order to do that, section II will briefly raise two topics; first, illustrate some basic aspects of the relation between International Humanitarian Law (IHL, henceforth) as a *norme de comportement*, and International Criminal Law while a branch of international law which its primarily task is to ascertain individual criminal responsibility; and second, as a way to understand the practical implications of those Principles in the context of a punitive sanction, due attention will be regarded to the content and scope of Distinction and Proportionality, showing the process which lead to get to their modern formulation through the rules of IHL.

Consequently, and provided that the focal point of the article is the influence of those principles into the modern system of individual

1 "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind (...)" Preamble of the UN Charter.

2 Vincent Chetail, *The Contribution of the International Court of Justice to International Humanitarian Law*, 850 *International Review of the Red Cross*, 253 (2003).

3 Antonio Cassese, *International Criminal Law*, 88 (2nd ed., Oxford University Press, Oxford, 2008).

criminal responsibility, it will be analyzed first, various common matters which influence the structure of war crimes, and second, the content of the legal provisions related to war crimes under the Statute of the International Criminal Court⁴ (the ICC Statute, hereafter), specifically those directly inspired by the universal formulations in comment, which may be divided in a general prohibition, on one hand, and their concrete application in the sphere of methods and means of warfare, on the other.

This is so in order to identify their basic penal structure, that is to say, the objective and subjective elements, and some circumstances which might lead to the exclusion of the unlawfulness of the conduct or the criminal responsibility. Hence, the study will address some problematic issues arising from the way the Statute was set forth, as it reflects the political position of the States tending to limit the possibility to punish some conducts provided the nature of modern armed conflicts and the subjects which take part on them. Finally, there will be displayed some conclusions on the challenges for International Criminal Law in respect of these specific situations.

As a transversal resource, relevant international jurisprudence⁵ will illustrate the way that International Criminal Law has understood the Principles of Distinction and Proportionality on concrete situations of armed conflict, and the important role which has been assumed to clarify the content and scope of those legal rules.⁶

4 Signed in Rome, Italy, on July 17th, 1998.

5 Limited to the case law produced by International Court of Justice and the *ad hoc* Criminal Tribunals.

6 “A major contribution of the International Court of Justice is that it has singled out, clarified and specified fundamental principles of International Humanitarian Law.” Vincent Chetail, *op. cit.*, 252. The same consideration can be made about the jurisprudence of the international criminal tribunals on war crimes.

I. PRELIMINARY MATTERS ON THE RELEVANT LEGAL BRANCHES

A. *The relation between International Humanitarian Law and International Criminal Law*

Following the ICTY's (International Criminal Tribunal for the former Yugoslavia) considerations on *Tadić case*, the elements which permit the identification of a war crime are (i) a serious infringement⁷ of an international rule that belongs to the corpus of a customary law or to be part of an applicable treaty, and (ii) that this conduct entails criminal responsibility for breaking the rule.⁸

Such precision permits to identify the nature of the relation between the rules of IHL and the ones of ICL; the former are *normes de comportement* or primary rules concerning a description of what is prohibited in case of an armed conflict, and the latter are secondary rules which complementary may adjudge criminal responsibility as an effect of the above mentioned breach.

It is clear then that an act which is not prohibited under the primary rules can not constitute a war crime. However, should it be noted that “*not every act prohibited under the primary rules also constitutes a war crime as the definitions contained in the various items in the catalogue are sometimes narrower than the primary norms,*”⁹ although they might give rise to state responsibility.¹⁰

As this is not the main purpose of this paper, it will just be mentioned that the reasons for this unbalanced situation are basically political, in the sense that the consequences to determine international criminal responsibility are touching, at least tangentially, the sovereignty of States. However, the notion of war crime is a dynamic concept, as it is bound to change with the development of the primary substantive rules relating to that behavior.¹¹

7 This serious infringement is verified if such rule protects a paramount value or generates grave consequences for the victim.

8 ICTY Trial Chamber, *Prosecutor v. Tadić*, Judgment May 7th, 1997, para. 94.

9 Michael Bothe, *War Crimes*, in *1 The Rome Statute of the International Criminal Court: A Commentary*, 387 (Antonio Cassese, Paola Gaeta, John R. W. D. Jones, eds., Oxford University Press, Oxford, 2002).

10 ICTY Trial Chamber, *Prosecutor v. Tadić*, Judgment May 7th, 1997, para. 94.

11 Michael Bothe, *op. cit.*, 381.

Why then an international criminal jurisdiction if regardless of the existence of a solid set of primary rules developed by the International Community, States are reluctant to include a broader number of war crimes?

“Despite these rules, however, the need remains for an international criminal court since many States have proved unwilling to fulfil their duty to exercise their jurisdiction. Though the States continue to have the primary role to play in prosecuting war criminals, the ICC is being set up precisely to step in for national courts when these are unwilling or genuinely unable to do so.”¹²

B. The Principles under the framework of International Humanitarian Law¹³

1. Distinction and Proportionality

According to Jean Pictet, the Principles which inspire the framework of IHL can be found expressly formulated on conventions or implicitly captured inside its substance, acting as *l’ossature du corps vivant*,¹⁴ and characterized by a high level of abstraction and generalization. In that sense, even if they are considered as fundamental elements,¹⁵ Distinction and Proportionality are not explicitly laid down in any normative provision.

12 Dörmann Knut, with contributions by Louise Doswald-Beck & Robert Kolb, *Elements of War Crimes: under the Rome Statute of the International Criminal Court*, 2 (University of Cambridge Press / ICRC, Cambridge, 2002).

13 Even if it is not the main point of this paper, it shall be mentioned as an illustration to the process of formation of the Principles that the actual content and scope of Distinction and Proportionality reflects the historical development of the law of armed conflicts, through a clash among the so-called “Hague Law” and “Geneva Law”. The former had the intention to codify an existent normative framework in order to regularize hostilities (assuming by the way that war was an unavoidable political fact), and the latter appointed humanity as a paramount value to be protected. In that way, by the time the Hague Regulations were laid down, the law mainly focused on the regularization of warfare through the identification of the parties which were legitimized to make war, and the way they could do it. Humanity considerations came properly with the Geneva Conventions of 1949 as a radical shift from the emphasis on *Ius in bello*, which was definitely reflected later on their Additional Protocols of 1977, on which both normative bodies were harmonized.

14 Jean Pictet, *Développement et Principes du Droit International Humanitaire* (Éditions A. Pédone, Paris, 1983).

15 *“The Principle of Distinction between civilians and combatants is one of the cardinal principles contained in the texts constituting the fabric of humanitarian law. (...) these fundamental rules are to be observed by all states whether or not they have ratified the conventions that contain them,*

Nevertheless, a systematic interpretation of the relevant rules could be useful to identify their presence as an influence on every likely disposition, provided that they personify the essence of modern IHL on one hand,¹⁶ as well as codifications are just the development and expression of such principles, on the other; that is in general terms, the balance between humanity and military necessity, values which normally can't be weighted up as they represent different scales of measurement.

Under the particularities of modern armed conflicts the possibility to make a fair application of the principles is problematic, as "*The protection of civilians from military operations is not absolute, [since] attacks made against military targets that lead to incidental damage to civilians are not prohibited.*"¹⁷ This would result, then, into an incomplete protection to civilians and civilian population.

However, it has to be pointed a specific relation of complementarity as Proportionality appears to be the way by which Distinction is concretely implemented when hostilities are considered from a pragmatic point of view; the rules related to targeting, collateral damage and collateral civilian casualties, among others, are derived from Distinction,¹⁸ and form part of the core content of Proportionality. This is the way these two principles are going to be treated through this study.

2. Location of the Principles on International Humanitarian Law

It has been suggested that even Distinction and Proportionality were present on the content of IHL since the first legal attempts to

because they constitute intransgressible principles of international customary law." *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, ICJ Reports, para. 79 (1996).

16 "(...) *il servent de lignes directrices dans le cas non prévus, ils constituent un sommaire facile à assimiler, indispensable à la diffusion.*" Jean Pictet, *op. cit.*

17 Gerhard Werle with Florian Jessberger, Wulf Burchards, Volker Nerlich, Belinda Cooper, *Principles of International Criminal Law*, para. 1011 (TMC Asser Press, The Hague, 2005).

18 This list is an example extracted from an *US Department of Defense Final Report to Congress on the Conduct of the Persian Gulf War*, 620 (April 10th, 1992), 31 *International Legal Materials, ILM*, Lesson 3 (United Nations Documents and Publications, New York / Geneva, 1992). See footnote 2 on Jean-François Quéguiner. *The Principle of Distinction: beyond an obligation of customary International Humanitarian Law*, in *The Legitimate Use of Military Force: The just War Tradition and the Customary Law of Armed Conflict* (Howard M. Hensel, ed., Ashgate, Aldershot, England / Burlington, Vermont, 2008).

codify the rules of IHL¹⁹ it wasn't until the emergence of the 1977 Additional Protocols to the Geneva Conventions Protocol I and II that they were finally laid down in proper sense.

Those legal instruments combined both branches of IHL (conduction of hostilities and protection to certain individuals and objects), creating a comprehensive vision of the law of armed conflicts, which notice the particularities of war, but at the same time purports for the protection of human dignity no matter the causes or mobiles for war to take place.

Distinction as a general principle is consecrated in article 48 of Protocol I²⁰ for the case of an international armed conflict. Such disposition shall be read in accordance to article 50,²¹ which defines the personal scope of application, by creating a dichotomy *par exclusion* between civilians and combatants, the latter comprehensively defined on several dispositions of IHL,²² even if at the end there is no vestige of a clear definition of who is protected, but who is not.

Regarding on Proportionality, article 51²³ establishes a comprehensive protection of civilians against dangers arising from military

19 Notwithstanding the key role of The Hague regulations of 1899 and 1907, the preamble of the St. Petersburg Declaration of 1868 is the clearest example of the primary referrals to the principles as it states that “*Considering that the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.*”

20 “*In order to ensure respect and protection of the civilian population and civilian objects, the parties to the conflict shall all times distinguish between the civilian population and combatants (...) and accordingly shall direct their operations only against military objectives.*”

21 “*1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 a (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian. 2. The civilian population comprises all persons who are civilians. 3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.*”

22 The articles mentioned in footnote 19.

23 “*1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in circumstances. 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. 3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities. 4. Indiscriminate attacks are prohibited. Indiscriminate attacks are: (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; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. 5. Among others, the following types of attacks are to be considered as indiscriminate: (a) An attack by*

operations in all circumstances, and develops concrete provisions to limit means (especially weapons) and methods of warfare resulting on indiscriminate attacks or which may cause incidental injuries. Following this approach, article 57 develops the concept and content of precautionary measures to the case of military operations which, provided their scale and magnitude, are subject to planning.

In the case of non-international conflicts the rules concerning Distinction and Proportionality are limited as Protocol II doesn't contain any provision consecrating the principles nor defining who is legitimized to take part into hostilities, and consequently, who is protected from them. In addition, article 13.²⁴ contains a similar but limited statement in relation with article 51 of Protocol I, as it lays down the general clause of protection from military operations and the prohibition to be treated as military objectives, and points the prohibition for a civilian to take direct part in hostilities. No mention on indiscriminate attacks, precautionary measures or prohibition of indiscriminate weapons is made.

II. GENERAL ISSUES ARISING FROM THE STRUCTURE OF ARTICLE 8 OF THE ICC STATUTE

The debate on Distinction and Proportionality as principles which influence the structure of war crimes reflects some of International Law's modern challenges, while the actors-parties (States) involved into its dynamics (creation, interpretation, application) are assuming political positions which give content to those legal institutions, norms and procedures according to their main aim; sovereignty to defend their interests when recourse to force is concerned.

bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects. And (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. (...)"

- 24 "1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances. 2. The civilian population as such, as well as individual civilians, shall not be the object of attack (...) 3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities."

Hence, such problematic can be condensed in three points which have an influence over the jurisdiction of the ICC on war crimes related with Distinction and Proportionality provided their general character; the ambiguity of the pairing civilian/combatant, the limitation of the jurisdiction of the Court in the case of a non-international armed conflict, and the relevance of customary law in order to extend the applicability of war crimes to specific situations *vis à vis* the certainty on the applicable law which a punitive legal system has to own.²⁵

A. Issues around the dichotomy civilian/combatant

The most immediate outcome of Distinction is the insertion into the legal texts of two categories of individuals which are related with the development of hostilities; civilians, the ones which are subject of protection, and combatants, which due to their status are legitimized to take part in hostilities.²⁶

Therefore, coming from humanitarian law, this vague pairing influenced the structure of war crimes in the same way that it created lacunas in the application of the *norms de comportement* on IHL,²⁷ specifically on the applicability of criminal descriptions to certain kind of individuals.

Thus, the nature of some of the involved individuals or groups in the light of penal responsibility is not clear, *i.e.* the category of “*civilians taking active part in hostilities*” as possible perpetrators of war crimes on one hand, and the possibility to exclude criminal responsibility in the case of an individual which causes injuries to a civilian who has lost protection as have taken active part into hostilities, on the other, as it will be expanded in section 4.4.

25 *Nullum crimen, nulla poena sine praevia lege poenali.*

26 Check footnote 13 to appreciate the historical background for the development of such categories. For a more detailed explanation on the origin and problematic of the dichotomy civilian/combatant, see Karma Nabulsi, *Evolving Conceptions of Civilians and Belligerents: one hundred years after The Hague Peace Conferences*, in *Civilians in War* (Simon Chesterman, ed., Lynne Rienner Publishers Inc., London, 2001). Anthony Rogers, *Combatant Status*, in *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Elizabeth Wilmshurst & Susan Carolyn Breau, ed., Cambridge University Press, New York, 2007).

27 See section 2.2.2 on the location of the Principles in IHL.

However, this problematic is directly linked with the jurisdiction of the ICC in the case of non-international armed conflicts, while the unqualified actors are the ones which perform as the counterpart of States in this type of hostilities.

B. War crimes in the context of a non-international armed conflict

As it was discussed, the standardization of the relevant actors on a conflict plays a relevant role not just as a protective measure, but in the determination of who is legally authorized to take part in hostilities (and who is not). Therefore, the scenario where those actors are performing is relevant as well when assessing which unlawful conducts are criminally reproachable.

While most of modern armed conflicts have a non-international character, surprising and regrettable omissions were made in this case when including criminal descriptions, specifically on the behaviors related with the prohibition of indiscriminate attacks (method of warfare) and the use of certain weapons (means of warfare), both of them coming from the Principle of Proportionality.

One possible explanation is that the omission comes from the primary rule, as by the last phases of the Geneva Diplomatic Conference where Protocol II was negotiated, States refrained from including such legal provisions to the case of an internal conflict because they considered their sovereignty to be particularly threatened in this area.²⁸ Therefore, it would look like a *real* war between belligerents having equal rights.

However, the result was a dramatic simplification of the text,²⁹ although for others, the sole inclusion of the provisions related to this type of conflict is one of the greatest achievements of the Conference.³⁰ Even more, this is shocking when it is brought what the International Criminal Tribunal for the former Yugoslavia (ICTY) stated on this respect while “*the rule that civilian population as*

28 Gerhard Werle et al., *op. cit.*

29 Michael Bothe, *op. cit.*, 420. The final result of this process is discussed on section 2.2.2 *supra*.

30 Thomas Graditzky, *War Crimes Issues before the Rome Diplomatic Conference on the Establishment of an International Criminal Court*. University of California, Davis, *Journal of International Law & Policy*, 199-217, 211 (1999).

*such, as well as individual civilians, shall not be object of attack, is a fundamental rule of international humanitarian law applicable to all armed conflicts,*³¹ and as we saw, Distinction and Proportionality are inseparable as they are a pairing constituted by a general aim and a provision of concrete application.

C. Issues on the customary nature of the primary rules vis à vis the principle of legality on the Statute

Following what the ICJ has stated in its case law,³² the Principles of Distinction and Proportionality have a customary character, so they should be applied to any type of armed conflict as they represent basic values to the international community, and which are concretized through a systematic practice. This means, then, that the humanitarian norms are flexible, and are able to be adapted to new circumstances whether the conditions to verify their customary character are met.

Nevertheless, the problematic described in the first sections of the paper showed that even if the secondary rules are feed from the *normes de comportement* in order to define which conducts inside an armed conflict could be criminally sanctioned, the former don't represent exactly the latter, creating a limited system of criminal responsibility in comparison with IHL.

Moreover, according to the principle *Nullum crimen, nulla poena sine praevia lege poenali*,³³ a person shall not be criminally responsible unless the conduct in question constitutes a crime within the jurisdiction of the Court, and that the definition of a crime shall be strictly constructed and shall not be extended by analogy. In other words, "*the principle of legality promotes a legal system's legitimacy by limiting the interventions of its criminal process to those which have been clearly prescribed by law in advance.*"³⁴

31 ICTY Trial Chamber, *Prosecutor v. Martić*, Judgment March 8th, 1996, para. 10.

32 See footnote 15 on the considerations of the ICJ in the Advisory Opinion on the legality of use of weapons of mass destruction.

33 Article 22 of the ICC Statute.

34 Bruce Broomhall, *Article 22 Nullum crimen sine lege*, in *Commentary on the Rome Statute of the International Criminal Court, Part 3, General Principles of Criminal Law*, 450 (Otto

Such provision would be subsequently a wall for customary international law to influence from a flexible point of view the content and scope of war crimes, in order to promote legal certainty as one of the cornerstones of the international penal system. In other words, that the judges do not have the right to supplant the authoritative law-maker.³⁵

Then, a conclusion *a priori* would be that the jurisdiction of the ICC is restricted to situations literally described in the Rome Statute. The question which raises here, provided the customary character of the principles in comment is whether the flexible performance of such humanitarian rules could be extended to the lists of crimes under the Statute, in order to adapt the latter to the changing structure of armed conflicts, as well as the need to protect universally some values vindicated by the international community.

As it will be seen henceforth, this proposal is one of the possible alternatives to clarify the case of the applicability of proportionality in war crimes related to non-international armed conflicts, specifically on the prohibition of indiscriminate attacks and the use of certain means of warfare, and in some way could assist the jurisdiction to clarify situations related with civilians taking active part in hostilities.

III. PRAGMATIC ISSUES ON DISTINCTION AND PROPORTIONALITY

Taking into account the theoretical issues displayed on section 3, it will be described the way that the Statute deals with war crimes related to the Principles of Distinction and Proportionality, firstly describing general common elements, and therefore analyzing each conduct.

A. Structure of war crimes and the place of the Principles on the International Criminal Court Statute: facteurs communs

Article 8 of the Statute establishes four categories of war crimes which are determined by two variables; the type of armed conflict

Triffterer, ed., Nomos Verlagsgesellschaft, Baden-Baden, 1999).
35 *Ibid.*, 458.

(international or non-international) and the legal source³⁶ where the conducts come from; on one hand “grave breaches” of the Geneva Conventions, and “other serious violations” of the laws and customs applicable in armed conflict on the other. Consequently, the Court may dispose of four lists of war crimes which describe diverse criminal actions related to the limits of the conduct of hostilities and the protection of certain persons and goods.

Hence, even if the Principles of Distinction and Proportionality have a global influence on the whole branch of IHL, and therefore, on every war crime, their direct manifestation can be found in one general prohibition applicable either to situations of international and internal armed conflicts (section B), and two complementary criminal conducts in relation the methods and means of warfare which are disproportionate (section C), following the way they were developed from the *normes de comportement* of the 1977 Additional Protocols to the Geneva Conventions, without prejudice of complementary rules coming from another legal instruments, for instance, in the case of means of warfare.³⁷

Even though each criminal behavior will be analyzed separately in order to address the specificities of each conduct, four common elements to the crimes can be identified in order to establish practical consequences for the determination of criminal responsibility:

36 The substantive applicable law to the ICC are defined on article 21 of the Statute, as it follows: “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 including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards. 2. The Court may apply principles and rules of law as interpreted in its previous decisions. 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 as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”

37 Such as the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, Canada, 1997.

- The conducts shall be unlawful in relation to a *norme de comportement* (primary rule) coming from the framework of International Humanitarian Law.
- Even if the results vary depending on each case, the conducts have to be concretized in an attack, *i.e.* the offensive or defensive use of violence against an adversary, which reflects the display of a military operation in the context of an armed conflict (nexus).
- The civilians individually considered or civilian populations³⁸ are the passive subject of the criminal conducts, *i.e.* the effects of military actions resides on them, directly (8.2 (b) (i)) or indirectly (8.2 (b) (iv; xx)).³⁹
- Notwithstanding subjective specificities for each criminal conduct, intent and knowledge from the perpetrator have to be verified when determining the mental element of the crimes.⁴⁰

B. Prohibition to intentionally direct attacks against civilians

The Statute of ICC recognizes that according to the Principle of Distinction, civilians cannot be considered as a legitimate objective, which means that a direct action against them is not justified in order to obtain a military advantage, and likewise, that it is forbidden provided that it constitutes a breach to the most *elemental considerations of humanity*.⁴¹

Thus, as a manifestation of its customary character⁴² there is an identical rule applicable to both types of conflicts even if reproduced on different lists; thus, articles 8.2 (b) (i) and 8.2 (e) (i) states such prohibition as it follows:⁴³

“Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.”

38 As it was mentioned on section 2, their determination has to be done through the rules of international Humanitarian Law. See likewise ICTY Trial Chamber, *Prosecutor v. Blaškić*, Judgment March 3rd, 2000, para. 180. ICTR (International Criminal Tribunal for Rwanda) Trial Chamber, *Prosecutor v. Kayishema and Ruzindana*, Judgment May 21st, 1999, para. 179.

39 The case of individuals taking active part in hostilities will be treated in detail on section 4.4.

40 Defined in a general way in the article 30 of the Statute, and complemented with the “*Elements of Crimes*”, a legal document developed by a Preparatory Commission under the mandate of the UN General Assembly, from February 1999 to June 30th, 2000.

41 *Corfu Channel Case*, Judgment of April 9th, 1949: ICJ Reports 1949, para. 35 *et seq.*

42 See section 3.3 on the customary nature of the Principle of Distinction.

43 These prohibitions are directly related to article 51.2 of Protocol I in the case of an international armed conflict, and 13.2 of Protocol II for a non-international armed conflict.

Moreover, the International Criminal Tribunal for the former Yugoslavia has confirmed that “*the rule that civilian population as such, as well as individual civilians, shall not be object of attack, is a fundamental rule of international humanitarian law applicable to all armed conflicts.*”⁴⁴

The general elements of crimes described above apply without any additional provision, save for the occasional problematic situation for the judge to identify who is protected in cases where civilians take direct part into hostilities, and the criminal conducts are committed against them (this will be treated in section IV-D), and the discussion on if the perpetrator should have the “*purpose*” of committing attacks against civilians, or just “*been aware*” of the civilian status of the object of attack, thesis stated by the ICTY.⁴⁵

C. Concrete provisions related to the Principle of Proportionality

As it was pointed on what the ICJ has said about the relation between distinction and proportionality, the former cannot be easily disassociated from the rules inherent to its implementation, which includes specifically the prohibition of indiscriminate attacks and the use of weapons with the same potentiality to cause incidental injuries to civilians and civilian population.⁴⁶

However, and relying on section III-B, no rule on the Statute was found in order to expressly establish criminal responsibility for the commission of disproportionate attacks in the case of a non-international armed conflict, despite of two lists of prohibited conducts dedicated to this factual situation.⁴⁷ Hence, actions contrary to the Principle of Proportionality would only be punishable in the case of an international armed conflict.

Nonetheless, it is suggested that the general prohibition of attacks to civilians and civilian population included in article 8.2 (e) would

44 ICTY Trial Chamber, *Prosecutor v. Martić*, Judgment March 8th, 1996, para. 10. This approach is different as the *ad hoc* tribunal required serious consequences to verify the commission of the crime, and the ICC Statute doesn't address so.

45 ICTY Trial Chamber, *Prosecutor v. Galić*, Judgment December 5th, 2003, para. 55.

46 Vincent Chetail, *op. cit.*, 255 (2003).

47 Articles 8.2 (c) and 8.2 (e) of the Rome Statute.

be sufficient to include such behaviors⁴⁸ in the case of an internal armed conflict, as they form a unity under the customary primary rules of IHL; however, and taking into account on the other hand what was pointed on the principle of legality, this issue is open to further discussion as the ICC develops relevant jurisprudence.

1. Methods of warfare (indiscriminate attacks)

Article 8.2 (b) (iv) lays down the prohibition to launch an attack which will cause incidental injuries to the protected entities, as it follows:

“Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”

Alternatively to the description of article 8.2 (b) (i) which dealt with direct attacks against civilians, this article develops the case of an operation which was initially directed to a legitimate military objective, but under certain conditions generates unlawful collateral effects to protected entities. Therefore, it implicitly recognizes that in terms of criminal responsibility, there’s a “*thin red line*” in order to determine when some incidental injuries during hostilities are not reproachable provided the reality of armed conflicts, and when they are.⁴⁹

In that sense, as the ICTY pointed, “*The protection of civilians (...) may cease entirely or be reduced or suspended in exceptional circumstances: (...) (ii) when, although the object of a military at-*

48 It has been suggested that article 13.2 of Protocol II would implicitly carry on the principle of proportionality, thus opening a door to interpret in a broad way the provision of the Statute (art. 8.2 (e) (i)), in order to punish conducts contravening the Principle of Proportionality under a non-international armed conflict. This vision is supported by the jurisprudence of the ICJ as mentioned above. Michael Bothe, *op. cit.*, 421.

49 “*When attacks on legitimate targets cause incidental consequences for protected persons, these must be limited to the extent possible. If any attack would lead to disproportionate incidental consequences, it may not be carried out. When engaging in a legitimate attack, parties must refrain from using means and methods that would cause unnecessary suffering.*” Gerhard Werle et al., *op. cit.*

*tack is comprised of military objectives, belligerents cannot avoid causing so-called collateral damage to civilians.*⁵⁰

Such delimitation deserves further discussion, as it is important to point some specificities of this criminal description:

*A priori, particular results coming from the launch of the attack are not required to verify the material element, as the reproach comes from the fact of committing the action which would cause incidental loss of life or injury to civilians.*⁵¹ This is so provided that in the Elements of Crimes, the word *will*, inside the original article, was replaced by *would*.⁵²

Consequently, there is a special qualification of the mental elements –intent and knowledge–, as it is specifically required that the perpetrator had conscience of the effects of the attack *before* it was launched, as well as of the factual circumstances that established the existence of an armed conflict. Specifically, the knowledge element implies that the perpetrator should make a value judgment based in the information available to him at the time the military action is being planned, and following the parameter of a “*reasonable commander*”⁵³ when taking the commented decisions.

Special controversy is provided by the phrase “*which would be clearly excessive in relation to concrete and direct overall military advantage anticipated,*” whether it is the one which determines to what extent military operations which generate incidental damages to civilians are disproportionate, and then, subject to criminal responsibility.

Departing from the primary norm which was displayed in articles 51.5 (b) and 57.2 (a) (iii) of Protocol I, the article of the Statute includes the words “*clearly*” and “*overall*”. This is relevant in order to point that whether by the time the IHL instrument was negotiated there were divergences in the way this provision had to be interpreted,⁵⁴

50 ICTY Trial Chamber, *Prosecutor v. Kupreškić and others*, Judgment January 14th, 2000, para. 526.

51 “*Launching an attack is sufficient for criminal liability under the ICC Statute.*” Gerhard Werle et al., *op. cit.*

52 Dörmann Knut et al., *op. cit.*, 162.

53 Dörmann Knut et al., *op. cit.*, 162.

54 For instance, the delegations of the UK and Germany inserted a reservation to articles 51 and 57 of Protocol I, pointing that “*the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from*

in the case of the Rome Statute concerns were even greater and recalled the old discussion under the Diplomatic Conference; so the flexibility of such new expressions pretended to contribute to solve the tension between states, finally letting it to the *bona fides* of the parties and a wide margin of appreciation to the judge. This argument shall be elaborated:

Firstly, regarding on the content of the expression “*clearly excessive*,” the negotiating history of Protocol I indicates that the term *disproportionate* was proposed initially but, as it was strongly challenged by several countries because of its subjectivity, it was replaced by the term *excessive*.⁵⁵

It can be inferred then an attempt to include an objective scale of proportionality to the results of a military action, as it pretends the evaluation of its effects in terms of the amount of force required to achieve an advantage, having as limit the protection of civilians and civilian population which occasionally might be affected.

Therefore, the determination of the excessiveness in an action results difficult as well, provided that the quantities being measured are dissimilar; then it is not possible to establish any reasonably exact proportionality equation between them.⁵⁶ Moreover, the adjective *clearly* is vague in the sense that attributes an even wider margin of appreciation to an equation *per se* complex, turning the criminal description even more hardly applicable.

Secondly, reference to “*concrete and direct overall military advantage*” constitutes a subjective scale of proportionality. Trying to interpret the meaning of “*overall*,” a footnote to the Elements of Crimes was included in order to explain that the warfare benefit should be “*foreseeable by the perpetrator*,” and that the advantage, as it has to be considered as a whole, “*may or may not be temporally or geographically related to the object of attack*,” suggesting that the military benefits which supports an action must be considered with regard to military actions in general.

isolated or particular parts of the attack.”

55 Lieutenant Colonel William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*. 98 *Military Law Review*, 91, 106 (1982).

56 *Ibid.*, 104.

In that sense, this term results dangerous provided that modifies the normal interpretation of the requirement that the military advantage shall be “*concrete and direct*,” as it is contradictory to demand a general view of the armed conflict to determine a circumstance which is visibly specific in the context of a military action.⁵⁷ However, the Committee which drafted the Elements of Crimes tried to get over this contradiction saying that whether the article suggested the possibility of lawful injuries it was not justifying any violation of the law of armed conflicts, it was just reflecting the proportionality element in order to determine the legality of a military activity in the context of an armed conflict.⁵⁸ In the same way, according to the ICC the term “*overall*” is redundant provided that its pretended meaning is included in the existing wording of Additional Protocol I.⁵⁹

At the end, unless further case law clarifies the text, it will be really difficult for the Court to address criminal responsibility for the case of violations of the Principle of Proportionality as but certainly it constitutes a possibility to use abusively the provision. Moreover, it gives great latitude to the belligerent and renders judicial scrutiny almost impossible,⁶⁰ reflecting the political impact of law, and the way States consider their sovereignty to be threatened by an international criminal jurisdiction.

However, the judge will have to examine each case in order to determine the final impact of military operations, and if excess on incidental injuries to protected entities (individuals and objects) can be identified from the factual circumstances, and to “*construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.*”⁶¹

57 According to some authors, “*several delegations emphasized that the term overall could not refer to long-term political advantages or the winning of a war per se.*” See Dörmann Knut et al., *op. cit.*, 164.

58 See footnote 36 on *The Elements of Crimes*.

59 Dörmann Knut et al., *op. cit.*, 164.

60 Antonio Cassese, *op. cit.*, 96.

61 ICTY Trial Chamber, *Prosecutor v. Kupreškić and others*, Judgment January 14th, 2000, para. 513.

2. Means of warfare (weapons)

The application of the Principle of Proportionality on individual criminal responsibility is also projected to the case of the indiscriminate use of means of warfare during an international armed conflict, as can be inferred from Article 8.2 (b) (xx):

“Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment In accordance with the relevant provisions set forth in articles 121 and 123”.

The consequences of the use of certain weapons could be so grave that their use should be restricted, even if they might be effective against the enemy.⁶² Therefore, weapons can be qualified as indiscriminate in the case that they can't be directed to a specific military objective, as well as when even if they can do it so, they cause incidental injuries to civilians or protected objects.

Consequently, according to the phrase *“inherently indiscriminate in violation of the international law of armed conflict,”* there are two elements which have to be taken into consideration in order to establish such restriction; a comprehensive prohibition and their inclusion into an annex to the Statute which will determine the prohibited methods of warfare.

Concerning the first element, it can be inferred from the Statute that poison, poisoned gas and certain types of ammunition are clearly forbidden, as they are expressly mentioned as unlawful in articles 8.2 (b) (xvii, viii, xix). Nevertheless, it should be taken into account what the ICJ stated in the Advisory Opinion on the legality of the Threat or Use of Weapons of Mass Destruction, as it was stated that under certain conditions, the prohibition of certain weapons of mass destruction such as nuclear chemical and biological military hard-

62 Gerhard Werle et al., *op. cit.*

ware is a customary principle, applicable even to non-international armed conflicts.⁶³

Regarding on the second element, given that so far no annex to the Rome Statute including the list of forbidden weapons, projectiles and material of warfare exists, it wouldn't be possible for the Court to adjudge criminal responsibility for the commission of this war crime until such list were developed as an amendment to the treaty,⁶⁴ as there is a lack of specific material elements for this crime.⁶⁵

IV. FINAL REMARK ON CIVILIANS TAKING ACTIVE PART IN HOSTILITIES

It is important to address as a corollary, a relevant common point to all the criminal behaviors analyzed, when establishing the consequences of attacks to civilians and civilian population in terms of criminal responsibility. This is the case of civilians taking active part in hostilities, whether according to the primary rules⁶⁶ they inherently lose their protection status, and moreover, they could be subject of the jurisdiction of the ICC.

Hence, civilians who take active part in hostilities are not anymore the passive subject of the criminal behaviors intended to protect them, as they lose the status coming from the primary rules. Therefore, they become legitimate military objectives and no criminal responsibility related with distinction can be attributed in case of attacks against them.

This is especially problematic in the case of non-international armed conflicts, where civilians are involved in several ways with non-state actors; the internal armed conflict in Colombia should be a

63 “This prohibition is the second of the cardinal principles (...) constituting the fabric of humanitarian law on the conduct of hostilities (...) it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.” *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, ICJ Reports 1996, 226, para. 78.

64 According to articles 121 to 123 of the Statute, an amendment has to be approved by a qualified majority and ratified by the 7/8 of the State members in order to be applicable, which is highly difficult to achieve considering the position of States.

65 Dörmann Knut et al., *op. cit.*, 297.

66 Article 51.3 of Additional Protocol I and article 13.3 of Additional Protocol II.

relevant example, as peasants have familiar relations with members of the guerrillas, and in various occasions national authorities have stated that those persons, even if civilians, are collaborating with the dissident armed forces. Would an attack against them contribute to gain a military advantage? Moreover, incidental injuries against them could be considered legitimated provided they are not any longer protected by the status of civilians? These questions open to discussion in further studies.

Finally, it has to be formulated the question whether civilians which effectively take active part in hostilities can be judged by the Court for the commission of criminal conducts, or just as common delinquents into national criminal systems, provided that they can't be treated as belligerents with equal rights in the context of an internal armed conflict due to the consideration of sovereignty made by States when adopting the Statute in articles 8.2 (d) and 8.2 (f).

V. CONCLUSIONS

The main purpose of this paper was to illustrate how the Principles of Distinction and Proportionality influence the framework of the modern system of international criminal responsibility.

It was showed then that Distinction and Proportionality are interrelated, as the latter cannot be effectively implemented without the balance which has to be done between it and the reality of war, where military actions have specific forms (methods and means) and acquire their worth from the advantage they can get in order to assume a dominant position in the hostilities.

Considerations were made on the way the Principles are set forth in the framework of IHL, and as primary rules, to what extent they influence politically and legally the configuration of the Statute of the International Criminal Court in order to adjudge criminal responsibility for the commission of war crimes, without prejudice to specific considerations States made in order to make their sovereign rights prevail.

Consequently, several problems for the application of war crimes related with them were identified; political constraints provided the intent to preserve the most amount of State sovereignty are reflected on legal issues such as the vague distinction between combatants and civilians whether to determine who is protected, the restrictive application of war crimes in the case of non-international armed conflicts and the so far inapplicability of war crimes related with the indiscriminate use of weapons due to a fore coming uncertain list.

It is paradoxical that even if most of war crimes are committed to civilians in the context of an armed conflict through the implementation of *clearly excessive* methods and means of warfare as it can be extracted from the experience of the ad hoc Tribunals, it looks like the jurisdiction of the Court, ready to act from July 2009, is not ready to confront such a challenges and rarely will be counting with elements to determine international criminal responsibility for such conducts.

Nevertheless, despite of this pessimist diagnosis, it has to be firmly pointed that the sole fact that a permanent criminal court has came to be a reality is a tremendous gain, provided that it is through

its activity i.e. the production of clarifying jurisprudence, that this problems will be confronted and solved. At the end, even if rules are instruments to do politics, they are artifacts able to vindicate values and principles which are fundamental to the preservation of the international community. Hopefully, provided the effective work of the International Criminal Court, this paper will have to be written again.

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